THE

Calcutta Weekly Notes.

REPORTS OF IMPORTANT DECISIONS

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON

Appeal from India.

VOL. XX.

NOVEMBER TO OCTOBER,

1915-1916.

CALCUTTA:
WEEKLY NOTES OFFICE.
3, HASTINGS STREET.

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THE

Calcutta Weekly Notes.

Vol. XX.] MONDAY, NOVEMBER 22, 1915. [No. 1.

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REPORTS (*See* Index).

Constitution of Benches.

The following constitution of the Courts and distribution of business amongst them take effect from date :—

GROUPS I, II AND PRIVY COUNCIL DEPARTMENT.—The Hon'ble Mr. Justice Holmwood and the Hon'ble Mr. Justice Mullick.

GROUP III.—The Hon'ble Mr. Justice N. R. Chatterjea and the Hon'ble Mr. Justice Newbould.

GROUP IV.—The Hon'ble Mr Justice Richardson and the Hon'ble Mr. Justice Imam.

GROUP V.—The Hon'ble Mr. Justice Sharfuddin and the Hon'ble Mr. Justice Chapman.

GROUP VI.—The Hon'ble Mr. Justice D. Chatterjee and the Hon'ble Mr. Justice Beachcroft.

CRIMINAL BUSINESS.—The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Walmsley.

APPEALS FROM ORIGINAL SIDE.—The Hon'ble the Chief Justice, the Hon'ble Mr. Justice Woodroffe and the Hon'ble Mr. Justice Mookerjee.

ORIGINAL SIDE.—The Hon'ble Mr. Justice Fletcher, the Hon'ble Mr. Justice Chaudhuri and the Hon'ble Mr. Justice Greaves sitting singly.

Reopening of the High Court.

We accord our hearty welcome to the Hon'ble Judges and members of the legal profession on returning to their arduous duties for the coming year after a well-merited rest during the Long Vacation. The Vacation Judges have had a very busy time during the vacation and their ardour and zeal in not merely keeping abreast of the work but also doing justice in every matter that came before them have given universal satisfaction. The High Court reopens with the assumption of the office of the Chief Justice by Sir Lancelot Sanderson, K. C. We gave in these columns on the 19th of July last a brief sketch of the career of his Lordship at the Bar and in the House of Commons. His Lordship's past record has inspired public confidence in him. We subjoin below a brief resume of his Lordship's career.

Sir Lancelot Sanderson.

Sir Lancelot Sanderson was born in 1863 and was called to the Bar in 1886. He used to go the Northern Circuit and soon secured a good junior practice. He was appointed Recorder of Wigan in 1901 and King's Counsel in 1909. He has been a member of the Bar Council since 1897. He sat both at Liverpool and Manchester as Commissioner of Assizes. He gave up Circuit work since 1910 owing to London practice. He was retained counsel for the London North-Western Railway Company since 1890 both as "Junior" and "Silk." He has been a member of Parliament since January 1910 for Appleby Division of Westmoreland. His Lordship appeared for the L. N. W. Ry., the L. Y. Ry. and the Midland Ry. in many important cases in the Railway and Canal Court. We have already noticed in these columns that he also appeared in many important commercial cases in the King's Bench Division, in the Court of Appeal and the House of Lords, many of which are reported in the Law Reports.

The late Sir Pherozeshaw Mehta.

We deeply regret to record the death of Sir Pherozeshaw Mehta, which melancholy event

took place in Bombay on the 5th November. As a lawyer of repute and public man of great experience he occupied a unique position and his death is a great loss to India. For about half a century he took a prominent part in every important political movement in the country. He worked very hard for the Corporation of Bombay to which he rendered very valuable services. He was a member of the Bombay as well as the Imperial Legislative Councils and in both Councils he espoused the public cause with great vigour and singular independence. He was one of the most prominent leaders of the progressive party in India. His political goal in common with his Congress colleagues was colonial self-government for India, but at all times he has been a warm advocate of constitutional methods of pressing forward the claims of his party before Government and was a bitter opponent of those who would resort to unlawful means for securing political privileges. His labours in various capacities were recognised by Government and he was made a Knight Commander of the Indian Empire. His death will be mourned by every section of the Indian public.

The late Mr. Lokendra Nath Palit.

It is with deep sorrow that we record the premature death of Mr. Lokendra Nath Palit, the second son of Sir Tarak Nath Palit. Mr. L. Palit after retirement from the position of a District and Sessions Judge joined the Calcutta Bar and there was every promise of his distinguishing himself at the Bar as well. He died at Benares of pneumonia and heart failure on last Saturday. His death is all the more to be deplored as it followed so soon after that of his illustrious father. We convey our deepest sympathy to Lady Palit and Mrs. Palit in their sad bereavement.

The Judicial Committee's latest pronouncement on the Doctrines of propinquity and spiritual benefit.

The decision of the Privy Council in *Buddha Singh* v. *Lalta Singh* reported in this issue decides an important question of succession amongst collaterals under the Mitakshara upon which opinion in this country, judicial as well as doctrinal, was divided. The case has for us besides a melancholy interest in that it adds one more to the number of instances where the late lamented Shastri Golap Chandra Sarkar's somewhat extreme advocacy of the principle of propinquity has failed to enlist in its favour the authority of the Judicial Committee. Shastri Golap Chandra Sarkar had fought consistently and strenuously to secure for the doctrine of propinquity a place, if not the dominant one, in the Dayabhaga system of succession, replacing to a considerable extent the doctrine of spiritual benefit which in his opinion owed its place in that system not to its inherent merits but to the unscholarly though specious advocacy of the late Mr. Justice Dwarkanath Mitter.

The Privy Council has in the case referred to affirmed—not indeed for the first time—that though *sapinda*-relationship is determined under the Mitakshara by considerations of propinquity, the nearness of propinquity must be determined by the test of religious efficacy of the oblations offered to deceased ancestors. In this instance, it is only right to observe, Shastri Golap Chandra had another no less doughty champion on his side, Mr. Mandlik of Bombay. The Rt. Hon'ble Mr. Ameer Ali who delivered the Board's judgment has declared against the authority of Devananda Bhatta and Bisweswara Bhatta, the authors respectively of the Dattaka Mimansa and Subodhini, and both of acknowledged authority as commentators—upon whose opinion Shastri Golap Chandra and Mr. Mandlik mainly relied. Ranged on the other side were Apararka, Nanda Pandita, Shama Charan Sarkar, Raj Kumar Sarbadhikari and Dr. Jolly. Sarbadhikari's statement of the scheme of succession has been approved by the Board. Amongst Hindu Judges, Mr. Justice Telang of Bombay and Mr. Justice Banerjee of Allahabad lend support to the view which has been finally accepted by the Judicial Committee, whilst Mr. Justice Muttusami Ayyar must be ranged on the losing side. The net result however is that the dissenting opinion of the Madras High Court is overruled and that which obtained in the three other High Courts is to be taken as the correct rule according to law.

Suit against Ruling Chief in British India.

The General Rule of International law is that foreign states and those persons in them who are called sovereigns under whatever designation they weild that sovereign power, be that of a King or a Chief, and whether their power in their states be absolute or limited, cannot be sued outside their dominions whether *ex contractu*, *quasi ex contractu* or *ex delicto*. Sec. 86 of our Code of Civil Procedure lays down the same general rule with certain exceptions mentioned in the section itself. It enacts that no

sovereign prince or chief can be sued in any Court in British India except with the previous sanction of the Governor-General in Council and such sanction shall not be granted unless it appears to the Government that the prince or chief has instituted a suit in the Court against the person desiring to sue him or by himself or another trades within the local limits of the jurisdiction of the Court or is in possession of immoveable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

A somewhat nice question arose in a recent case decided by the Madras High Court (*K. Narayanan Moothad* v. *The Cochin Sircar*, I. L. R. 38 Mad. 635). The point was whether the restriction imposed by sec. 86 applies to a case where a ruling chief is sued not as such but in his private capacity. The Plaintiff's allegation was that he had a perpetual *karaimer* right in a certain temple in British India and brought his suit in British India against the *Cochin Sircar* and prayed for a declaration as to his own rights and for damages. Relying on *Duke of Brunswick* v. *The King of Hanover* (1848) 2 H. L., p. 24, it was contended on behalf of the plaintiff that sovereigns may be sued in their private capacity and inasmuch as the Raja of Cochin was sued not as such Raja but as a trustee of the temple in question the suit was maintainable although admittedly no previous sanction had been obtained from the Governor-General. This contention was overruled and the Court held that sec. 86, C. P. C., is exhaustive with reference to the question when a ruling chief can be brought on the record against his wish and whether or not such a prince or chief can be brought on the record does not depend on the relief sought or on the question whether the acts alleged to constitute the cause of action are of a sovereign or of a private character. This is quite in accord with the general rule of international law lately reaffirmed in *Statham* v. *Statham* and *The Gaekwar of Baroda*, 1912 L. R. Pr. 92.

The Defence of India Ordinance.

The continuance of war has made it necessary to arm the executive with extraordinary powers. It was with this view that the Defence of India Act (IV of 1915) was passed. The latest ordinance promulgated by the Government of India. (The Defence of India Ordinance) invests the Governor-General in Council with power to bring under his absolute control the entire resources of the country. The Ordinance provides that it shall be lawful for the Governor-General in Council to direct that there shall be placed at his disposal the partial or entire output of any factory, workshop, mine or other industrial concern for the manufacture of any article or thing which in his opinion can be utilised in the prosecution of the present war, to take possession of such factory, workshop, etc., and to do anything necessary to increase the output. The Governor-General in Council shall also have power to regulate the sailings of British steamers from any port in British India and to reserve for his use all or any accommodation of whatever kind for the carriage of persons, animals or goods on any such steamers.

Reviews.

LATIN FOR LAWYERS. *Messrs Sweet and Maxwell, Ld., 3, Chancery Lane, London. 1915. Price 7s. 6d.*

This book is intended for lawyers and law students who are not acquainted with Latin for their acquiring a workable knowledge of that language for facilitating the study and practice of the law. The work is divided into three parts. The first part purports to impart a course of instructions in Latin grammar in 32 lessons. The scheme for imparting such instruction is certainly very ingeneous and has been devised by Mr. E. Hilton Jackson of the American Bar. In presenting the elements of grammar the author has selected his lessons from Latin legal maxims in current use. Those that have the simplest grammatical construction are presented first and students are then progressively led to master the more complex ones. In the second part, over 1,000 Latin legal maxims are collected, and not merely are they rendered into English but short notes are appended and references given to *Broom's Legal Maxims*. Cross references to allied maxims and a subject index enhance the usefulness of the work. In the third part, a Latin legal vocabulary explaining the words and phrases in common use is given. The work will prove very useful in India where lawyers as a rule are not required to acquire a knowledge of Latin as a part of their legal education.

LAW OF EVIDENCE, with Cases, Statistics and Explanatory Notes. *By Ernest Cockle, Bar-at-Law. Third Edition, 1915. Messrs. Sweet and Maxwell, Ld., London. 3 Chancery Lane. Price 12s. 6d.*

We are glad to welcome a new edition of this work. We notice that in the present edition nearly 150 pages of additional matter have been put in. The scheme of the work is to present the principles of the English Law of Evidence through the medium of the leading and typical cases. The author has added connective notes to remove the defect of presenting the law on any subject and of evidence in particular, through the medium of case law. Each case is preceded by a statement of the law in the form of a proposition stated in as general terms as the circumstances of the case would justify. In the illustrative cases which follow verbatim extracts are given of the judgments from the law reports. Then follow additional notes and cases falling under the same head of law which are grouped together. The English Statutes relating to the Law of Evidence are also inserted in appropriate places. This work will be found very useful by both the students and members of the legal profession in India to grasp the leading principles of the English Law of Evidence.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before THE MASTER OF THE ROLLS and LORDS JUSTICES PICKFORD and WARRINGTON. *In re Charles Bowman* v. *The Secular Society, "Ld."*. 30th July 1915.

Secular Society and its objects when legal—Company, registered not for gain, entitled to bequest when object not immoral—Blasphemy—Public policy varies from time to time.

This was an appeal from a decision of Joyce, J. The appeal raised the question whether a bequest to the Secular Society, Ld. was legal and valid. The Court below held that there was nothing in the Articles of Association of the Society or of its constitution which was subversive of morality or contrary to law. The present appeal was dismissed.

THE MASTER OF THE ROLLS said it was argued on behalf of the Appellants that the Plaintiff Society was illegal as its objects were antagonistic to all religion and therefore no Court ought to aid it in recovering the legacy. A limited company was bound by its Memorandum of Association. It could not go outside its limits. He declined to look at anything but the Memorandum, and in particular he had no right to consider whether the chairman or any of the directors of the company might have been guilty of what the law would undoubtedly regard as the publication of blasphemous libels. The society was one of those companies permitted by law the objects of which were not pecuniary gain. No dividend or income could be received by any member of the company. It was a company limited by guarantee. Many of its objects were supported by a large section of the community, and he thought it would be a retrograde step if the Court was to hold that there was necessarily any illegality in the company. He said "necessarily" because he did not think that it was sufficient to say that the society, acting by its directors, might use the funds which they received under this Will for a blasphemous purpose, in which case the parties concerned might justly be exposed to an indictment. It was sufficient that they could so apply the money as to be free from any taint of illegality. If however, any one of the objects in the Memorandum was necessarily unlawful, for example, for an immoral purpose, the addition of other innocent objects would not entitle the company to obtain the money, but his Lordship did not think the facts brought the case within that principle.

It had, however, been strenuously argued that blasphemy at common law was unlawful even though it might not be a criminal offence, and there was a large body of ancient authority and some modern authority in support of that view. In his opinion the better view and the one which ought to be followed was that expressed by Lord Coleridge in the *Queen* v. *Ramsey* and others (15 Cox, C.C., 231), that publications intended in good faith to propagate opinions on religious subjects which the persons who published them regarded as true were not blasphemy if done in a decent way and with regard to the feelings of others. There had been a great change of opinion on the subject within the last 100 years. It was really a question of public policy which varied from time to time.

It was impossible to contend that the main object of the Plaintiff Society, as described in cl. (*a*), could not be given effect to without incurring any liability to indictment at common law.

The cases of *Briggs* v. *Hartley* (14 Jur., 683) and *Cowan* v. *Milbourn* (2 L. R., Ex., 230), undoubtedly presented difficulties, but his Lordship was not aware that these cases had ever been followed, and he did not think that they ought to be followed.

Messrs .Cave, K.C., and *Price* for the Appellant.

Messrs. Tomlin, K.C., and *Macnaghten* for the Respondents.

B. D.

KING'S BENCH DIVISION. (DIVISIONAL COURT).—Before JUSTICES BAILHACHE and LOW. *Alfred Liebmann* v. *The King*. 6th September 1915.

A German subject residing in England who obtained a discharge from German nationality but did not get naturalized and was interned in England, if a prisoner of war. Has the Crown any prerogative to imprison Civilians, who are not British subjects, during war?

This was a writ of *habeas corpus* taken out at the instance of Alfred Liebmann who was interned in England. It appeared that the Petitioner was a German and born of German parents.

In 1889 he came over to England and started business. In 1890 he made a formal application to the German authorities to obtain a formal discharge from German nationality, and a Certificate was granted to him according to German law.

The Petitioner's contention was that from that time he ceased for all purposes whatsoever to be a German subject, and lost all the rights and obligations of such subject. He was a man of no nationality.

The Solicitor-General raised the preliminary objection on the ground that the Court had no jurisdiction to grant a writ of *habeas corpus* in the case of a prisoner of war.

That had been decided in three cases—the *King* v. *Schiever* (97 Eng. Rep., 551; 2 Burr., 765); *Furley* v. *Newnham* (2 Dougl., 419); and The Three Spanish Sailors (96 Eng., Rep., 775; 2 Black., W., 1324).

MR. JUSTICE BAILHACHE.—Why do you say that this man is a prisoner of war?

The Solicitor-General.—I submit that any alien in this country who is interned is a prisoner of war, and *a fortiori* if he is an alien enemy.

MR. JUSTICE BAILHACHE.—The cases you have referred to are concerned with prisoners of war in the ordinary sense of the term.

The Solicitor-General submitted that on principle no distinction ought to be drawn between the case of an alien enemy captured in the field and an alien enemy in this country whose liberty had been curtailed for reasons of State policy. In his submission the Court had no jurisdiction to consider the propriety of issuing a writ of *habeas corpus* the moment it was established that the person at whose instance it was moved for was a prisoner of war.

MR. JUSTICE LOW.—Surely we must be satisfied first that he is lawfully a prisoner of war?

The Solicitor-General submitted that as the Applicant had not been nationalized in this country he remained an alien enemy.

The Solicitor-General further submitted that the internment of aliens and the taking of any steps necessary to make such internment effective fell within the prerogative rights of the Crown at common law. If the Crown and its advisers were of opinion that the presence of alien enemies in this country was a menace to the national security the Crown was entitled to intern them as a matter of discretion, without question in that or in any other Court. Although it was unnecessary to rely upon them the internment could also be justified under the Defence of the Realm Act and under the Aliens Restriction Order 1914. In the present case the Applicant had not discharged the onus cast upon him under those enactments of showing that he was not an alien enemy. He had taken no steps to become naturalized in this country and, that being so, he must be treated as being still a subject of the country where he was born. *Ex parte* Weber (31 T. L. R., 602).

Mr. Healy, in support of the rule *nisi*, said there was no authority for the internment of the Applicant under the Defence of the Realm Act or under the Aliens Restriction Act, and since the Revolution no Law Officer of the Crown had arisen who had attempted to justify the detention of a man in custody for whose arrest no authority could be found except the prerogative of the Crown. The cases referred to in which it had been held that a writ of *habeas corpus* would not lie in the case of a prisoner of war were all cases of a man taken in arms against this country. This was the first time for 300 years when it had been claimed that His Majesty had an inherent right to arrest a man who was admittedly innocent, and keep him in gaol, if it was thought porper, for the term of his natural life. There was no onus upon the Applicant as had been suggested, because he had been arrested without authority.

The Court discharged the rule *nisi*. MR. JUSTICE BAILHACHE observed as follows.—

If the preliminary objection raised by the Crown is sound, the second point, which is one of supreme constitutional importance, does not arise. It will be convenient, therefore, to consider the preliminary objection first. In so

doing the question whether Liebmann is an alien enemy is so closely connected with the question whether he is a prisoner of war that it is necessary to discuss and determine both those points. I will consider in the first place whether Liebmann is an alien enemy. He denies it, and claims that he is a person of no nationality. I have had the advantage of reading the judgment about to be delivered by my Brother Low. I agree with the conclusion at which he has arrived. I agree, too, that this point is covered by the decision of the Court of Appeal in *Weber's* case (31 T. L. R., 602). There is a distinction between the two cases in that in Weber's case nationality was lost by long residence abroad, while in this case Liebmann obtained a formal discharge from German nationality, but in my judgment this distinction makes no difference in principle. The Applicant is an alien enemy.

Next, is Liebmann a prisoner of war? It is at first sight somewhat startling to be told that a civilian resident in this country, interned by the police on the instructions of the Home Secretary, can be accurately described as a prisoner of war. One generally understands by a prisoner of war a person captured during warlike operations by the naval or military forces of the Crown, or, perhaps, a civilan arrested as a spy. I think, however, that the Courts are entitled to take judicial notice of certain notorious facts which may be summarized thus :—There are a large number of German subjects in this country. This war is not being carried on by naval and military forces only. Reports, rumours, intrigues, play a large part. Methods of communication with the enemy have been entirely altered and largely used. I need only refer to wireless telegraphy, signalling by lights, and the employment, on a scale hitherto unknown, of carrier pigeons. Spying has become the hall mark of German *kultur*. In these circumstances a German civilian in this country may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movement of submarines and Zeppelins, a far greater danger, indeed, than a German soldier or sailor.

I have come to the conclusion that a German subject resident in the United Kingdom, who in the opinion of the Executive Government is a person hostile to the welfare of this country and is on that account interned, may properly be described as a prisoner of war, although neither a combatant nor a spy.

It is, I believe, settled law that no writ of *habeas corpus* will be granted in the case of a prisoner of war. The cases cited on behalf of the Crown (*Rex* v. *Shiever*, 2 Burr., 765, and 97 Eng. Rep., 551; *Furley* v. *Newnham*, 2 Doug., 419, and 99 Eng. Rep., 269; and *The Three Spanish Sailors*, 96 Eng. Rep., 775), are conclusive on the point. If, therefore, Liebmann is in fact a prisoner of war, as I hold that he is, his application must fail.

Another reason is that there is, I understand, no precedent except in the case of a spy which covers the case of a civilian subject of a Power at war with this country. The cases referred to above are all cases of combatants, prisoners of war in the ordinary acceptation of that term. As the preliminary objection succeeds it is unnecessary to say more; but these Courts are specially charged to safeguard the liberty of the subject as one of their most sacred duties. The Courts owe that duty not only to the subjects of His Majesty, but also to all persons within the Realm who are under his Majesty's protection and are entitled to resort to these Courts to secure for them any rights which they may have, whether they are aliens or alien enemies. I think it right, therefore, to add that, impressed as I am with the sanctity of the liberty of the subject, I cannot forget that above the liberty of the subject is the safety of the Realm, and I should be prepared to hold, as at present advised, that when the internment of an alien enemy is considered by the Executive Government which is charged with the protection of the Realm to be desirable in the interests of the safety of the realm and the Government thereupon interns such alien enemy, the action of the Government in doing so is not open to review by the Courts of Law by *habeas corpus*.

I trust that I have throughout made it quite clear that I have been confining my observations to the case of alien enemies. I desire with emphasis to state expressly that I am not dealing with the case of British subjects or with aliens who are the subjects of neutral countries, and I trust that nothing in this judgment will be considered as having any bearing whatever upon any class of persons other than alien enemies. I desire to say this because there were some observations by the Solicitor-General as to the extent of the Royal Prerogative to which I am not prepared to assent.

I cannot leave the case without a reference to Mr. Healy's argument that there can be no prerogative of the Crown to intern alien enemies, because if there were there would be no need of emergency legislation giving the King power to

estrict the movements of aliens to compel them o register themselves, and the like. His argunent was that, if there is this inherent power in he Crown to imprison there must be also inerent the power to do all the lesser acts prooided by the emergency legislation. This short *résumé* of Mr. Healy's argument scarcely does t justice. I felt the force of it, and must ask Mr. Healy and his client to believe that I have ully considered it. I do not know why express ower to intern alien enemies was not included n the emergency legislation, or why there has een no Order in Council dealing with the subect as it now arises, but I notice that the mergency legislation reserves all the powers of he Crown. The rule *nisi* must be discharged.

MR. JUSTICE LOW in his judgment said :—It vas alleged on behalf of the Crown (1) that the Applicant is an alien enemy; (2) that he is a risoner of war; (3) that the Crown is entitled n exercise of its prerogative to imprison an lien enemy, and that this Court has no jurisliction to interfere with the exercise of such rerogative.

The first question is whether the Applicant s an alien enemy. He was born at Mannheim n 1868. He resided in Germany until 1889, erving a year in the German Army. In 1889 he came to England, and has resided here ever since. In 1890 he obtained a document purporting to discharge him from German nationality, but he has taken no steps to naturalize himself n "alien enemy," under the Aliens Restriction Order. He states that he did this although he knew that he was not a German subject, but as he could not at the time find his document of discharge, he registered himself as a precaution, that he subsequently found the document, and applied to the police to cancel the registration, but that they refused to do so. He also says that later he applied to the Home Office Advisory Committee to exempt him from internment, and that that application was refused.

The discharge from German nationality is said to have been granted under the provisions of a German law of 1870, which was amended by another German law of 1913. The effect of both these enactments has been already considered by the Court of Appeal in *Ex parte Weber* (31 T. L. R., 602), and, in my opinion, that decision covers this question. It is clear on the examination of these laws that they attempt to place what is called in the later statute "a former German" in a privileged position, and that such a person can recover full German nationality (see par. 13 of the Law of 1913) without even going back to Germany at all, whereas "a foreigner" (see par. 8) can only obtain German nationality after settling in Germany. It is clear, therefore, that this Applicant has not become entirely divested of the rights belonging to a natural-born German, and therefore, following the decision of the Court of Appeal, I hold that the applicant is an alien enemy.

The second question is :—Is he a prisoner of war? The authorities cited—*Rex* v. *Shiever* (*sup.*), *Furley* v. *Newenham* (*sup.*), and *The Three Spanish Sailors* (*sup.*)—show that a writ of *habeas corpus* cannot be granted on the application of a prisoner of war, even to give evidence, much less to obtain his release. We are informed that there are no other authorities and that the question what in the circumstances of any particular case constitutes a prisoner of war is one of first impression. In my opinion, to show that a man is a prisoner of war it is not necessary for him to have been an actual combatant. War at the present moment is not as it was in olden times, confined to easily ascertained limits. The inventions and discoveries of recent years, and especially the existing means of communication, have so widened the fields of possible hostility that there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put upon the exercise of acts of hostility, and real danger to the Realm may therefore exist, although impossible of discovery, at distances far from where the actual clash of arms is taking place. In addition to this, methods of warfare or methods ancillary to warfare have come into practice on the part of our foes which involve the honeycombing of the Realm with enemies not only to obtain and dispatch information, but to serve purposes directly helpful to the conduct of enterprises either actually warlike or eminently calculated to assist the prosecution of war.

In a contest with people who consider that the acceptance of hospitality connotes no obligation and that no blow can be foul, it would, I think, be idle to expect the executive to wait for proof of an overt act or for evidence of an evil intent. In my opinion this Court is entitled to take judicial cognisance of these matters, and in a question so greatly involving the security of the Realm is entitled to say that where the Crown in the exercise of its undoubted right and duty to guard the safety of all represents to this Court that it has become necessary to restrain the liberty of an alien enemy within the kingdom,

and accordingly, within the terms of the notice served in this case, to intern such alien enemy as a prisoner of war, he must be regarded for the purposes of a writ of *habeas corpus* as a prisoner of war.

With regard to the third question, as to the Prerogative of the Crown as to the arrest of an alien enemy, I have really answered almost as much of it as is necessary to deal with the present case when I have been dealing with question No. 2. I have no doubt at all that such action is quite within the Crown's Prerogative. At common law an alien enemy had no rights (see *Sylvester's* case, 7 Mod. Rep., page 150), and he could be seized and imprisoned and could have no advantage of the law of England. This position, however, has been softened by custom and by the decision of the Courts, and the judgment of my Brothers Sargant in *Princess Thurn and Taxis* v. *Moffitt* [(1915) 1 Ch. Div., 58], approved by the Court of Appeal in *Porter* v. *Freudenberg* [(1915) 1 K. B., 874], shows that an alien enemy registered under the Aliens Restriction Act, 1914, as thisApplicant is, is entitled to sue in the King's Courts (which would, I suppose, include such an application as the present), as he is resident here by tacit permission of the Crown, and so is *sub protectione domini regis*. He is therefore in a similar position to an alien enemy resident here under licence from the Crown. That licence, however, can be terminated at any time by the Crown, and although this point was not presented to us in the present case, I have little doubt that it might be successfully contended that the notice of internment given by the authority of the Secretary of State is a sufficient revocation of the licence. Of course, the alien enemy is protected from outrage, because in such case it is not the alien who invokes the aid of justice, but the King in vindication of his peace. Whether his licence is revoked or not, I see no reason why it should protect him in the present circumstances from being made a prisoner of war.

The Solicitor-General and *Mr. G. A. H. Branson* for the Crown.

Messrs. T. M. Healy, K. C., and *Frampton* for the Applicant.

B. D.

KING'S BENCH DIVISION.—Before Mr. Justice Lush. *Terrill* v. *Parker and Thomas*. 20th October 1915.

Solicitor's liability—In the absence of actual authority from the principal or holding out, the principal is not liable for an act of his agent.

This was an action against a firm of Solicitors. The Plaintiff was introduced to a Mr. Knowles, a clerk of the Defendants' firm, and for a considerable time she transacted business with the said clerk who attended to her. She paid the clerk moneys, and drew cheques in his name, but the clerk embezzled them, and was convicted and sentenced for it. She now sued the Solicitor to recover the money embezzled by their clerk. It was urged in defence that in view of *Lloyd* v. *Grace, Smith & Co.* (1912) A. C. 716 the Plaintiff could not succeed without showing that Knowles actually had authority to receive money from the Defendants' clients. The learned Judge dismissed the claim and said it was not suggested that the money had been handed to either of the Defendants personally; to succeed, therefore, the Plaintiff must show that Knowles had actual authority from the firm to accept her money, or that there was a holding out of Knowles as having authority, and that she reasonably believed Knowles to have authority and relied on it. It was admitted that there was no actual authority: and as to the holding out, he had no hesitation whatever in accepting the Defendants' evidence rather than that of the Plaintiff whenever the two were in conflict.

Messrs. Mathews, K. C., and *Warde* for the Plaintiff.

Messrs. Colam, K. C., and *Fraser* for the Defendants.

B. D.

THE CALCUTTA WEEKLY NOTES.

REPORTS.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD SHAW.	BUDDHA SINGH	
SIR GEORGE FARWELL.	and others,	
SIR JOHN EDGE.	Appellants,	
MR. AMEER ALI.	*v.*	
1915,	LALTU SINGH	
Heard, 3 and 4, June.	and others,	
Judgment, 29, July.	Respondents.	

Hindu Law—Mitakshara—Succession—Uncle's grandson to be preferred to grand-uncle's son—Collaterals, inheritance by, not limited to two degrees below common ancestor—Whether descent continues to the third or the seventh degree—"Putra," "santana," "sunu," *meaning of*—Sapinda *relationship, under Mitakshara—Principle of propinquity does not exclude principle of spiritual benefit—Place in order of succession determined by latter principle*—Apararka, Nanda Pandita, Devananda Bhatta, Viswesvara Bhatta, *as authorities—Propriety of relying on opinion of Judge not a party to judgment.*

Under the Mitakshara, whilst the right of inheritance arises from sapinda-*relationship, or community of blood (in contradistinction to the Dayabhaga notion of community in the offering of religious oblations), in judging of the nearness of blood-relationship or propinquity among the* gotraja *the test to be applied to discover the preferential heir is the capacity to offer oblations.*

Between the grandfather's great-grandson (uncle's grandson) and the great-grandfather's grandson (granduncle's son), the former is, under the Mitakshara, the preferential heir.

The following construction of the provisions of the Mitakshara relating to inheritance of property left by a deceased was approved by the Privy Council.

"*According to the scheme of succession propounded by the Mitakshara, the lineal descendants of the deceased owner down to and including the third degree, who constitute the first class of propinquous relations (the nearest* sapindas), *inherit in succession in the first instance. In their default the widow and daughter take by express provision of the law. The daughter's son comes in similarly. In their absence the inheritance ascends; each ascending line begins with a female and each has to be exhausted in accordance with the rule of propinquous* sapinda-*relationship before the next in order can take; so that the parents and 'their three successive descendants' take first, then the paternal grandmother and the paternal grandfather and their three successive descendants come next and so on.*"

Quære: *Whether Mr. Harrington's view with regard to the continuation of each line of heirs to the seventh degree does not contravene the limitation thereof by Manu to three descendants.*

RUTCHEPUTTY DUTT JHA *v.* RAJUNDER NARAIN RAE (4) *referred to.*

Meanings of the words "putra" "santana" *and* "sunu" *as used by Vijnaneswara in this connection explained.*

BUDDHA SINGH *v.* LALTU SINGH (11) *affirmed.*

SURAYA-BHUKTA *v.* LAKSHMI NARASAMMA (8) *and* CHINNASAMI PILLAI *v.* KUNJU PILLAI (9) *overruled.*

The opinions of Devananda Bhatta and

(4) 2 M. I. A. 132 at p. 188 (1838).
(8) I. L. R. 5 Mad. 301 (1882).
(9) I. L. R. 35 Mad. 168 (1911).
(11) I. L. R. 36 All. 498 (1914).

BUDDHA SINGH *v.* LALTU SINGH.

Visweswara Bhatta in the Smriti Chandrika and Subodhini respectively that the Mitakshara must be taken to limit collateral descent to two degrees in each line disapproved.

It is undesirable to introduce the opinion of another judge not a party to the judgment for the purpose of enforcing the conclusion arrived at.

Advantage of referring matters upon which a difference of opinion has arisen in the High Court to a Full Bench adverted to.

This was an appeal from a judgment (reported in I. L. R. 34 All. 663) and decree of the High Court of Allahabad, dated the 6th of July 1912 affirming a judgment and decree of the Subordinate Judge of Moradabad of June 23rd, 1910.

The Appellants sued the Respondents for the possession of moveable and immoveable property, the last owner of which was one Saheb Sahai, deceased.

The sole question to be determined in the appeal was whether, according to the Mitakshara law of the Benares School, the first Appellant, who was the grandson of the great-grandfather of Saheb Sahai, had a preferential right of inheritance as against the first Respondent, the great-grandson of the grandfather of the propositus.

The Subordinate Judge of Moradabad dismissed the suit, being of opinion that the propinquity which extends down to the great-grandson in the case of lineal inheritance extends in a similar manner to three degrees from each ancestor in the case of collaterals.

The High Court (Sir P. C. Banerji and Piggott, JJ.) affirmed the decree of the Subordinate Judge, vide *Buddha Singh* v. *Laltu Singh* (11). The former learned Judge after setting out the text of *Yajnavalka*, reproduced in the Mitakshara Ch. 2, sec. 1, Vol. 1, and the text of the Mitakshara Ch. 2, sec. 5, Vols. 4 and 5, said :—

"The question thus turns on the interpretation of the words '*santan*' and '*putra*' in Vols. 4 and 5 of the Mitakshara cited above, that is to say whether by '*santan*' in Vols. 4 and 5 is meant the descendant specifically mentioned in the preceding verses, and the word '*putra*' is to be taken in the narrow sense of 'son' and does not include 'grandson'. The Appellant contends that the enumeration of heirs given in the above paragraphs should be strictly followed, and that after the paternal uncle comes the line of the paternal great-grandfather. He says that the paternal uncle's grandson is a '*gotraja*' only under the last portion of Vol. 5.

"It may be taken as settled that the enumeration of heirs in the Mitakshara is not exhaustive. We have, therefore, to consider whether the word 'son' is to be understood in the narrow sense contended for, and whether in the case of each ancestor in the ascending line, only two descendants are to be computed.

"The word '*putra*' has, it seems to me, been understood in a wide sense. In the text of Yajnavalkya beginning with '*patni*' (wife), etc., cited above, the word at the end is '*aputrasya*.' That the word '*putra*' is used by him in an extended sense and is not limited to the son, but also includes the son's son and the son's grandson is manifest. This is admitted by Mr. Mandlik on page 222 of his work on Hindu law. In the translation of the text itself he has retained the word '*putra*,' and in the note relating to it he says 'the word *pautra* in this verse stands for son, son's son, son's son's son.' He refers to the Viramitrodaya and Balambhata as authorities for this interpretation.

(11) I. L. R. 34 All. 663 (1912).

"This is also in accordance with what Manu ordains (Chap. IX, v. 187, Sacred Books of the East, Vol. XXV, p. 366) in the following text: 'To three ancestors water must be offered; to three funeral cakes must be given; the fourth descendant is the giver of oblations; the fifth has no connection.' So that the participation of the body extends to the fourth descendant, including the 'propositus.' To the same effect is the following text of Devala: 'Up to the third degree the members of the family *are of the same body*.' (Ghose's Hindu Law, 2nd Ed., p. 97.) Parasara says that 'the separation of the body accrues to the fifth person born of one's family.' (Ghose, p. 57.)

"Jimutvahana, quoting Manu, Vishnu, Harita, Yajnavalkya, Sankha and Likhita says that 'the term *putra* stands for descendants up to the son's son's son.' (Mandlik, Hindu Law, p. 381.) Vijnaneswara, the author of the Mitakshara, has also used the word '*putra*' in the same sense.

"In chapter I, S. I, § 3, treating of unobstructed and obstructed inheritance, he says with reference to sons and grandsons, etc., that the rule should be 'inferred in respect of their sons.' Both Balam Bhatta and the author of the Subodhini are of opinion that the word 'their' (*tat*) in the above passage refers to the grandson, etc., so that the grandson includes the great-grandson. Again chapter II, section I, of the Mitakshara is headed 'Right of the widow to inherit the estate of one who leaves no *putra* (*aputrasya*).' There can be no doubt that the word '*putra*' here also includes the grandson and the great-grandson. Similarly, in section 4 of the same chapter, the word seems to have an extended meaning; so that the author of the Mitakshara has generally used the word '*putra*,' wherever it occurs, in the sense of including the two immediate descendants of the son in the direct line. There is apparently no reason for holding that he has used the same word in a restricted sense in section V, §§ 4 and 5. It seems that having used the word '*putra*' in other places in an extended sense, he considered it unnecessary to state that he used it in the same sense in the chapter in question also."

The learned Judge further came to the conclusion that the preponderance of opinion of modern commentators and of judicial authority was in favour of the Respondents, but that the view of Mr. Harrington extending the line to six descendants, went too far. He concluded his judgment by saying:—"Upon a true interpretation of the text of the Mitakshara and on the authorities referred to above, I hold that the three immediate descendants of the grandfather succeeded in preference to the great-grandfather and his descendants, and that the great-grandson of the grandfather is a preferential heir as against the grandson of the great-grandfather."

Messrs. L. DeGruyther, K.C. and *Dunne* for the Appellants:—In ch. 2, s. 5, v. 4, of the Mitakshara, which lays down the position of the descendants of the grandfather, the expression "uncles and their sons" does not include the grandsons of uncles. Upon default of uncles and sons of uncles the inheritance passes under s. 5, v. 5, to the line of the great-grandfather. From each ascendant in order two descendants only are to be exhausted before passing to the ancestor further removed. The Madras High Court rightly so held in *Suraya Bhukta* v. *Lakshmi Narasamma* (8) and in *Chinnasami Pillai* v. *Kunju Pillai* (9).

The view taken by the Allahabad High

(8) I. L. R. 5 Mad. 291 (1882).
(9) I. L. R. 33 Mad. 152 (1911).

BUDDHA SINGH *v.* LALTU SINGH.

Court in *Kalian Rai* v. *Ram Chandra* (7) and in the present case is erroneous. The Bombay decisions in *Rachava* v. *Kalingapa* (3) and *Kashibai* v. *Moreshvar Raghunath* (12) do not affect the present question as they turned upon the rights of widows. Sanskrit employs distinct words for "son", "grandson" and "great-grandson" (*putra*, *pautra* and *prapautra*), there is therefore no reason to suppose that Vijnaneswar uses "*putra*" as meaning both sons and grandsons. None of the commentators upon the Mitakshara say that "*putra*" as there used includes grandsons. The Subodhini of Visweswara Bhatta expressly limits inheritance to two descendants of a brother (see passage cited in the first Madras case already referred to). The high authority of the Subodhini as a commentary is referrred to in Vyavashta Chandrika, vol. 1, p. 17, Morley's Digest, p. 205, Jolly's Hindu Law, p. 14. The Appellants' contention is supported by the Viramitrodaya, ch. III, pts. 6 and 7, the authority of which in the Benares School is high : *Gridari Lal Roy* v. *Bengal Government* (13). No inference as to the meaning of "*putra*" in the Mitakshara can be drawn from the use of "*aputrasya*" in ch. 2, s. 1, v. 2, since the latter word has the technical meaning of "issueless" apart from its use in the Mitakshara. The Respondents' contentions are inconsistent with the position expressly assigned by s. 5, vv. 1 and 2, to the grandmother, namely, immediately after the brother's son. Mr. Harrington's view as stated in *Rutcheputty Dutt Jha* v. *Rajumder Narain Rae* (4), that six descendants are to be exhausted before passing to the next ascendants is erroneous; West and Bühler, 3rd Ed., p. 124. Apararka and Vaijainti, referred to by the High Court are not of value in the Benares School; Jolly, pp. 13, 15 and 16. Mayne 7th Ed., pp. 27 and 28. [The following were also referred to *Lullubhai Bapoobhai* v. *Cassibai* (2) (for translations of s. 5 approved by the Board), *Kureem Chand Gurain* v. *Oodung Gurain* (5), *Oordhya Kooer* v. *Rajoo Nye Sookool* (14), *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (6) and *Ram Chandra* v. *Vinayak Venkatesh* (1).] Mayne 7th Ed., para. 573, and Mandlik, pp. 360 and 380 to 385.

Sir Robert Finlay, K. C., and *Mr. Bhugwandin Dubé* for the Respondents :— In the Mitakshara ch. 2, s. 5, v. 4, the word "sons" includes "grandsons". The descendants of each lineal ancestor are to be brought in down to the great-grandsons. It is indisputable that in the case of lineal descendants of the propositus the right of inheritance extends to the great-grandsons, although by ch. 1, s. 1, v. 3, only sons and grandsons are named. Yajnavalkya, in the passage repeated in the Mitakshara, ch. 2, s. 1, v. 2, uses the word "*aputrasya*" in its technical sense meaning sons, grandsons and great-grandsons.

The propinquity which in the case of lineal descent extends to the great-grandson, equally does so in the case of collaterals. The word "*putra*" throughout the Mitakshara is to be interpreted in accordance with this principle. The weight of judicial authority is strongly in favour of the Respondents. Each line or class of heirs must be exhausted before the other begins to take.

"To the nearest *sapinda* the inheritance

(1) L. R. 41 I. A. 290 : s. c. 18 C. W. N. 1154 (1914).
(2) L. R. 7 I. A. 212 (1880).
(3) I. L. R. 16 Bom. 716 (1892).
(4) 2 M. I. A. 132 at p. 158 (1839).
(5) 6 W. R. 158 (1866).
(6) 13 M. I. A. 373 (1870).
(7) I. L. R. 24 All. 128 (1902).
(12) I. L. R. 35 Bom. 389 (1911).
(13) 12 M. I. A. 448 at p. 466 (1868).
(14) 14 W. R. 208 (1870).

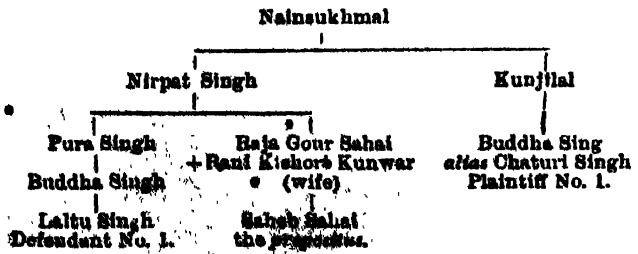
next belongs" was the basic rule of the Mitakshara and the Respondent was unquestionably a nearer *sapinda* than the Appellant. [Their Lordships intimated that they did not wish to hear Counsel for the Respondents any further.]

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The question for determination involved in this Appeal is one of considerable importance under the Hindu Law, and relates to the order of succession under the Mitakshara as expounded in the Benares School, among the collateral kindred belonging to the same paternal stock as the deceased.

The suit out of which the Appeal arises was brought by the Appellant Buddha Singh *alias* Chaturi Singh to establish his right as the nearest reversioner to the estate of one Saheb Sahai, who died in 1873 without leaving any male issue. Saheb Sahai was a minor and unmarried at the time of his death; his mother, Rani Kishori Kunwar, who survived him, accordingly came into the possession of his estate, which she held for nearly 34 years. She died in 1907, when the succession opened to the male collaterals of Saheb Sahai.

The following genealogical table, on which both the courts in India have based their judgments, will explain the relative position of the parties to this action :—



The Plaintiff, Buddha Singh, is thus the grandson of Nainsukhmal, the great-grandfather of Saheb Sahai, whilst the Defendant Laltu is the great-grandson of Saheb Sahai's grandfather, Nirpat, and the grandson of his paternal uncle, Pura. The Plaintiff's contention is that under the law of the Mitakshara he has a preferential title to the inheritance of Saheb Sahai as against the Defendant, who is admittedly in possession of the deceased's estate since Rani Kishori's death. He bases his right on the following text of the Mitakshara :—"On failure of the father's descendants the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons" (Colebrooke's translation, Chap. II, sec. V, v. 4). And he contends that the expression "sons" occurring in this verse must be strictly construed, and so construed, the devolution of the inheritance in Nirpat's line ceased with his grandson, Buddha, and did not come down to his great-grandson, the Defendant Laltu, and that after Buddha, by virtue of the immediately following verse he, as the grandson of the great-grandfather of the deceased has become entitled to the estate. Their Lordships will refer presently a little more fully to this text and examine its meaning by the light of other texts.

Both the courts in India have held against the Plaintiff's claim; hence this Appeal to His Majesty in Council.

The learned Judges of the Allahabad High Court in two separate and able judgments have exhaustively reviewed the authorities bearing on the subject, and as their Lordships agree in the main with their deductions and the conclusion at which they have arrived on these deductions, they find themselves relieved of the necessity of discussing the law in any detail.

The Mitakshara of Vijnaneswara, who flourished about the end of the eleventh and the beginning of the twelfth century of the Christian era, purports to be a com-

mentary on the Institutes of Yajnavalkya. Vijnaneswara analyses and discusses the text of his great predecessor, often at considerable length, explains the meaning of recondite passages, supplies omissions and reconciles discrepancies by frequent reference to other old expounders of the law. The best example of his treatment of Yajnavalkya's text is to be found in the commentary on the rule relating to the succession to the estate of a person who dies without leaving any male issue. After stating that the right of "sons, principal and secondary" to "take the heritage," had been already shown, he proceeds to quote the rule of Yajnavalkya declaring the order of succession in their default, which runs thus (Mr. Colebrooke's translation of the Mitakshara, Chap. II, sec. I, para. 2): —"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, a pupil, and a fellow-student: on failure of the first among these, the next in order is indeed heir of one who has departed for heaven leaving no male issue. This rule extends to all persons and classes."

Mr. Mandlik's rendering of these two slokas of Yajnavalkya is more literal and is as follows (Mandlik's translation of the Institutes of Yajnavalkya, p. 220, vv. 135, 136):—

"The wife, daughters, both parents, brothers and likewise their sons, *gotrajas* (gentiles); *bandhus* (cognates); a pupil and a fellow student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven leaving no *putra*. This rule extends to all (males whether belonging or not to the four) classes."

The compound word *aputra*, occurring in Yajnavalkya's text has been rendered by Mr. Colebrooke as "leaving no male issue"; by Mr. Mandlik as "leaving no *putra*." He was evidently anxious to avoid any English synonym, as the word *putra* here, according to all the commentators, conveys a larger meaning than is usually implied by the term "son." The *Viramitrodaya* says clearly that the word "sonless," which is the literal equivalent of *aputra*, signifies "in default of son, grandson and great-grandson" (Chap. III, Part I, v. ii, Shastri Golap Chundar Sircar's translation, p. 154), that, in other words, it comprehends three degrees in the direct line of descent. In fact, it is not disputed at their Lordships' Bar that the word *putra* as used in relation to the last owner signifies and includes son, grandson, and great-grandson. What is contended for is that the same word in connection with other relatives, such as brother, uncle or grand-uncle, must be construed in a restricted and literal sense.

The commentary of Vijnaneswara on the above-quoted slokas of Yajnavalkya, extends over several sections in Mr. Colebrooke's translation, and makes the work more a digest than a mere commentary. In Section I of Chapter II the author deals exhaustively with the right of the widow to inherit the estate of "one who has died *aputra*." Her right of succession is dependant on his leaving no male issue to the third degree. In paragraph 3 the word *putra* is used again in the same generic sense. After treating of the rights of daughters and parents in Sections II and III respectively, he deals in Section IV with the succession of brothers and "their sons." Here, again, the word *putra* is used, whether in the literal or in an extended sense is a matter for consideration.

Section V relates to the right of collateral kindred of the same paternal stock or *gotra*, and therefore called the *gotraja*, to take the inheritance of the *aputra* in default of "brother's sons." Admittedly both the Plaintiff and the Defendant are Saheb Sahai's *gotrajas*. Reference, there-

fore, is necessary to the rules embodied in Section V.

It is to be noted here that the word *putra* or more correctly *put-tra*, which literally means "one who releases from hell (*put*)," is used by Vijnaneswara at the very beginning of his Book on Inheritance. In para. 3, Section I, Chapter I, describing the two kinds of property (*daya*, wealth) to which rights of inheritance attach, viz., the "unobstructed" and "obstructed," he speaks thus of the latter class :—

"But property devolves on parents (or uncles) and brothers and the rest, upon the demise of the owner if there be no male issue, and thus the actual existence of a son and the survival of the owner are impediments to the succession ; and on their ceasing the property devolves [on the successor] in right of his being uncle or brother. This is an inheritance subject to obstruction."

And then comes the significant passage :—"The same holds good in respect of their sons and other descendants," meaning, clearly, the sons and descendants of uncles and brothers. And this is the construction which Balambhatta, one of the best known commentators of the Mitakshara, appears to have put on these words.

As pointed out in the case of *Ram Chandra* v. *Vinayak Venkatesh* (1), the right of collaterals to succeed to the inheritance of a deceased person is based on the rule of Manu, which has been translated differently by different writers, but which in substance amounts to this, that the estate of a deceased goes to his nearest *sapinda*. The right of collaterals, therefore, is dependant on the existence of the *sapinda*-relationship between the *propositus* and the claimant. It is now well settled by the decisions of this Board that under the Mitakshara, *Lullubhai Bapoobhai* v. *Cassibai* (2) and *Ram Chandra* v. *Vinayak Venkatesh* (1), the *sapinda*-relationship arises "between two people through their being connected by particles of one body," *viz.*, that of the common ancestor, in other words, from community of blood in contradistinction to the Dayabhaga notion of "community in the offering of religious oblations." But, as will be shown later on, the Mitakshara, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood.

Mr. Colebrooke has, in his translation of Section V, erroneously rendered the word *sapinda* as "relations connected by funeral oblations," and *samanodakas* as those connected by "libations of water," which has led to some confusion of ideas. Their Lordships, therefore, propose to follow the translation which was before this Board in *Lullubhai's* case (2).

The first paragraph stands thus : "If there be no brother's sons, *gotrajas* share the estate. *Gotrajas* are the paternal grandmother and *sapindas* and *samanodakas*."

Their Lordships understand that the word rendered "sons" in this paragraph is *putra* in the original. Then follows paragraph 2, in which Vijnaneswara develops the position of the grandmother in the following terms :—

"In the first place the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before cited. 'And the mother also being dead, the father's mother shall take the heritage'" (Section 1, paragraph 7). "No place, however is found for her in the compact series of heirs from the father to the

(1) L. R. 41 I. A. 290 ; s. c. 18 C. W. N. 1154 (1914).

(2) L. R. 7 I. A. 212 (1880).

nephew, and that text ('the father's mother shall take the heritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course, succeed imemdiately after the nephew; and thus there is no contradiction."

Para. 3 then states in general terms that after the grandmother the *sapindas* of the same paternal stock, *viz.*, "the paternal grandfather and the rest inherit the estate, for *bhinnagotra sapindas* (i.e., *sapindas* belonging to another stock) are indicated by the term *bandhu*" (dealt with in Section VI).

Paras. 4 and 5 deal specifically with the succession of the *samanagotra sapindas* and run as follows:—

"(4) Here on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, and their sons."

"(5) On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue, inherit. In this manner must be understood the succession of the *samanagotra sapindas.*"

It is clear from the observations of both Mr. Mandlik and Dr. Jolly (Mandlik's Hindu Law, p. 379; Dr. Jolly's Tagore Law Lectures, p. 124), that Mr. Colebrooke in his translation of para. 5 has omitted towards the end the important words "up to the seventh," which makes a material difference in the sense of the passage.

Mr. Mandlik translates the last sentence as follows: "In this manner up to the seventh (*sapinda*) the taking of wealth by the *samanagotra sapindas* should be known." Only instead of the expression *samanagotra*, which is in the original, he uses the abbreviated term *sagotra*.

Para. 6 then provides as follows:—

"6. If there be none such, the succession devolves on *samanodakas*, and they must be understood to reach the seven degrees beyond *sapindas*, or else as far as the limit of knowledge and name extend. Accordingly Vhrat Menu says: 'The relation of the *sapindas* ceases with the seventh person, and that of *samanodakas* extends to the fourteenth degree, or as some affirm, it reaches as far as the memory of birth and name extends.' This is signified by *gotra.*"

It is contended on behalf of the Appellant on the strength of these several passages that the word "son" used in conjunction with brothers must be literally construed, for otherwise, it is urged, the position assigned to the grandmother in the order of succession would be displaced. The effect of this argument (which by parity of reasoning must apply also to uncles), if well founded, is that the succession in the father's or grandfather's line must cease *ipso facto* on the failure of descendants of the second degree, and the inheritance must be diverted to another line ascending first to the female ancestor.

In their Lordships' opinion it begs the very question which they have to determine, *viz.*, in what sense Vijnaneswara has used the term "son" in these passages; and that question can be answered only first by examining his own method of employing the word, and *secondly*, by inquiring in what sense other Hindu jurists of the same school or cognate schools have understood the expression. Before proceeding with their examination of Vijnaneswara's own words, their Lordships desire to make one observation, as it strikes them, regarding the place of the grandmother in his scheme of succession.

In Yajnavalkya's rule, already quoted, to which Vijnaneswara refers as "the compact series of heirs," the paternal grandmother is not included as an heir. Vijnaneswara finds a place for her among the *gotraja*, on the authority of an enunciation of Manu, which he quotes in para. 7 of Section I, Chapter II, and which runs thus: "Of a son dying childless the mother

shall take the estate; and the mother also being dead, the father's mother shall take the heritage."

According to Manu, then, if his words are to be literally construed, the paternal grandmother would take immediately after the mother. This difficulty Vijnaneswara himself recognises; in order to reconcile the conflict between Yajnavalkya, who omits the grandmother altogether from his "compact series of heirs," and Manu, who would place her directly after the mother, he places her somewhat arbitrarily, as Messrs. West and Bühler also indicate, after the "brother's sons." The question, however, whether he intended his declaration to be imperative can be solved only by a less free translation than Mr. Colebrooke's. Anyhow, the meaning to be attached to the word "sons" is left subject to explanation.

Now, in paragraph 1 of Section V, where Vijnaneswara says, "if there be not even brother's sons," the word used is *putra;* in paragraph 2, where the grandmother's place is declared, the expression employed is brother's *suta*, a synonym of *putra*. In paragraph 4 again the word *putra* appears to be used in connection with uncles. In paragraph 5, where the expression "his sons and their issue" occurs, the original words are said to be *tat putrâs*, "his sons," and *tat sunâvas* (plural of *sunu* "offspring," *sunu* is the old Indo-Aryan word which survives in the English "son"), "their sons."

The word "descendants" in Mr. Colebrooke's translation is in the original "*santana*," which means race, lineage, or posterity, and is still used among Hindus to mean male progeny without limitation. Mr. Justice Telang construes it as meaning "continuation." *Rachava* v. *Kalingapa* (3). Other learned Sanscritists interpret it to signify "an uninterrupted series" [of progeny or heirs]. Their Lordships have no doubt that Vijnaneswara has used it in the sense of lineal male descendants. *Sunâvas*, translated by Mr. Colebrooke as "issue," connotes the same idea.

Having regard to the fact that this great legist, whose logical acumen judging from his work seems to have been remarkable, has used the term *putra* in previous parts of his book on inheritance in a comprehensive and generic sense, their Lordships find it difficult to conceive why he should arbitrarily and without any explanation have used the word towards the end in quite a different and restricted sense, or why, if his intention was to confine the descent in the case of the collaterals to the actual sons of brothers and uncles, he did not employ terms which would have exactly conveyed his meaning, such as *atmaja* or *auras*, which, their Lordships understand, mean "son of one's loins." [See Mandlik, p. 380; and Sutherland's translation of the *Dattaka Mimansa* (Stoke's Hindu Law Books, p. 547).] Nor can their Lordships appreciate the argument that the meaning of such words as *santatei* and *sunâvas*, which mean lineal male progeny without limitation, should be arbitrarily cut down to two degrees.

There seems to be great force then in Sir Robert Finlay's contention that the limitation is to be found elsewhere. The rule of Manu supplies one limitation:— "To three (ancestors) water must be offered, to three funeral cake is given, the fourth (descendant is) the giver of these (oblations), the fifth has no connection with them." ("Sacred Books of the East," Vol. XXV, v. 186, p. 36.) The other is deduced by Mr. Harrington, see *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (4), the well-known author of

(3) I. L. R. 16 Bom. 716 (1892).

(4) 2 M. I. A. 139 at p. 168 (1839).

the "Analysis," and one of the most erudite judges of the old Sudder Court of Bengal, from the enunciations of Vijnaneswara himself in paragraph 6, Section V, where he declares that the succession of the *samanagotra sapindas* extends "in this manner" to "the seventh degree." It is not necessary in their Lordships' opinion to examine the force of the criticism that has been levelled at Mr. Harrington's construction of Vijnaneswara's dictum, for if the view based on Manu's doctrine or rule be well-founded, as the High Court has considered it to be, it would be sufficient to dispose of this Appeal.

In this connection their Lordships desire to make another observation. If it be correct, as has been suggested, that the words *putra-pautra* ("son-grandson"), used by Vijnaneswara in Section I, Chapter I, did not comprehend originally a great-grandson, but that it has been included by the commentators, as the *Viramitrodaya* shows, on the strength of analogical reasoning, then, in their Lordships' opinion, the objection to the High Court's reading of the text, based on the necessity of strict adherence to a literal interpretation, loses considerably its force, and the Courts are compelled to resort to other texts to extract the meaning of undefined expressions.

Turning now very briefly to the other authorities to which their Lordships' attention was called, they observe that Apararka, another scholiast of Yajnavalkya, who flourished about a century later than Vijnaneswara, dealing with the same text, on which the author of the Mitakshara has commented at such length, construes, as pointed out by the High Court, the expressions "brother's sons" and "uncle's sons" in a wider sense. That Apararka's authority is acknowledged by the expositors of the Benares School is clear from the fact, to which Mr. Mandlik refers, that Visweswara Bhatta, the author of the *Subodhini*, a commentary on the Mitakshara, has used Apararka's work among others for the compilation of his *Madanaparijata*. Parts of Apararka's treatise and of the *Madanaparijata* have been translated by Dr Sarvadhikari and are to be found in his Tagore Lectures for 1880.

Nanda Pandita, "an esteemed writer of "the Benares School," and the author of the noted work on the Law of Adoption, called the *Dattaka Mimansa*, a standard treatise among the followers of the Mitakshara, has written commentaries both on the Mitakshara as well as on the Institutes of Vishnu, a predecessor of Yajnavalkya, who is frequently quoted by Vijnaneswara. In this latter work, called the *Vaijayanti*, in giving the order among the *sagotras*, he states that "in the father's line, on failure of the brother's son, the brother's son's son is heir." And he bases this rule on the prescriptions of Manu already quoted. It is to be noted that this writer, who must have had Vijnaneswara's words in his mind, certainly did not limit the term *putra* to two degrees. Varadaraja, whose authority is said to be great in Southern India, and whose enunciations appear to be received with respect also by the expounders of the Benares School, has given expression to the same view. Vidyabhusan Shama Charan Sarkar, a learned Hindu scholar who for many years held the post of principal Oriental Interpreter in the High Court of Calcutta, and at one time occupied the chair of Tagore Law Professor in the Calcutta University, also deals with the subject in his well-known work called the *Vyavastha Chandrika*.

This learned Hindu writer states in Principle 153 that "a brother's grandson succeeds in default of a brother's son," and refers to the decision of the Calcutta

High Court in *Kureem Chand Gurain* v. *Oodung Gurain* (5), without taking any exception to its correctness. In the note to the Principle he states the reason why the brother's grandson succeeds on failure of a brother's son in these words: "Because the term brother's son is inclusive also of the brother's grandson, and because he is *sapinda* and the nearest of the persons understood by the term *gotraja*." The significance, however, of the statement lies in the question which Shama Charan Sarkar propounds in the footnote: "It may be asked that when in law the term 'son' (*put-tra*) is inclusive of the grandson and great-grandson, why then the term 'brother's son' does not include also the 'brother's great-grandson'?" The answer which he gives to his own question is both interesting and instructive. "The answer is," he says, "that in law calculation is made from the son of the common ancestor, which here is the father of both the deceased and his brother, consequently the term 'son' (of that ancestor) is inclusive of his great-grandson, who is the brother's grandson."

Dr. Raj Comar Sarvadhikari, whose authority as an expounder of the Hindu Law has been recognised by the Calcutta High Court and this Board, in his Tagore Law Lectures, gives emphatic expression to the view that the word "son" includes three degrees of descendants.

Devananda Bhatta, the author of the *Smriti Chandrika*, whose doctrines, however, are not recognised in Northern India, holds the contrary opinion; and Visweswara Bhatta in the *Subodhini* certainly appears to say that the father's line ceases with the brother's son; and probably the same meaning is to be attached to his statements in the *Madanaparijata*. With regard to these two writers, their Lordships deem it necessary to observe that Devananda Bhatta, who is supposed to have been a contemporary of Apararka, admittedly differs from the author of the Mitakshara in several essential rules of law. It seems, to say the least, doubtful whether an enunciation in the *Smriti Chandrika* can be safely applied, except perhaps by way of analogy, to explain a dubious or indeterminate phrase or term in the Mitakshara. The *Subodhini* stands on a different footing; it no doubt professes to be a commentary on the Mitakshara, but it is equally clear that in several instances it diverges from the acknowledged interpretations of its doctrines. The views of Visweswara Bhatta and Devananda Bhatta have been propounded with much force by Mr. Mandlik and Golap Chunder Shastri both of whom take their stand on the literal construction of the word *putra*. This thesis has been elaborately worked out by the former writer, but in substance it amounts to this, that as Vijnaneswara has used the expression "son" in conjunction with "brothers" and "uncles" it must be restricted to their direct male issue, and no extension of its meaning is permissible.

Their Lordships agree with the High Court of Allahabad that this reasoning proceeds on a very narrow basis and materially ignores the chief ground on which the opposite doctrine is based. Dr. Raj Comar Sarvadhikari's construction appears to them to rest on a logical foundation, and his views seem to be consistent and clear. In effect he says that the Mitakshara propounds a definite scheme of succession; lineal male descendants of the deceased owner down to and including the third degree, who constitute the first class of propinquous relations (the nearest *sapindas*) inherit in succession in the first instance. In their default the widow and

(5) 6 W. R. 188 (1866).

daughter take by express provision of the law. The daughter's son comes in similarly. In their absence the inheritance ascends; each ascending line begins with a female, and each has to be exhausted in accordance with the rule of propinquous *sapinda*-relationship before the next in order can take; so that the parents and "their three successive descendants" take first; then the paternal grandmother and the paternal grandfather, and "their three successive descendants" come next, and so on.

It may be noted here that two recent Hindu writers of repute (Dr. Jogendra Nath Bhuttacharjea, M.A., D.L., in his Commentaries on the Hindu Law, p. 414; Mr. Jogendro Chunder Ghose, Hindu Law, p. 119), and Dr. Jolly, who was at one time Tagore Law Professor in the Calcutta University, and is one of the translators of "The Sacred Books of the East," are in substantial agreement with Dr. Raj Comar Sarvadhikari.

As regards the decided cases there seems to be a conflict of opinion between the High Courts of Allahabad and Calcutta on one side and that of Madras on the other. The latter High Court has upheld the narrow construction propounded by the *Smriti Chandrika* and the *Subodhini*, and though it purports to confine its interpretation to Southern India, the opinion it has expressed has a wider application and deserves, therefore, careful attention.

Their Lordships do not consider it necessary to refer to the earlier decisions of the Sudder Dewanny Adalut of the North-West Provinces; they think it sufficient to treat the judgment of Mr. Harrington in *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (4) as a starting point in the current of decisions in Northern India. The question at issue in that case related to the right of *bandhus* or cognates under the Mitakshara to the succession to a deceased person in the presence of a *gotraja*. Mr. Harrington in dealing with the question examined exhaustively the meaning of the word *putra*, and came to the conclusion that it had been used by Vijnaneswara in a generic sense. His judgment was affirmed on appeal to this Board; and there appears to be no challenge of his interpretation of the law. It again received the approval of this Board in *Bhyah Ram Singh* v. *Bhyah Ugut Singh* (6). Perhaps Mr. Harrington's view with regard to the continuation of each line of heirs to the seventh degree is open to the objection that it contravenes the rule of Manu. As already observed, their Lordships do not, however, consider it necessary for the purposes of the present case to consider whether the principle suggested by him is correct or not.

In *Kureem Chand Gurain* v. *Oodung Gurain* (5) also the exact point in issue was not identical with the one involved here, but Mr. Harrington's construction of the word *putra* was accepted; and it was held that in the scheme of the Mitakshara, the term "brother's son" includes "brother's grandson."

In *Kalian Rai* v. *Ram Chandra* (7), the point at issue directly concerned the position of the brother's grandson in the line of descent, and the learned Judges of the Allahabad High Court (Burkitt and Chamier, JJ.) came to the conclusion that under the law of the Mitakshara, as accepted and expounded in the Benares School, the brother's grandson had the right of succession to the deceased before it ascended to the second line, *viz.*, the grand-paternal line.

(4) 2 M. I. A. 182 at p. 158 (1839).

(5) 6 W. R. 158 (1866).
(6) 13 M. I. A. 373 (1870).
(7) I. L. R. 24 All. 128 (1902).

BUDDHA SINGH *v.* LALTU SINGH.

This decision has been followed in the case under appeal.

In the Bombay Presidency also the doctrines of the Mitakshara are recognised subject to the interpretation of the *Vyavahara Mayukha* of Nilkantha Bhatta, and although on many points there is considerable divergence between the Benares and the Maharashtra Schools, as regards the question involved in the present case, one decision at least of the Bombay High Court indicates an agreement with the Allahabad High Court.

Mr. Justice Telang, a Sanscritist of high order, in *Radhava* v. *Kalingapa* (3), explains thus the order of descent among the *gotrajas* (enunciated in Chapter II, Section V, paragraphs 4 and 5 of the Mitakshara), although, as he points out, each ascending line begins with a female (*gotraja*) ancestress.

"In the Mitákshara, Chapter II, Section V, pl. 4-5, it is laid down, that the propinquity of *gotrajas* is to be determined by lines of descent—that is to say, the inheritance is to go first in the line" (the word in the original is *santana* literally, "continuation") "of the paternal grandfather, then in default of any one in that line, of the paternal great-grandfather, then of the paternal great-great-grandfather, and so forth," . . .

The Madras High Court in two cases, named respectively *Suraya Bhukta* v. *Lakshmi Narasamma* (8) and *Chinnasami Pillai* v. *Kunju Pillai* (9), has held as already stated, the direct opposite. The *ratio decidendi* in both judgments, which are elaborate and closely reasoned, is of a two-fold character; in the first place the learned Judges say that when a word purports to bear two meanings, one primary, the other secondary, it must be understood in the primary sense unless there is anything in the context to show that it was not used in that sense. In the second place they seem to consider the opinions of Devananda Bhatta and of Visweshwara Bhatta in the *Smriti Chandrika* and *Subodhini* respectively as conclusively showing that the Mitakshara must be taken to limit collateral descent to two degrees in each line. Their Lordships have already made their remarks on these two authorities; they do not feel disposed to attach any canonical authority to the rule of the *Subodhini*. Curiously enough there is no reference in either of the Madras judgments referred to above to a previous decision, *Parasara Bhattar* v. *Rangaraja Bhattar* (10), of the same court to which Turner, C. J., was also a party. In that case the rule of the *Smriti Chandrika* was not accepted nor was the literal construction of the Mitakshara followed. It is usual in such cases where a difference of opinion arises in the same Court to refer the point to a Full Bench, and the law provides for such contingencies. Had that course been followed their Lordships would probably have had more detailed reasoning as to the change of opinion on the part at least of one judge.

In *Suraya Bhukta* v. *Lakshmi Narasamma* (8) the judges say they had "consulted their learned colleague, Mr. Justice Muttusami Ayyar," and acknowledged their obligations to him for his assistance. Their Lordships cannot help remarking that it is an undesirable course, which has not been approved of by this Board, to introduce the opinion of another judge not a party to the judgment for the purpose of enforcing the conclusion arrived at. The recorded opinion of Muttusami Ayyar, J., would have been of great value had he been associated in the decision.

(3) I. L. R. 16 Bom. 716 (1892).
(8) I. L. R. 5 Mad. 291 (1882).
(9) I. L. R. 35 Mad. 152 (1911).
(8) I. L. R. 5 Mad. 291 (1882).
(10) I. L. R. 3 Mad. 202 (1880).

However, the two Madras decisions have received the respectful consideration of their Lordships. They have already given reasons for holding that in the Mitakshara, as expounded in the Benares School, the word *putra* and its synonym employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the third degree before making the ascent to the line next in order of succession.

It seems to their Lordships that there is another ground on which the Plaintiff must fail. It is admitted that the Defendant confers greater benefit on the deceased by the offerings he makes to the *manes* of the common ancestor. Now, it is absolutely clear that under the Mitakshara, whilst the right of inheritance arises from *sapinda*-relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the *gotraja*, the test to be applied to discover the preferential heir is the capacity to offer oblations. Mitra Misra, the author of the *Viramitrodaya* (Golap Chunder Shastri's translation, p. 91, Chapter II, part I, s. 23A), an authoritative commentary on the Mitakshara, lays down this doctrine in express terms. He says, "when there are many claimants to the heritage among *gotrajas* and the like (Dr. Raj Comar Sarvadhikari construes the word "like" as meaning "other classes of heirs,") then the fact of conferring benefits on the proprietor of the wealth by means of the offering of oblations and the like only excludes those that do not confer such benefits." Dr. Raj Comar Sarvadhikari renders the last part of this passage thus: "The benefit conferred on the late owner by the offering of the cake and the water determines the title to inheritance." ["Tagore Law Lectures," for 1880, p. 629.]

In the case of *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (6) the Board affirmed this rule in the following words: "When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty."

For these considerations their Lordships are of opinion that the conclusion arrived at by the High Court is well founded, and this Appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Ranken Ford, Ford* and *Chester* for the Appellants.

Solicitors: *Messrs. Pyke, Parrott & Co.* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 300 OF 1911.

MOOKERJEE, J. BEACHCROFT, J. 1914, 17, June.	GANPAT MAHTON and ors., Defendants, Appellants, *v.* RISHAL SINGH and ors., Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 45, 116, 120, Sch. III, Art. (1), (a)—**Zerait,** ***land let to tenant claimed as—Tenant's admission in*** **kabuliyat** ***executed after 2nd March 1883, if admissible—Lease of*** **zerait** ***land for a term—Suit to eject brought more than 6 months after the expiry of term—Limitation.***

The new sub-sec. (2), (a), to sec. 120 which shows that "any other evidence that may be produced" does not include an agreement or a compromise between the landlord and the tenant, confirms the view taken in the case of SHER

(6) 18 M. I. A. 373 (1870).

GANPAT MAHTON *v.* RISHAL SINGH.

BAHADUR *v.* MACKENZIE (2) *that a statement made in a* kabuliyat *executed after the 2nd March 1883 that the land is* zerait *was not admissible, not on the ground that it was not included in the expression "any other evidence that may be produced" but for the reason that when the Legislature expressly made evidence of letting before the 2nd March 1883 admissible in proof of the character of the land, they must be intended to exclude evidence of letting after the 2nd March 1883.*

Where therefore the only evidence to prove that land let out for a term of seven years expiring on 4th June 1909 was zerait *was a recital to the effect in the* kabuliyat, *dated the 19th September 1902,*

Held—*That the recital was no evidence of the alleged* zerait *character of the land.*

NILMONEY CHAKRABURTY *v.* BYKANT NATH BERA (1), AJODHYA PROSAD *v.* RAM GOLAM (4), BHAGTU SINGH *v.* RAGHUNATH (5) *and* MASUDAN SINGH *v.* GOODAR NATH PANDEY (3) *referred to.*

A suit to eject a raiyat of zerait *land brought more than six months after the expiry of the term of his lease is barred by Art.* (1), (a), *of Sch. III of the Bengal Tenancy Act, sec. 45 of the Act which was not applicable to* zerait *lands under sec. 116 having been replaced by the said article which is applicable.*

This was an appeal from a decision of Babu Hem Chandra Mookerjee, Subordinate Judge, Monghyr, dated 27th June 1911.

The facts of the case appear from the judgment.

(1) I. L. R. 17 Cal. 466 (1890).
(2) 7 C. W. N. 400 (1902).
(3) 1 C. L. J. 456 (1905).
(4) 13 C. W. N. 661 (1908).
(5) 13 C. W. N. 994: s. c. 9 C. L J. 15 (1908).

Babus Mohini M. Chatterjee and *Probodh Ch. Dutt* (for *Babu Surendra Kumar Bose*) for the Appellants.

Babus Umakali Mukerjee and *Kulwant Sahay* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendants in a suit for ejectment and arrears of rent. The Plaintiffs are landlords, and their case is that the Defendants executed a *kabuliyat* in their favour for a term of seven years, and came into occupation of the disputed lands on the 19th September 1902. The term expired on the 4th June 1909. The *kabuliyat* states expressly that on the expiry of the term the tenants would give up the lands, but they did not vacate the lands, and the present action was consequently commenced on the 16th September 1910. The Plaintiffs assert that the lands are their *zerait* and that the Defendants have not acquired the status either of occupancy or non-occupancy raiyats under the provisions of the Bengal Tenancy Act. The Defendants allege on the other hand, that they were in occupation from before the execution of the *kabuliyat*, that the lands are not *zerait* and that they are in fact occupancy raiyats as recorded in the settlement proceedings. The Court below has held that the lands are *zerait* lands and that the Plaintiffs are entitled to eject the Defendants. On the present appeal it has been argued that there is no evidence to show, at any rate no reliable evidence to prove, that the lands are *zerait* as alleged by the Plaintiffs.

The evidence has been placed before us and it appears that the only evidence to show that the lands are *zerait* is the recital in the *kabuliyat* of the 19th September 1902. It has been argued on behalf of the Defendants-Appellants that this re-

cital is not admissible in proof of the allegation that the lands are *zerait*; and in support of this view reliance has been placed upon the cases of *Nilmoney Chakraburty* v. *Bykant Nath Bera* (1), *Sher Bahadur* v. *Mackenzie* (2), *Masudan Singh* v. *Goodar Nath Pandey* (3) and *Ajodhya Prosad* v. *Ram Golam* (4). On the other hand attention has been invited to the decision in *Bhagtu Singh* v. *Raghunath* (5), where, it is said, a different view was taken. The question raised must be determined primarily on a construction of the statutory provisions on the subject.

Sub-sec. (3) of sec. 120 of the Bengal Tenancy Act, read with sub-secs. (1) and (2) lays down the tests to determine the question, whether a particular land is the proprietor's private land. According to clause (*a*) of sub-sec. (1), land which is proved to have been cultivated as *zerait* by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of the Bengal Tenancy Act is proprietor's private land. There is no evidence of this description in the case before us. According to clause (*b*) of sub-sec. (1), cultivated land which is recognised by village usage as proprietor's *zerait* is also the proprietor's private land. There is no evidence of this description in the present case. Finally, according to sub-sec. (2) of sec. 120, when a question arises whether any land, other than land of the description mentioned in cls. (*a*) and (*b*) of sub-sec. (1), is *zerait* the presumption is that the land is not *zerait*, but to determine the question, regard shall be had to (*a*) local custom, (*b*) to the question whether the land was before the 2nd March 1883, specifically let as proprietor's private land, and (*c*) to any other evidence that may be produced. It will be observed that this sub-section refers to evidence of three descriptions; *first*, local custom; *secondly*, letting of the land specifically as the proprietor's private land before 2nd March 1883; and *thirdly*, any other evidence that may be produced. In the case before us, there is no evidence of local usage or of letting before the 2nd March 1883; the only evidence of letting which has been produced is the *kabuliyat* of the 19th September 1902. The question is, whether regard can be had to this evidence as included in the comprehensive description "any other evidence that may be produced." Upon this point there has been some divergence of judicial opinion.

In the case of *Nilmoney Chakraburty* v. *Bykant Nath Bera* (1), the view was adopted that the expression "any other evidence that may be produced" means any other evidence tending to show the assertion of any title on the part of the proprietor and communicated to the tenant before the 2nd March 1883. The particular evidence produced in that case was an entry made in a settlement record in 1885 and 1886, to the effect that the disputed land was the proprietor's private land. The Court held that this evidence was inadmissible, because it was evidence of an event which had happened after the 2nd March 1883. This interpretation seems open to the criticism that it unduly restricts the generality of the expression "any other evidence that may be produced"; but, as will presently appear, it is not necessary for our present purpose to consider whether this extreme view gives effect to the true intention of the Legislature. The question was raised again in

(1) I. L. R. 17 Cal. 466 (1890).
(2) 7 C. W. N. 400 (1902).
(3) 1 C. L. J. 456 (1905).
(4) 13 C. W. N. 661 (1908).
(5) 13 C. W. N. 994: s. c 9 C. L. J. 15 (1908).

the case of *Sher Bahadur* v. *Mackenzie* (2) where reliance was placed upon a statement made in a *kabuliyat* executed after the 2nd March 1883. The Court held that the evidence was not admissible, not on the ground that it was not included in the expression "any other evidence that may be produced," but for the reason that . . . . . when the Legislature expressly made evidence of letting before the 2nd March 1883 admissible in proof of the character of the land, they must have intended to exclude evidence of letting after the 2nd March 1883. The Court held in substance that it would not be right to impute to the Legislature the intention that they specifically made mention of evidence of letting before the 2nd March 1883 and then included evidence of letting after the 2nd March 1883 in the general expression "any other evidence that may be produced." Had this been the intention the sub-section might have been differently framed, and it might have been laid down that regard shall be had to "local custom and any other evidence that may be produced." The view taken in the case of *Sher Bahadur* v. *Mackenzie* (2) does seem reasonable, and, if we adopt it, there is no room for controversy that the recital in the *kabuliyat* of the 19th September 1902 cannot be treated as evidence of the alleged *zerait* character of the disputed lands. The same question was again mooted in the case of *Masudan Singh* v. *Goodar Nath Panday* (3). One member of the Court did not commit himself finally to an opinion upon the matter, but expressed a doubt whether the case of *Nilmoney Chakrabarty* v. *Bykant Nath Bera* (1) gave effect to the true intention of the Legislature. The other member of the Court held that the evidence contained in an agreement executed after the 2nd March 1883, was not admissible in view of sec. 178 of the Bengal Tenancy Act, cl. (4) of sub-sec. 3 whereof provides that nothing in any contract made between a landlord and a tenant after the passing of the Act shall prevent a raiyat from acquiring, in accordance with the Act, an occupancy right in land. The view taken was that if the recital in an agreement between the landlord and the tenant made after the passing of the Bengal Tenancy Act was admitted in evidence to prove that the land was the proprietor's private land, in which no occupancy right would be acquired by the tenant, the provisions of cl. (*a*) of sub-sec. (3) of sec. 178 would be practically defeated. The matter came under consideration, again, in the case of *Ajodhya Prosad* v. *Ram Golam* (4) where the view taken in *Nilmoney Chakrabarti* v. *Bykant Nath Bera* (1) was practically adopted, though for the purposes of that case, the more restricted view taken in *Sher Bahadur* v. *Mackenzie* (2) would have been sufficient to support the conclusion of the Court. Finally, in the case of *Bhagtu Singh* v. *Raghunath* (5), the earlier cases were distinguished, and it was held that evidence which was relevant under the provisions of the Indian Evidence Act, could be admitted *quantum valeat*, although it related to a transaction subsequent to the 2nd March 1883. Since the decision of these cases, the Legislature have added sub-sec. (2), (*a*) to sec. 120. That sub-section is in these terms: "Notwithstanding anything contained in any agreement or compromise or in any decree which is proved to his satisfaction to have

(1) I. L. R. 17 Cal. 466 (1890).
(2) 7 C. W. N. 400 (1902).
(3) 1 C. L. J. 456 (1905).
(4) 13 C. W. N. 661 (1908).
(5) 13 C. W. N. 994; s. c. 9 C. L. J. 1 (1908).

been obtained by collusion or fraud, a Revenue Officer shall not record any land as a proprietor's private land, unless it is proved to be such by satisfactory evidence of the nature described in sub-sec. (1) or sub-sec. (2)." The intention of the Legislature, as indicated in the new sub-section, obviously is to exclude from sub-sec. (2) evidence contained in an agreement or compromise between the landlord and the tenant. This clearly confirms the view taken in the case of *Sher Bahadur* v. *Mackenzie* (2) and shows that the expression "any other evidence that may be produced" does not include an agreement or a compromise between the landlord and the tenant. We hold, accordingly, that the recital in the *kabuliyat* of the 19th September 1902 cannot rightly be treated as evidence of the alleged *zerait* character of the disputed lands. We may add, however, that even if the view taken in *Bhagtu Singh* v. *Raghunath* (5) were adopted, we feel no doubt whatsoever that the recital by itself would not justify the inference that the lands were *zeraits*. We must further remember that the Defendants have been recorded as settled raiyats. They start with a presumption in their favour. We have also the important fact that the Defendants were found to be settled raiyats in a proceeding for commutation of rent under sec. 40 of the Bengal Tenancy Act. We have finally the presumption mentioned in sub-sec. (2) of sec. 120, that the lands are not the proprietor's private lands. The burden lies very heavily upon the Plaintiffs to establish their allegation of *zerait*, and is unquestionably not discharged by the recital in the *kabuliyat* of the 19th September 1902, even if such recital were deemed admissible as evidence for this purpose. The inference is irresistible that the Plaintiffs have wholly failed to establish that the disputed lands are *zerait*.

There would have been a grave difficulty in the way of the success of the Plaintiffs even if they had established that the lands were *zerait*. Art. (1), (*a*) of Sch. III of the Bengal Tenancy Act provides that a suit to eject a non-occupancy raiyat on the ground of the expiration of the term of his lease shall be brought within six months from the expiration of the term. This Article replaces sec. 45 of the Bengal Tenancy Act which originally found a place in Chap. VI. Sec. 116 excluded the operation of sec. 45 in the case of a proprietor's private lands, when such lands were held under leases for a term of years or under leases from year to year. Sec. 45 laid down a two-fold condition, namely, *first*, that six months before the expiry of the term a notice must be served upon the non-occupancy raiyat and, *secondly*, that the suit for ejectment must be instituted within six months after the expiry of the term. This provision was, by virtue of sec. 116, inapplicable to *zerait* lands, when such lands were held under leases for a term of years or under leases from year to year. Sec. 45 has now been repealed and has been replaced by Art. (1), (*a*) of Sch. III. There can be no question that the Defendants, even if they had been tenants of *zerait* lands, would be non-occupancy raiyats though by virtue of sec. 116, the special provisions of Ch. VI might not have applied to them. But the operation of Art. (1), (*a*) of Sch. III is not excluded by sec. 116 in the case of *zerait* lands. Consequently, if the lands were proved to be *zerait*, the Plaintiffs would be bound to institute this suit within six months from the 4th June 1909; but it was not commenced till the 16th September 1910. The

(2) 7 C. W. N. 400 (1902).

(5) 13 C. W. N. 994: s. c. 9 C. L. J. 15 (1908).

suit is consequently clearly barred by limitation.

The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The claim for ejectment is dismissed. As the plaint contained a claim for the rent of the year 1316, we make a decree in favour of the Plaintiffs for Rs. 600 in respect of the rent and cesses for that year, without prejudice to the right of either party to prove the proper amount of rent for subsequent years, in any suit that may be brought hereafter. The arrears decreed will carry interest at 12½ per cent. per annum from the 4th June 1909 to the date of suit, and at 6 per cent. per annum from date of suit to this date. The total amount thus determined will be set off against the costs allowed to the Defendants. The Defendants will have full costs both here and in the Court below.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3707 OF 1910.

MOOKERJEE, J. BEACHCROFT, J. 1913, Heard, 22, April. 1914, Judgment, 26, May.	RETKI and ors., Defendants, Appellants, *v.* LAK PATI PUJARI, Plaintiff, Respondent.

***Hindu Law—Adoption by Brahmin*—Dattahoma *ceremony not performed—Adoption if valid —Adopter and adoptee of same* gotra.**

Held, *on a review of authorities, that the* dattahoma *ceremony is not essential when the adopted boy is of the same* gotra *as the adopter, even amongst the twice-born classes.*

This was an appeal from a decision of Babu Ramal Das, Subordinate Judge, Sambalpur, dated 29th June 1910, affirming that of Babu Susil Chandra Mitra, Munsiff, Bergarh, dated 7th March, 1910.

The facts of the case fully appear from the judgment.

Babus Satis Chandra Ghose and *Smritish Chandra Ghose* for the Appellants.

Babus Sarat Ch. Roy Choudhuri, Charu Chandra Bhattacherjea and *Gobinda Ch. Chakrabarty* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the third and fourth Defendants in a suit for declaration of title to land and for recovery of possession thereof. The property in dispute belonged to Pitabas, one of four brothers, who were members of a Hindu family governed by the Mitakshara law. The Plaintiff is one of the sons of a brother of Pitabas and his case is that he was taken in adoption by his uncle in the year 1900. The Defendants, now Appellants, are two of the daughers of Pitabas, who would be entitled to succeed to the estate of their father in the absence of an adopted son. They consequently challenged the factum as also the validity of the alleged adoption. The Courts below have concurrently found in favour of the Plaintiff and decreed the suit. They have held on the evidence that the adoption did in fact take place, that since then the Plaintiff has been treated as the son of Pitabas, that his thread and marriage ceremonies have been performed as such and that he has performed the annual *sradh* ceremony of his adoptive father and enjoyed the turn of worship of the family deity as his successor-in-interest. The Courts below have also held that there is no evidence that the Dattahoma ceremony was performed on the occasion of the adoption of the Plaintiff, but they have taken the view that as the Plaintiff was the nephew of his adop-

tive father, the performance of such ceremony was not essential. In this view, the adoption has been held valid and the claim of the Plaintiff to the estate of his adoptive father sustained. The Defendants have appealed to this Court and have reiterated the objection that the adoption was invalid, as the parties are Bramhins in whose case the Dattahoma ceremony is essential; in support of this view, reliance has been placed upon the case of *Luchman Lal* v. *Mohan Lal* (1), where Dwarkanath Mitter, J., stated that the performance of the *putrashtijag* (apparently written inadvertently for Dattahoma) is essential to the validity of an adoption in the Dattaka form among the three superior castes. On behalf of the Respondent, it has been argued that this is not an accurate statement of the rule on the subject; that, in any event, it is too broadly formulated, and that no Dattahoma is necessary when the son of a brother is taken in adoption. In support of this contention, reference has been made to the cases of *Atma Ram* v. *Madho Rao* (2), *Govinda Ayyar* v. *Dorasami* (3) and *Valubai* v. *Govind* (4). In our opinion the contention of the Plaintiff must prevail that the validity of his adoption has not been affected by the non-performance of the Dattahoma.

The claim of the Plaintiff is supported by a text attributed to Yama: "The *homa* or the lic ceremony is not necessary in the case of adoption of the daughter's or the brother's son; by the verbal gift and acceptance alone, that is accomplished; this is declared by the Lord Yama." This text is quoted by the authors of the Datta Kaumudi and Dattaka Darpana as one of Devala mentioned in the Saraswati Vilasa of Dwaipayana (Dattak Siromoni, by Prof. Bharat Chandra Siromoni published under the direction of Prosanna Kumar Tagore, pp. 45, 92, 244, 246), and the comment is added by the author of the Dattaka Darpana that the expression "brother's son" includes persons who are *sapindas* and *sagotras* and that consequently it is only when an adoption is made of a *samanodaka or sakulya sagotra*, that the rule for performance of the Dattahoma ceremony operates. The text which was quoted as early as 1821 by the Punidits consulted in connection with the case of *Hulbant Rao* v. *Gobind Rao* (5), has also been accepted as genuine in the cases of *Valubai* v. *Gobind* (4) and *Atma Ram* v. *Madho Rao* (2), and its authority was treated as unquestionable by V. N. Mandlik (Yajnavalka, pp. 483). The rule enunciated in the text of Yama was also recognised by the Full Bench of the Madras High Court in *Govinda Ayyar* v. *Dorasami* (3), on the authority of an opinion expressed by Ellis that Dattahoma though proper in all cases, was not indispensible if the person adopting and the boy adopted were of the same, *gotra*. It has been argued, however, that the text of Yama is not based on any intelligible reason which could justify a departure from the general rule that the Dattahoma is an essential ceremony for the validity of an adoption amongst members of the three regenerate classes. We are not prepared to accept this contention as well founded. There has been considerable divergence of opinion amongst text writers, ancient and modern, which is reflected also in judicial decisions, upon the question, whether the Dattahoma is essential for the validity of an adoption, and even if it be conceded that there is a strong body of opinion in

(1) 16 W. R. 179 (1871).
(2) I. L. R. 6 All. 276 (1884).
(3) I. L. R. 11 Mad. 5 (1887).
(4) I. L. R. 24 Bom. 218 (1899).
(5) 2 Borr. 83 (1821).

favour of the view that it is obligatory in the case of adoption amongst Brahmins, we would not be disposed to ignore or even to minimise the effect of an exception for which direct authority may be found in a text of unquestionable genuineness and authority.

To take the texts first, it is plain that Manu undoubtedly contemplated nothing more than gift and acceptance for the validity of an adoption in the Dattaka form, as in defining the Dattaka son he says that the gift is to be made "together with water," that is, as Sir William Jones renders it, the gift is confirmed by pouring water. "That (boy) equal (by caste) whom his mother or his father affectionately gives, (confirming the gift) with (a libation of) water, in times of distress (to a man) as his son, must be considered as an adopted son (Datirma)" (Manu, IX, 168; S. B. E. Vol. XXV, p. 361). It is noteworthy that none amongst the commentators of Manu, not even Medhatithi, the oldest amongst them, touches upon this question. (Mandalik's Manu. p. 1202.) Vasistha describes the ceremonies in a more developed form, though not in the passage (XVII, 29; S. B. E. Vol. XIV p. 87) where he classifies the different kinds of sons. He directs that "he who desires to adopt a son, shall assemble his kinsmen, announce his intention to the King, make burnt offerings in the middle of the house, reciting the *Vyahritis*, and take (as a son) a not remote kinsman, just the nearest among his relatives". (Vasistha, XV, 6; S. B. E. Vol. XIV, p. 75; Mitakshara, I, 11, 13; Dattaka Mimansa, II, 51; Dattaka Chandrika, II, 11.) The ritual is further elaborated by Baudhayana (VII, 5; S. B. E. Vol. XIV, pp. 334-336; Dattaka Mimansa, V, 42; Dattaka Chandrika, II, 16; Journal A. S. B., Vol. XXXV, p. 162), though not in the passage where he classifies the various kinds of sons (III, 2, 3 and 20; S. B. E. Vol. XIV, p. 227). An equally elaborate description is given by Saunaka [Dattaka Mimansa (V, 2 and 42); Dattaka Chandrika (II, I, 3, 5, 7 and 9); Vyavahara Mayukha (IV, paras. 5 and 8, 36-42); Mandlik pp. 52-53 and 63-65; Bühler Journal A. S. B., Vol. XXXV, p. 149]. These statements, nothing like which can be found either in Yajnavalkya (II, 130; Mandlik, p. 219) or in Vishnu (XV, 18-19; S. B. E., Vol. VII, p. 63), still, leave the question open whether the performance of the *homa* is essential for the validity of the adoption, because they enunciate it along with other matters, such as the assembly of the kindred and notice to the King, which have never been deemed indispensible to validate the adoption. The Mitakshara and its commentaries, Subodhini and Balambhatti, though referring specifically to the text of Vasistha, do not raise the question at all. (Mitakshara, Ed. Setlur, p. 605.) A similar observation applies to Apararka who, in his commentary on Yajnavalkya (II, 130) contents himself by quoting the verse of Manu (IX, 168). When, however, we come to the Dattaka Mimansa, we find definite rules laid down on the subject. Para. 50 of Section V lays down that the filial relation of the five sons previously mentioned proceeds from adoption, only with observance of the form of either Vasistha or Saunaka and not otherwise. This is emphasised in Section V, para. 56, where the general conclusion is stated that the filial relation of adopted sons is occasioned only by the proper ceremonies, and that the filial relation even fails, should either gift, acceptance, a burnt sacrament and so forth, be wanting. [Reference may also be made to Section V, para. 47, where an ingenious attempt is made to read this interpretation into

the simple text of Manu (IX, 168) and to sec. V, para. 55, where a quotation from Medhatithi, which cannot be traced in his commentary on Manu, is similarly treated.] To the same effect is the statement in the Dattaka Chandrika, Section II, para. 17, where it is recited after the description in para. 16 of the mode of adoption prescribed by Baudhayana for followers of the Taittiri Veda, that in case no form as propounded should be observed, the adopted son will be declared entitled to assets sufficient for his marriage. This is reiterated in Section VI, para. 3, where reliance is placed on a text of Manu which has not been traced: "He who adopts a son without observing the rules ordained, should make him the participator of the rites of marriage, not a sharer of the wealth." In this connection it is worthy of note that the opinion has been expressed by Sastri Golap Chandra Sarkar (Tagore Lectures on Adoption, p. 124; Hindu Law, 4th Edition, page 126) that the Dattaka Chandrika was composed about the year 1800 for the purposes of a particular litigation, by one Raghumani Vidyabhusan who passed it off as the work of Kuvera. Serious notice need not accordingly be taken of the text which has not been found in the Institutes of Manu. There remains, however, the opinion of the author of the Dattaka Mimansa which is no doubt entitled to weight. As against his opinion, we have the contrary view maintained by commentators of repute. Sankarabhatta, in his work styled the Dharma Dvaita Nirnaya, in the chapter styled the "Solution of doubts," which has been translated by Mandlik (page 55, lines 39-42), says that by the operation of the rule Yathasaktinyaya (the rule which enjoins the observance of a precept as far as possible) the *homa* (sacrifice) or the like, which is a part of the ritual enjoined for adoption, may be disregarded, for, the rule properly applies with regard to the details of an enjoined ritual. Laugakshibhaskara, as Mandlik points out (Yajnavalkya, p. 509), goes into this question very elaborately and comes to the conclusion that the *homa* (sacrifice) or any other ceremonies beyond giving and taking are not essential for any of the four classes. The Dattaka Darpana, as we have already stated, declares the performance of the *homa* and other ceremonies unnecessary where the person to be adopted is a near relation, on the strength of a liberal interpretation of the expression brother's son in the text of Yama. The Dattaka Nirnaya (Dattaka Shiromoni, page 238) declares an adoption performed without *homa* to be valid, at least in the case of Sudras. The Dattaka Kaumudi (Dattaka Shiromoni page 245) quotes the commentary of Maheswara and the Dayakala of Bhabadeva as authorities in favour of the validity of an adoption where the Dattahoma ceremony has not been performed. Jagannath, in his great Digest of Hindu Law, translated by Colebrooke, after an elaborate examination of the texts, comes to the conclusion that an adoption without the performance of the Dattahoma is valid. (Volume III, page 323; Book V, Chap. IV, Section VIII, para. 273.) Jagannath observes that the gift and acceptance only are essential, and that the *homa* or oblation to the fire with holy words from the Veda is an unessential part of the ceremony; even though it be defective, the adoption is nevertheless valid, for no one admits that the principal object is unattained if an unessential part be defective. Jagannath directs a very weighty criticism against the position that the Dattahoma is necessary; if you say that the performance of the *homa* is essential, then you cannot but admit that it must be

accurately, properly and completely performed; for if there be any defect in its performance, it cannot serve the purpose; but if you say that even a defective *homa* is sufficient, you necessarily admit that it is not essential. There can be no question as to the weight to be attached to an opinion expressed by Jagannath Tarkapanchanon, who, as stated by Dwarkanath Mitter, J., in *Kery Kolitany* v. *Moneeram Kolita* (6) was one of the most learned pundits that Bengal had ever produced and whose authority on questions of Hindu Law ranks only next to that of Jimutavahana, Raghunandan and Srikrishna. The divergence of opinion to which we have referred, has led to a similar want of unanimity amongst leading text writers of the last century. Thus, Shama Charan Sirkar strenuously maintained, to the end, the view that the Dattahoma is essential, not only in the case of the three regenerate classes, but also in the case of Sudras, and wrote a learned criticism on the contrary opinion established by a Full Bench of this Court. [*Behari Lal* v. *Indramani* (7)], subsequently approved by their Lordships of the Judicial Committee [*Indramani* v. *Biharilal* (8)]. [Vyavastha Darpan, 3rd Ed., Part I, p. 355, Part II, p. 574; Vyavastha Chandrika, Part II, p. 125).] Dr. Jogendra Nath Bhattacherjee acquiesced in the view that the Dattahoma is not necessary in the case of Sudras, but maintained that it is essential in the case of the three regenerate classes (Hindu Law, 3rd Ed., Vol. I, p. 450). On the other hand, Sastri Golap Chandra Sarkar follows the view of Jagannath that the absence of the Dattahoma does not in any case affect the validity of an adoption (Tagore Lectures on Adoption, p. 377).

When we turn to examine the course of judicial decisions on the subject, we meet with a similar absence of uniformity. But one point is now finally settled, *viz.*, no religious ceremony is essential in the case of adoption by Sudras. This had been formulated by the Supreme Court of Calcutta as early as 1800 when Sir John Anstruther, C. J., with the concurrence of Royds and Russell, JJ., held, in the case of *Gopeemohan Deb* v. *Raj Krishna Deb* (9) that the adoption was validly made if gift and acceptance of the child by an overt act was shown to have taken place. The elaborate judgment of the Chief Justice is mentioned by Sir Thomas Strange in his Elements of Hindu Law, 1825, Vol. I, page 84, but has never been traced. There was after this, a uniform succession of decisions to that effect *Jaymony* v. *Sibo Soondery* (10), *Doyamoyee* v. *Rashbehari* (11), *Ram Kishore* v. *Bhubanmayee* (12), *Perkash Chunder* v. *Dhunmonee* (13) and *Srinarayan* v. *Krishna Sundari* (14). The flow of this current was, however, interrupted by the contrary view taken in *Bhairab Nath* v. *Mahesh Chandra* (15) and *Sayam Lal* v. *Saudamini* (16) which were doubted and disapproved in *Nittianand* v. *Kirshna Dayal* (17) and were ultimately overruled by the Full Bench in *Behari Lal* v. *Indramani* (7) the decision wherein was con-

(6) 19 W. R. 307; 13 B. L. R. 1 at p. 49 (1878).
(7) 13 B. L. R. 401; 21 W. R. 285 (1874).
(8) L. R. 7 I. A. 24: s. c. I. L. R. 5 Cal. 710 (1879).
(9) Montriou H. L. Cas. 381 (1800).
(10) Fulton 75 (1857).
(11) (1852) Beng. S. D. A. 1001.
(12) (1859) Beng. S. D. A. 229.
(13) (1858) Beng. S. D. A. 96.
(14) 11 W. R. 196; 2 B. L. R. 279 (1869) on P. C. L. R. I. A. Sup. Vol. 149; 19 W. R. 168; 11 B. L. R. 171 (1873).
(15) 13 W. R. 168; 4 B. L. R. 182 (1870).
(16) 5 B. L. R. 285 (1870).
(17) 7 B. L. R. 14; 15 W. R. 396 (1871).

firmed on appeal to the Judicial Committee. *Indramani* v. *Biharilal* (8). This brought the rule on this point into harmony with what had been laid down in *Satrughan* v. *Sabitree* (18), on appeal from *Sabitree* v. *Suturghan* (19), *Veerapermal* v. *Narayan* (20), *Alwar* v. *Ramaswamy* (21) and *Thangathanni* v. *Ramu Mudali* (22), and the principle that religious ceremonies are not necessary in the case of an adoption by a Sudra has been applied to support the inference that a Sudra leper can adopt, *Sukumari* v. *Ananta* (23) (see also *Shosinath* v. *Krishna Sundari* (24). As regards the three regenerate classes, however, the point is by no means settled. The *dictum* of Lord Wynford in *Satrughan* v. *Sabitree* (18) undoubtedly admits of a wide interpretation and in Madras it was actually decided in *Singamma* v. *Venkata Charlu* (25) on the strength of the opinion of Jagannath and the decision of Sir Thomas Strange in *Veerapermal* v. *Narayan* (20), that even in the case of Brahmans the gift and acceptance of a boy qualified to be adopted is sufficient to constitute a valid adoption according to Hindu Law. A similar view was adopted in the case of a Kshatriya in *Chandramala* v. *Muktamala* (26), and of a Nambudri Brahman in *Shankaran* v. *Keshavan* (27). But the tide has apparently turned back in Madras, and the view taken in *Singamma* v. *Venkata Charlu* (25), has been doubted in *Venkata* v. *Subhadra* (28) and *Subbar Ayer* v. *Subbamal* (29), though it has been held in the second of these cases that the Dattahoma which had not been performed by the adoptive father could, after his death, be performed by his widow. The later view in Madras, as indicated in *Govinda Ayyar* v. *Dorasami* (3), and *Ranganaya Kamma* v. *Alwar* (30), is sought to be supported by reliance on the *dictum* of the Judicial Committee in *Shosinath* v. *Krishna* (24), to the effect that "amongst the twice-born classes, there can be no valid adoption by deed, as certain religious ceremonies, the Dattahoma in particular, are in their case requisite." A similar view is embodied in the extract from Savara Swami translated by Ellis (Strange's Hindu Law, 1825, Vol. II, p. 192) and had also been put forward by the Pundits who were consulted in the cases of *Alak Manjari* v. *Phakir Chand* (31) and *Ballavakant* v. *Kishenpriya* (32). The statement by Dwarkanath Mitter, J., in *Luchman Lal* v. *Mohan Lal* (1), to which reference has already been made, points in the same direction, and *Thakur Omrao* v. *Thakurani* (33), leads to the same conclusion, though it recognises that the ceremony may be performed at any place. There are also expressions in *Ravji* v. *Lakshmi Bai* (34), which may possibly be called in aid by those who seek to support the more stringent rule.

(8) L. R 7 I. A. 24: s. c. I. L. R. 5 Cal. 770 (1879).
(18) 2 Knapp. 287 (290) (1834).
(19) 2 Mac. Sel. Rep. 21 (1812).
(20) 1 Strange N. C. 91 (1801).
(21) 2 Mad. S. D. 67 (1858).
(22) I. L. R. 5 Mad. 358 (1882).
(23) I. L. R. 28 Cal. 168 (1900)
(24) L. R. 7 I. A 250: s. c. I. L. R. 6 Cal. 381 (1880).
(25) 4 Mad. H. C. R. 165 (1868).
(26) I. L. R. 6 Mad. 20 (1802).
(27) I. L. R. 15 Mad. 7 (1891).
(1) 16 W. R. 179 (1871).
(3) I. L. R. 11 Mad. 5 (1887).
(24) L. R. 7 I. A 25: s. c. I. L. R. 6 Cal. 381 (1880).
(25) 4 Mad. H. C. R. 165 (1868).
(28) I. L. R. 7 Mad. 548 (1884).
(29) I. L. R. 21 Mad. 497 (1898).
(30) I. L. R. 13 Mad. 214 (1889).
(31) 5 Mac. Sel. Rep. 356 (418 N. E.) (1884).
(32) 6 Mac. Sel. Rep. 219 (270 N. E.) (1888).
(33) 3 Agra H. C. R. 103 (1868).
(34) I. L. R 11 Bom. 381 (393) (1887).

RETKI v. LAK PATI PUJARI.

In this diversity of Judicial opinion, it must be conceded that the principle that Dattahoma ceremony is essential for the validity of an adoption among Brahmans still counts a strong body of supporters, and that the rationalistic view has not yet finally triumphed over formalism. Yet, among all this divergence of opinion, the doctrine clearly emerges that the Dattahoma is not necessary when the adoptive father and the adopted child belong to the same *gotra*. *Gobinda Ayyar* v. *Dorasami* (3), *Ranganaya Kamma* v. *Alwar* (30), *Thangathanni* v. *Ramu Mudali* (22), *Vedavalli* v. *Mungamaia* (35), *Valubai* v. *Govind* (4), *Atmaram* v. *Madho Rao* (2), *Nityanand* v. *Krishna Dayal* (17). It has, indeed been argued that this distinction is not based on logical grounds, and that the view cannot be maintained that Dattahoma becomes unnecessary when the adoptive father and the adopted child belong to the same *gotra*, because a change of *gotra* is not necessary in such a case. It is not necessary for our present purpose to examine whether what is thus regarded as an exception is based on logical grounds, or, as is not improbable, really indicates a modern relaxation of the primitive inflexible rule, in the growth of which as in so many archaic systems, formalism exercised a dominating influence. Whether the Rule itself will ultimately stand discredited and disappear, it is needless to speculate in this instance; it is sufficient to hold that the present case falls within the text of Yama and is covered by the long series of decisions which affirm the doctrine that even amongst twice-born classes, the Dattahoma is not essential when the adopted boy is of same *gotra* as his adopter.

In this view, the validity of the adoption of the Plaintiff must be upheld, the decree of the Subordinate Judge affirmed and this appeal dismissed with costs.

Appeal dismissed.

(2) I. L. R. 6 All. 276 (1884).
(3) I. L. R. 11 Mad. 5 (1887).
(4) I. L. R. 24 Bom. 218 (1899).
(17) 7 B. L. R. 1; 15 W. R. 300 (1871).
(22) I. L. R. 5 Mad. 358 (1882).
(30) I. L. R. 13 Mad. 214 (1889).
(35) I. L. R. 27 Mad. 538: s. c. 14 M. L. J. 340 (1903).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 48 OF 1913.

FLETCHER, J. RICHARDSON, J. 1915, Heard, 15, 16, 19 & 23, July. Judgment, 30, July.	PORMESHWAR DUBEY and others, Defendants, Appellants, *v.* GOBIND DUBEY and others, Plaintiffs, Respondents.

Hindu Law—Mitakshara School—Suit for partition—Karta if accountable and to what extent—Account of property as they exist—Karta's statement if conclusive.

In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the karta *is liable for is as to the existing state of the property divisible. The parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters.*

But this does not mean that the parties are bound to accept the statement of the karta *as to what the properties consist of, for that would not be an account at all. The* karta *is the accountable party and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property consists of.*

This was an appeal preferred on 13th February 1913, against the decree of Babu Amrita Lal Palit, Subordinate

Judge, 1st Court of Zillah Mazafferpore, dated the 31st January 1913.

The facts of the case will appear from the judgment.

Sir Rash Behary Ghosh and *Babu Gour Chandra Pal* for the Appellants.

Dr. Dwarkanath Mitter, *Babus Baikuntha Nath Mitter*, *Shivanandan Ray* and *Baidyanath Narayan Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an appeal by the Defendants against the judgment of the learned Subordinate Judge of Mazafferpore, dated the 31st of January 1913.

The Plaintiffs brought the present suit for partition. The defence was that a partition took place between the parties in the year 1305.

The learned Judge found that there was no such partition. The Defendants called a considerable body of evidence to prove the story set up by them. The learned Judge, however, remarked "The story of division and separation in 1305 is therefore a myth . . . I entirely disbelieve the witnesses examined by the Defendants and find that there was no partition in 1305." The Defendants have asked us to dissent from this finding of fact by the learned Judge. In the first place it seems highly improbable that the partition if there had been one could have taken place as long ago as the year 1305. No reason is given why a partition should have taken place at that date. There is no document from which it could be inferred that a partition took place as long ago as the year 1305. The story set up by the Plaintiffs that the Plaintiff No. 1 separated in mess from the Defendants in 1309 has been accepted by the Judge and so far as I could gather from the learned Vakil of the Defendants, Appellants, he only faintly challenged the fact that the separation in mess took place in 1309. But he asked us to use the separation in mess in 1309 as proof or at any rate very strong evidence of a partition. The case of the Defendants is not however that there was a partition in 1309 and they must stand or fall by the case they put forward in their oral evidence. The Defendants have kept back the books of account. These books would be of the greatest value if they had been produced. Take for instance the question as to the expenses of marrying the daughters of the Plaintiff No. 1. The case of the Defendants was that the Plaintiff No. 1 had raised a loan to marry his third daughter. The answer of the Plaintiff No. 1 was that it was true that he borrowed money to marry his third daughter but that his other two daughters were married at the expense of the family in 1305 and 1309. This, if true, shows that there could not have been a partition in 1305. The Defendants by the production of the books of account could easily have shown whether or not the statement of the Palintiff No. 1 was correct.

Then the Defendants produced certain *sheahas* in order to prove that the Plaintiffs were in receipt of their share of the rents and profits from 1305. There can be little doubt that the learned Judge arrived at a correct conclusion when he found that these papers were fabricated.

Then again it is admitted that after the date of the alleged partition the Plaintiff No. 1 and the Defendants have brought suits jointly to recover rent in arrear. Further it is not shown that any portion of moneys that have been realised under any of these decrees was made over to the Plaintiffs. The learned Judge also points out that the family clearly had a money-

lending business and it is not alleged that the amounts due by debtors were partitioned.

The forms of the roadcess returns do not support the partition alleged by the Defendants. The matters relied on by the Defendants are first the separation in mess. No doubt this is a matter for consideration but it is not conclusive. Further the separation appears to have taken place in 1309. Then the lease to Dholi Factory and the mortgage to Mackenzie have been relied on. And also the application for registration by the Plaintiff No. 1 for registration of his share in Mauza Sardimal. The lease and mortgage do no doubt suggest that the Plaintiff No. 1 had a separate share but in neither of these documents is it stated that there had been a partition between the parties.

With reference to the separate registration of the name of the Plaintiff No. 1 under the provisions of the Land Registration Act Sir Rash Behary Ghosh who appeared for the Appellants very frankly informed us that we ought not to place too much stress on this matter as he said it was a matter within his own experience that in many cases of families governed by the Mitakshara law applications were made for registration of distinct shares when admittedly there had been no partition. The Appellants also rely on the opening of a separate account for payment of Government Revenue by the Plaintiff No. 1 with reference to certain of the mauzas. But this was only done after the Defendants Nos. 1 and 2 had applied to have separate accounts opened in their names. Upon the whole I cannot find that on the documentary evidence the learned Judge ought to have believed the witnesses for the Defendants who spoke to the actual partition in 1305. The onus of proving the partition was clearly on the Defendants and I am not prepared to dissent from the finding of the learned Judge that they have failed to prove the partition alleged. The point however that was chiefly in debate before us was as to the form of account to be ordered against the *karta*. The learned Judge has ordered the Defendant No. 1 to render accounts from the year 1283 corresponding with the year 1876 that is the date when the Defendant No. 1 became *karta*. The Plaintiff No. 1 attained majority in the year 1889 or 1890. The question is therefore what is the usual form of account to direct against the *karta* of a Hindu joint family on a partition. The cases are not very numerous on this matter and are not easy to reconcile. The family we are dealing with is governed by the Mitakshara Law. The earliest authority is a decision of Phear, J., *Chuckun* v. *Poran* (1). This decision was explained by a Full Bench of this Court in *Obhay Chunder* v. *Pearee* (2). But as I read the decision of the Full Bench the decision of Phear, J., was not overruled. In the case of *Konerrav* v. *Gurrav* (3), Melvill, J., observed: "the ordinary rule no doubt is that the members of an undivided Hindu family when making a partition are entitled not to an account of past transactions but to a division of the family property actually existing at the date of the partition." In the case of *Damodar Das* v. *Uttamram* (4), Sargant, C. J., commented on this decision. His view was that the form of the account depended on the circumstances of each particular case. The learned Chief Justice seems moreover to have considered that Melvill, J., had laid down that the

(1) 9 W. R. 488 (1868).
(2) 13 W. R. 76 (F. B.) (1870).
(3) I. L. R. 5 Bom. 630 (635) (1881).
(4) I. L. R. 17 Bom. 681 (1892).

members of the family were bound to accept the *karta's* statement as to what the property consisted of. But Melvill, J., was dealing with the form of the account not with the evidence the *karta* should give to vouch or justify the account. In the case of *Raja Setrucherla Rambhadra* v. *Raja Setrucherla Virabhadra* (5), the Judicial Committee of the Privy Council appear to have assumed that in a partition the *karta* usually would only be liable to account as to the existing state of the property. In the case of *Narayan* v. *Nathaji* (6), Chandavarkar, J., remarked "If we allowed it we should be acting contrary to the principle of law that in a partition suit no coparcener has any right to an account of past transactions." A similar view was adopted in the Madras High Court in the case of *Balakrishna* v. *Muthusami Iyer* (7). The result of these authorities I think is that in an ordinary suit for partition in the absence of fraud or other improper conduct the only account the *karta* is liable for is as to the existing state of the property divisible. The parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters.

But of course this does not mean that the parties are bound to accept the statement of the *karta* as to what the properties consist of. That would not be an account at all. The *karta* is the accountable party and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property (not what the *karta* says it) now consists of.

The decree of the Lower Court must be varied by ordering an account of the existing state of joint property in lieu of that ordered by the learned Judge.

The Plaintiff No. 1 admits that he has received certain moneys forming a portion of the joint estate. The Plaintiff No. 1 must account for these moneys.

Subject to these remarks the judgment of the learned Judge in the Court below must be affirmed and the appeal dismissed. There will be no order as to the costs of the appeal to this Court.

RICHARDSON, J.—I am of the same opinion. As to the form of accounts the order which we propose to make is supported by the case of *Sookhmoy Chandra Dass* v. *S. Monoharri Dassi* (8).

(5) 8 C. W. N. 538: s. c. I. L. R. 22 Mad. 470 (1899).
(6) I. L. R. 28 Bom. 201 (208) (1904).
(7) I. L. R. 32 Mad. 271 (1908).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 478 OF 1914
WITH
RULE No. 266 OF 1915.

D. CHATTERJEE, J. BEACHCROFT, J. 1915, Heard, 30, June, 9, July. Judgment, 2, August.	SARAT CHANDRA PAL, Defendant, Appellant, *v.* BENODE KUMARI DASSI, Plaintiff, Respondent.

Probate and Administration Act (V of 1881), secs. 86, 90—Administrator's application to sell, granted against opposition—Appeal—Order if appealable as decree or irrespective of whether order decree or not—Interlocutary orders under the Act, if appealable.

A Hindu widow who had obtained Letters of Administration to the estate of her deceased husband applied under sec. 90 of the Probate and Administration Act for permission to sell the dwelling house for the purpose of satisfying debts. The application which was opposed by the reversioner having been granted, the latter appealed.

Held, *Per* D. CHATTERJEE, J., *that the*

(8) L. R. 12 I. A. 103 at p. 111 (1885).

SARAT CHANDRA PAL *v.* BENODE KUMARI DASSI.

order was a decree as defined in the Civil Procedure Code and was appealable as such.

Quære—*Whether sec. 86 of the Probate and Administration Act in making orders of the Probate Court "appealable under the rules contained in the Civil Procedure Code" means only that the procedure in such appeals would be as in appeals under the Civil Procedure Code.*

Per BEACHCROFT, J.—*An appeal lay under the terms of sec. 86 of the Probate and Administration Act irrespective of whether the order was a decree or not.*

This was an appeal preferred on 8th September 1914 against the order of H. P. Duval, Esq., District Judge of Zillah 24-Parganas, dated 27th August 1914.

The facts of the case will appear from the judgment.

Babus Mohini M. Chatterjee and *Jyotis Ch. Sircar* for the Appellant.

Dr. Basak and *Babu Abani B. Mukerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

D. CHATTERJEE, J.—The Petitioner who is a Hindu widow obtained Letters of Administration to the estate of her deceased husband and applied for permission to sell the dwelling house for the purpose of satisfying debts. She was opposed by the reversioner who expressed his willingness to pay all just debts and to give her suitable maintenance. She however did not agree as evidently there is some ill feeling against the reversioner. The learned Judge has given her the permission under sec. 90 of the Probate and Administration Act and the reversioner appeals. A preliminary objection is taken that there is no appeal. Sec. 86 of the Act provides that every order made by a District Judge by virtue of the powers conferred by the Act upon him shall be appealable to the High Court under the Rules contained in the Civil Procedure Code applicable to appeals. The order made by the lower Court is an order made under the powers conferred by sec. 90. There is some difficulty however about the reference to the Civil Procedure Code. The Civil Procedure Code provides for appeals against decrees and specified orders. The order is not one of the specified orders but it may be looked upon as a decree which is an adjudication of the rights of the parties which is final so far as the Court making it is concerned. Here the order decides the necessity for the sale in the presence of the reversioner who is the only party interested in preventing the sale or impeaching it for want of legal necessity. This order may therefore be looked upon as one analogous to a decree and is therefore appealable. An order under sec. 90 was held to be appealable in the case of *Uma Charan Das* v. *Muktakeshi Dasi* (1), though on another ground. The objection about the Civil Procedure Code was not made or considered in that case. The Respondent relies on the case of *Kalimuddin* v. *Mahurni* (2) as laying down a rule to the contrary. This latter case however was against an order under sec. 79 making an assignment of an administration bond—an order which could have no resemblance to a decree. There is another view of the case that the rules referred to mean that the procedure in the appeals would be as in appeals under the Civil Procedure Code. This view if literally interpreted would let in appeals against interlocutory orders and I think it more in accordance with the spirit of the

(1) I. L. R. 28 Cal. 449 : s. c. 5 C. W. N. 448 (1900).

(2) I. L. R. 39 Cal. 582 : s. c. 16 C. W. N. 668 (1912).

law and the practice of the Court to take the view I have above taken.

Then the question is whether the order is right. I think it is not. The reversioner is willing to purchase the property for its proper value. The Petitioner says she contracted with a third party to sell the house for Rs. 3,000 and has subsequently by advertisement obtained Rs. 3,500 as the highest offer. I think the best order to make is that the Petitioner do sell the house to the reversioner for Rs. 3,500 including the amount deposited by him. The debts found by the Commissioner be paid up and satisfied out of that sum. If any further debts are established in the presence of the reversioner the same will be paid out of the balance. The Petitioner may be allowed for her maintenance up to date at the rate of Rs. 10 per mensem from the said sum and the ultimate balance may be invested by the District Judge and the interest paid to the Petitioner during her life. What remains at her death by way of investment will belong to the person or persons who may be the reversioner or reversioners at that time. Each party to pay its own costs in both Courts. The Appellant must make up his deposit of the value of Rs. 3,500 inclusive of the deposit already made within three weeks from this date and also a draft *kobala* and the costs of stamp and registration to be estimated by the Nazir. The Respondent will execute the *kobala* within three weeks from the said deposit. The payments to creditors will be made on the completion of the Registration. The amount payable to the Respondent also will be paid out on the completion of the Registration.

If the money is not put in as directed, the appeal will stand dismissed with costs —hearing fee, three gold mohurs.

The Rule is discharged.

Beachcroft, J.—Sec. 86 of the Probate and Administration Act provides that every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals. This is the only section in the Act which gives a right of appeal or provides for the procedure on appeal, for sec. 55, which, it was contended, made the Code of Civil Procedure applicable at all stages of the case, only refers to proceedings in the District Judge's Court. Reading the words of the section by themselves and without the influence of other considerations, I should consider that they meant that there could be an appeal against every order by a District Judge under the Act and that the procedure provided by the Code of Civil Procedure for appeals should apply to such an appeal. If the Legislature intended to allow appeals only in cases in which they are allowed by the Civil Procedure Code it seems to have adopted a very clumsy method of expressing its intention, for taking that view the section might be paraphrased in this way : " there shall be a right of appeal in every case, but there shall not be an appeal in certain cases."

But the view which I have indicated is not the view which has been taken almost uniformly in this Court as instanced by the cases of *Brojo Nath Pal* v. *Dasmoni Dasi* (3), *Abhiram Dass* v. *Gopal Dass* (4), *T. Lucas* v. *H. Lucas* (5), *Khetramoni Dasi* v. *Syama Charan Kundu* (6), *Kalimiddin* v. *Mahurni* (2) and *Lakhi Narain Shaw* v. *Multan Chand Daga* (7).

These cases decide that all the rules of

(2) I. L. R. 39 Cal. 563 : s. c. 16 C. W. N. 662 (1912).
(3) 2 C. L. R. 589 (1878).
(4) I. L. R. 17 Cal. 48 (1889).
(5) I. L. R. 20 Cal. 245 (1892).
(6) I. L. R. 21 Cal. 539 (1894).
(7) 16 C. W. N. 1099 (1912).

the Civil Procedure Code regarding appeals apply to appeals under the Act. Unless then the order under consideration amounts to a decree it would not be appealable according to the view taken in the cases cited.

But against these cases there is a direct authority that an order under sec. 90 of the Act is appealable : the case of *Uma Charan Das* v. *Muktakeshi Dasi* (1). It is true that in that case the objection to appeal was based on the meaning of the word "hereby" and no reference was made to the clause referring to the rules contained in the Code of Civil Procedure. But Maclean, C. J., speaks of sec. 86 as allowing an appeal in every case without any qualification, and as the case is a direct authority, that an order under sec. 90 is appealable we are bound to follow it, unless we are prepared to refer the question to a Full Bench for decision.

Whether therefore the order under sec. 90 amounts to a decree or not, as to which I express no opinion, we are concluded by authority and it must be held that an appeal lies.

As regards the merits I agree in the order proposed by my learned brother.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 147 OF 1915.

N. R. CHATTERJEA, J. ROE, J. 1915, Heard, 28, June. Judgment, 30, June.	}	ANANDA KUMARI DEBI, Defendant, Petitioner, *v.* DURGA MOHAN CHUCKERBUTTY Plaintiff, Opposite Party.

Court of Wards Act (IX B. C. of 1879), sec. 6 (a)—Debtor's widow made Ward of Court—Suit to recover debt from widow without making manager of Court party as her guardian, if maintainable, when whole estate not taken over.

Where the creditor of a deceased zemindar sued his widow who had been declared a disqualified proprietor under sec. 6 (a) of Act IX of 1879 B. C. (Court of Wards Act) for recovery of the debt from the assets left by her husband, without describing her as a Ward of the Court or as being represented by the manager of the Court of Wards as her guardian as required by sec. 51 of the Act.

Held—*That the suit was badly framed even though it appeared that one of her husband's properties had not been taken over by the Court at the date of the suit, and was taken over only after the lower Court had passed a decree against the lady in the suit as framed.*

DHANIPAL DAS *v.* RAJA MANESHAR BAKSH SINGH (2), DHUNPUT SINGH *v.* SHUVADRA KUMARI (3) *and* KRISHNA PROSAD *v.* GOSTA BEHARY (1) *referred to.*

This was a Rule granted on the 17th February 1915 against the judgment of Babu K. N. Das, Small Cause Court Judge of Dacca, dated 23rd November 1914.

The Defendant's husband, late Kumar Rabindra Narayan Ray Chaudhuri, Zemindar of Bhowal, declared himself disqualified to manage his own property under sec. 6 (c) of Act IX of 1879, and on the 7th April 1911, the Court of Wards took charge of his estate. On the 7th July 1911, while his estate was under the management of the Court of Wards, the Kumar borrowed Rs. 300 from the Plaintiff on a promissory note, without the sanction of the Court of Wards; and of this amount Rs. 100 was paid back to Plaintiff during the lifetime of the Kumar. The Kumar died while his estate was in the hands of

(1) I. L. R. 28 Cal. 149 : s. c. 5 C. W. N. 443 (1900).

(1) 5 C. L. J. 434 (1907).

(2) L. R. 38 I. A. 118 : s. c. 10 C. W. N. 849 (1906).

(3) 1 L. R. 3 Cal. 620 (1852).

ANANDA KUMARI DEBI *v.* DURGA MOHAN CHUCKERBUTTY.

the Court of Wards, and on the 17th September 1913, the Defendant, being his widow and sole heiress, was declared disqualified under sec. 6 (*a*) of Act IX of 1879. In July 1914, the Plaintiff brought a suit in the Court of Small Causes at Dacca, against the Kumar's widow claiming Rs. 272 on the promissory note, without describing her as a Ward of Court, or adding the manager under the Court of Wards as next friend or guardian. The Defendant objected *inter alia* to the frame of the suit as having been in contravention of sec. 51 of Act IX of 1879. The Judge of the Court of Small Causes overruled the objection and passed a decree in favour of the Plaintiff against "the assets, if any, of late Kumar Rabindra Narayan Ray Chaudhury." The Defendant thereupon moved the Hon'ble High Court under sec. 25 of the Provincial Small Causes Court Act; and a rule was issued on the ground that the suit was framed in contravention of the provisions of sec. 51 of the Court of Wards Act. At the hearing of the rule, the Plaintiff, Opposite Party, filed a counter-affidavit in which it was alleged, among other things, that a particular *taluq* was owned by the late Kumar as distinct from the Bhowal Estate proper, and that "the said Kumar during his lifetime, and after his death, the present Petitioner, were in possession and enjoyment of the same, and realise rents and profits of the said property by their own officers without any interference of the Court of Wards, till the decree in this suit, after which, I am informed, the Court of Wards has taken formal possession of the property."

Babu Dwarkanath Chakravarty (with him *Babu Prokash Chandra Pakrashi*) for the Defendant, Petitioner.—Sec. 51 of the Act is a mandatory section which requires that in every suit against a disqualified proprietor, he "shall be described as a Ward of Court," and the manager under the Court of Wards shall be made next friend or guardian.

The present suit was framed in contravention of sec. 51, and was *ipso facto* incompetent. The Defendant had no personal liability in the matter, and could not be sued except as laid down in sec. 51. The decree was against the assets of the Defendant's husband, which were all in the hands of the Court of Wards.

Babu Kshitish Chandra Neogy for the Plaintiff, Opposite Party.—Certain properties of the Defendant were left out by the Court of Wards. According to sec. 35, actual possession alone could give the Court of Wards jurisdiction. So long as there was any property outside its jurisdiction, Plaintiff was under no obligation to frame his suit according to the provisions of sec. 51. The principle of *Krishna Prosad* v. *Gosta Behary* (1) would apply. In *Dhunput Singh* v. *Shuvadra Kumari* (3), Justices Macdonald and Field observed that sec. 51 laid down a provision of procedure, and on this ground upheld a personal decree against a Ward of Court. A disqualified proprietor is not absolutely incapacitated from contracting. The incapacity extends to the properties actually in the hands of the Court of Wards, and any immunity enjoyed by a Ward is only in respect of such properties. The case of *Dhanipal Das* v. *Raja Maneshar Baksh Singh* (2) laid down very clearly that a Ward could make himself personally liable by contracting. It followed, therefore, that he could be sued personally in respect of such liabilities. The decree was, however, not a personal decree against the Defendant, it was against any assets of the late Kumar which might be in her hands. If

(1) 5 C. L. J. 434 (1907).
(2) L. R. 33 I. A. 118: s. c. 10 C. W. N. 849 (1906).
(3) I. L. R. 8 Cal. 620 (1882).

THE

Calcutta Weekly Notes.

Vol. XX.] MONDAY, NOVEMBER 29, 1915. [No. 2.

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Criminal Sessions.

The Hon'ble Mr. Justice Fletcher will preside at the 5th and last Criminal Sessions of the year which is to commence its sittings from Wednesday next.

Bar's welcome to the Chief Justice.

On the reopening of the High Court, on Sir Lancelot Sanderson, the new Chief Justice of Bengal, taking his seat on the Bench, members of all sections of the professions assembled in the Court room to welcome his Lordship. The Advocate-General on behalf of the Bar, Babu Ram Charan Mitter on behalf of the Vakils and Babu Kally Nath Mitter on behalf of the Attorneys, addressed his Lordship on his assumption of office. The Hon'ble the Chief Justice made a very appropriate reply which we publish in another column.

Profession and its duty in respect of ready cases.

We have to draw the attention of the legal profession to the fact that on the reopening of the High Court on the 22nd of November last a very large number of Appeals from the Original Side of the High Court had to be struck off because those in charge of the cases were not ready. This is certainly not very creditable to those who are entrusted with the duty of seeing that the cases and appeals which appear in the list should in every respect be ready for hearing. Their Lordships the Chief Justice and Mr. Justice Woodroffe and Mr. Justice Mookerjee who preside over this Court were prepared to show and did in fact show every consideration in granting adjournments in every case where any reasonable excuse was put forward for unpreparedness. But where no solicitor or counsel was present or no reason was assigned for not being ready, their Lordships had no other alternative than to strike off the appeals. This laxity on the part of those whose duty it is to be quite ready with the cases entrusted to them is very much to be regretted and let us hope that instances like those which happened on the day of the reopening of the Court will not be repeated.

Misprint in paper books.

Another matter to which his Lordship the Chief Justice with the concurrence of his brothers on the Bench drew pointed attention is the very large number of material misprints that are often to be found in printed paper books of Original Side Appeals. In the very first appeal that was argued before their Lordships there were so many mistakes in the printed judgment that counsel asked for adjournment for getting the judgment reprinted. But their Lordships offered to help counsel with the office copy of the judgment and the appeal proceeded. In another appeal which came before their Lordships soon after, there were so many errors within the small compass of its paper book that it put their Lordships to considerable inconvenience in following the case. It was no less embarrassing to the Bar, as counsel had frequently to refer to the original documents and correct the misprints in the course of argument. We endorse therefore every word of the observation that was made by his Lordship in this connection and hope that attorneys of this Court will in future take care that the paper books are printed and edited correctly. His Lordship said they had noticed "very serious mistakes and material omissions in the printing of paper books. Even in very short and important

documents such as bills of exchange, the numbers appearing in the original and to which references had been made in the books of account had been omitted in printing. Such omissions caused great inconvenience and embarrassment to the Bench and his Lordship desired to say on his own behalf as also on behalf of his brothers on the Bench that unless those who were responsible for the preparation of the paper book were careful to see the paper books correctly printed, their Lordships would have to take serious steps in future."

Business before judicial committee.

On the resumption of the sitting of the Judicial Committee after the Long Vacation on the 18th of October last, Lord Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and the Rt. Hon'ble Ameer Ali took their seat on the Bench. The new session opened with a much larger number of appeals than in the previous year. This year there were thirty-nine appeals before the Board while last year there were only twenty-six. Although the business of the House of Lords and the Court of Appeal in England have considerably gone down owing to the war, that of the Judicial Committee have this year reached almost a record figure. India and Canada have supplied the bulk of these appeals, the former contributing 21 and the latter 10. Comparing the population of Canada to India, the contribution of Canada is proportionally much larger than that of India. South Africa and New Zealand do not contribute a single appeal and the evident reason is that the constitution of these countries restrict the right of appeal from the Highest Appellate Courts of these Colonies. Australia contributes only two and four of the minor colonies one each. It is very satisfactory to note that only three appeals stand over for jugdment and these were argued before the Board just before the Long Vacation. Two of these are Prize Court cases namely the *Odessa* and the *Roumenion*.

Propriety of offering legal opinion through periodicals.

We have in these columns always refused to offer any legal opinion in answer to queries or correspondence inviting such opinion. We are glad to find that the practice we have followed is in accordance with approved professional etiquette and we have therefore much pleasure in publishing below the following notice recently issued by the Bar Council. "The General Council of the Bar have reasons to believe that some member or members of the Bar is or are, in the habit of answering legal questions in concrete cases in certain periodicals in contravention of the resolution of the Council of March 1909 a copy of which is set out below They desire to express their strong reprobation of this practice; and invite the co-operation of the members of the Bar in order to put an end to it."

Copy of resolution of March 1909 :—That it is contrary to professional etiquette for a barrister to answer legal questions in newspapers or periodicals, whether for a salary or at ordinary legal remuneration (1) where his name is directly or indirectly disclosed or liable to be disclosed or (2) where the question answered have reference to concrete cases which have actually arisen or are likely to arise for practical decision.

SIR LANCELOT SANDERSON'S REPLY TO THE WELCOME ACCORDED IN THE HIGH COURT.

Mr. Advocate-General, Mr. Ram Charan Mitter, and Mr. Kally Nath Mitter, I think you and through you all those on whose behalf you have spoken, for the welcome which you have extended to me in such eloquent and generous terms. I appreciate such a welcome very highly and rejoice to think that the relations between myself and those who practise in the High Court have begun in such a friendly and cordial manner and it is my sincere hope that they may always continue in the same spirit. I can assure you that while I occupy the high and responsible position of Chief Justice, my principal object will be to promote and maintain the efficiency of this Court. I appreciate to the full the great responsibilities which attach to this high office. I know that they are many and of great variety and I can only say that it will be my earnest endeavour to discharge to the best of my ability the duties connected with this office in accordance with the best traditions of the Judicial Bench, and in the manner in which the profession to which I have so much pride to belong would like to see them performed. I do not believe that a Court of Justice can be thoroughly efficient without the whole-hearted support and assistance of those who practise before it and who are charged with the very responsible duty of the conducting of the cases heard therein. It is, therefore Mr Advocate-General and Gentlemen, with the greatest satisfaction that I heard this morning the words you have spoken, because I feel sure

I shall receive the cordial co-operation of all those on behalf of whom you have spoken in the sacred cause of the administration of Justice.

Mr. Advocate and Gentlemen, I cannot allow this occasion to pass without acknowledging in the fullest extent the many acts of kindness and assistance which Lady Sanderson and I have already received since our arrival in India. They have been of such a cordial and generous nature that I am glad to think we may look forward with some confidence to a happy life in this great and wonderful country. Once more, gentlemen, I beg to thank you in all sincerity for your very kindly welcome.

CURRENT INDIAN CASES.

(CIVIL.)

Companies Act.

IN THE MATTER OF THE INDIAN COMPANIES ACT, I. L. R. 39 Bom. 331.

A person applied for a number of shares in a certain company which were allotted to him. He received dividends and allowed his name to be included in the register of members but when payment of the balance due from him in respect of the shares allotted to him was demanded he contested his liability on the ground that he was a minor at the date of the allotment.

Held—That he was estopped by his conduct while a person *sui juris* from denying as between himself and the Company's representative that he was a shareholder.

That a minor may be a member of a Company under the Company's Act.

Limitation Act.

SUBAPPA *v.* VENKAPPA, I. L. R. 39 Bom. 335.

Every suit for possession of immovable property in which the Plaintiff alleges that he has had possession must fall under Art. 142. It is only where the Plaintiff does not allege that he has ever been in possession that the case will fall under Art. 144.

Civil Procedure Code, sec. 97—Preliminary decree.

CHANMALSWAMI *v.* GANGADHARAPPA, I. L. R. 39 Bom. 334 (F. B.).

A decision in favour of the Plaintiff upon a preliminary defence that the matters in dispute are caste questions outside the jurisdiction of Civil Courts does not amount to a preliminary decree from which the unsuccessful party must at once appeal by reason of sec. 97 of the Code.

Admission of pleader—Saranjam *grant.*

DATTAJI RAO *v.* NILKANT RAO, I. L. R. 39 Bom. 352.

Under the authority of the Privy Council where a pleader in the lower Court makes an admission upon an issue regarding which evidence might be but is not given the client will be bound.

In the absence of evidence to the contrary the grant of a *saranjam* must be presumed to be a grant of land revenue and not of the soil.

Hindu Law.

VITHAL RAMKRISHNA *v.* PRAHLAD RAMKRISHNA, I. L. R. 39 Bom. 373.

Under the Mitakshara law the paternal grandmother is entitled to a share in the ancestral estate on a division thereof among her grandsons.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—Before MR. JUSTICE LUSH. *German* v. *Yates and anr.* 25th October 1915.

The validity of an equitable assignment of a chose in action.

This claim raised the question whether an equitable assignment was valid. Sophia Yates owed money to Mrs. German under an I. O. U. But Mrs. German wished that her mother should have the benefit of the debt. Sophia Yates therefore executed a new I. O. U. in favour of Mrs. German's mother and the first I. O. U. was destroyed. Mrs. German's administrator now claimed the money.

The learned Judge held that the equitable assignment was good and dismissed the Plaintiff's claim.

Mr. Giveen contended that equity would not assist a person who claimed under an imperfect gift, and would not complete an imperfect gift by turning the donor into a trustee for the donee (*Richards* v. *Delbridge*, 11 Eq. Cas., 15). That would be true if they were dealing with a chattel or with choses in action, such as shares in a company, which the law required to be transferred in some particular way. But the subject matter here was a simple chose in action which could be transferred so as to give the transferee a right to sue under the Judicature Act and could also be transferred by equitable assignment. No form of words

was required for an equitable assignment; the only thing that was necessary was to make the meaning plain [*Brandts* v. *Dunlop* (1905) A. C., at p. 462].

Mr. Giveen had contended that since the Judicature Act the creditor could make a good legal assignment under the Act, and that if he purported to say the an equitable assignment without consideration he was trying to do what could be quite well done in another way and the transaction failed. But Mr. Justice Lush could not accept that view. *Brandts* v. *Dunlop* (at p. 461) showed that the Act had not destroyed equitable assignments or impaired their efficiency in any way, and they still existed alongside of the new kind of assignment under sec. 25. Nor could he accept the view that the assignment here was invalid because it was incomplete; it was perfectly good and complete.

There remained the question whether the assignment was invalid for want of consideration, and he thought that the *dictum* in *Glegg* v. *Bromley* applied only to an assignment of rights of property which were not yet in existence. An equitable assignment of future property, was a contract to assign future property, and that contract required consideration. It might be that if a creditor ordered his debtor to pay the money to some other person he might revoke the order if it was given without consideration: but if the creditor died without revoking it his executor could not ignore the transaction. He held, therefore, that the Plaintiff's action failed.

There was a further answer to it, that in fact the transfer here was made for good consideration. Sophia entered into an obligation to pay Maria, and even if in fact the assignment was ineffective and her obligation was non-existent, yet if she and all the parties believed, as in the circumstances they were justified in doing, that it was a valid transaction, there was sufficient consideration to support an equitable assignment.

Mr. Giveen for the Plaintiff.

Messrs. Dodd and *Thorpe* for the Defendant.

B. D.

CHANCERY DIVISION.—Before MR. JUSTICE JOYCE. *Horlick's Malted Milk Co.* v. *Summerskill*. 27th October 1915.

There is no trade mark in "malted milk."

The Plaintiffs were manufacturers of "Horlick's Malted Milk." The Defendant manufactured a similar preparation and sold it under the name of "Hedley's Malted Milk." The Plaintiff sued for an injunction but the learned Judge held that there was no infringement of the Plaintiffs' right and rejected the claim. He said it could not be maintained merely because "A" had been for some time the only person selling a certain article here that its name or title must be taken to have ceased to denote simply the article, whoever might have made it, and to have become the distinctive designation of the particular make or selection of "A" alone. Any person who was entitled to make or sell an article, whatever it might be, might tell the public what article it was that he made or sold—might employ the terminology of the trade, or, in other words, might sell or deal in it under the name which the article bore in the market, provided that he did nothing to represent his goods to be of the manufacture or selection of some other person.

The adjective or participle "malted" in the term "malted milk" was no more unmeaning or fanciful than the word "salted" in the expression "salted almonds." "Malted" or the compound "malted milk" was not fanciful or a fancy word. It was originally and always had been, and was naturally and strictly, a descriptive designation. Nothing could make the word "malted" otherwise than descriptive. It would still be so even if it had become distinctive of any particular make of salted food or milk, supposing that that were possible, which was doubtful.

The Defendant's preparation was not an imitation of the Plaintiffs' preparation, and he sold it under the name "Hedley's Malted Milk," while the Plaintiffs' preparation was always advertised and sold as "Horlick's Malted Milk," stress being laid on the word "Horlick's," and there was no similarity between the tins and wrappers. He must hold that the name "malted milk" had never lost its original proper descriptive meaning, and that it had never become distinctive, exclusively or otherwise, of the preparation manufactured and sold by the Plaintiffs, and that it was not their property, and that the Defendant, by prefixing and always using "Hedley's" as the first part of the title of his product, sufficiently distinguished for the public his malted milk from Horlick's.

Messrs. Walter, K. C., White and *Sebastian* for the Plaintiffs.

Messrs. Kerly, K. C., and *Gover* for the Defendant.

B. D.

there were no such assets in her hands, the decree would remain a paper-decree. There could, therefore, be no question of prejudice of the Defendant. The Defendant enjoyed an allowance of Rs. 4,000 a month, and deserved no assistance of the Court in an attempt to get round the legal liabilities of her husband.

Babu Dwarkanath Chakravarty in reply.—The cases in *Krishna Prosad* v. *Gosta Behary* (1) and *Dhunput Singh* v. *Shuradra Kumari* (2) were distinguishable. In the former, the suit specifically related to a mortgage on a property which the Court of Wards had refused to take charge of. It had no application to the present case where the suit was on a promissory note. In the case of *Dhunput Singh* v. *Shuradra Kumari* (2), the observation with regard to sec. 51 was *obiter*, as the case was governed by Reg. X of 1793 and not by Act IX of 1879.

THE JUDGMENT OF THE COURT was as follows :—

The Plaintiff, Opposite Party brought a suit for recovery of a certain sum of money alleged to be due from the deceased husband of the Petitioner. It appears that the Petitioner was declared a disqualified proprietor under sec. 6 (*a*) of Act IX of 1879 B. C. which relates to females declared by the Court incompetent to manage their own property, and her estate which she inherited from her husband is in the hands of the Court of Wards. She was not, however, described in the suit as a Ward of the Court nor was she sued as represented by the manager of the Court of Wards as her guardian as required by sec. 51 of the Act. She objected to the frame of the suit on that ground, but her objection was overruled by the Small Cause Court Judge who held as follows :—"The contention of the Defendant as to the frame of the suit is not very fatal. There can be no difficulty to pass a decree against the assets of the deceased debtor. Whether his estate under the management of the Court of Wards will be liable or not will be matter for consideration in the Execution Department," and accordingly passed a decree against her. We are of opinion that the suit as framed is in contravention of the provisions of sec. 51 of Act IX of 1879 and that she ought to have been described as a Ward of the Court and represented by the Manager of the Court of Wards as her guardian. The Opposite Party in showing cause has produced an affidavit in which it is stated that there is one property belonging to the husband of the Petitioner which was not taken charge of by the Court of Wards and of which the Petitioner is in possession, and that under the circumstances it was not necessary to sue her as a Ward of the Court. We were referred to certain observations in the case of *Krishna Prosad* v. *Gosta Behary* (1) as supporting that contention. It appears, however, that in that case, the Court of Wards did not take charge of a portion of the estate which was sold in execution of a decree and the question was whether the Manager of the Court of Wards was entitled as a matter of right to act as a guardian *ad litem* of the minor judgment-debtor in a litigation relating to the property which had been sold. It was held with reference to the provisions of sec. 35 of the Act that the Court of Wards was not in charge of the property sold, because possession had not been taken of it, and therefore it could not deal with the property under sec. 5 of the Act which authorises the Court to deal only with property which it took charge of and that

(1) 5 C. L. J. 434 (1907).
(2) I. L. R. 8 Cal. 620 (1882).

(1) 5 C. L. J. 434 (1907).

consequently the provisions of sec. 51 of the Act had no application to the case.

We are also referred to the observations of the Judicial Committee in the case of *Dhanpal Das* v. *Raja Maneshwar Baksh Singh* (2) and of Mr. Justice Field in the case of *Dhunput Singh* v. *Shuvadra Kumari* (3). We are of opinion that both the cases are distinguishable from the present case.

In the first case their Lordships were dealing with the provisions of Act XVII of 1876 (The Oudh Land and Revenue Act 1876), and their Lordships held that the provisions of that Act were not intended to interfere with the personal status or rights of disqualified proprietors except as regards the management of their property unless they were idiots or lunatics and that although such disqualified proprietors might not without the sanction of the Court of Wards create any charge upon their property, there was no prohibition in the act of the proprietors contracting debts or borrowing money. No question was raised as to how the Ward should be sued and their Lordships did not deal with that question. A disqualified proprietor was sued in that case upon a personal contract entered into by him and no question as to any portion of the estate not having been taken charge of by the Court of Wards, nor as to the manner in which a Ward should be sued in such a case, was either raised or decided in that case.

In the second case it was held upon a construction of Reg. X of 1793 that a Ward of Court is not absolutely incapacitated from contracting but that the power of the Ward to contract is taken away so far as regards all property which under the provisions of the law comes under the charge and control of the Court of Wards. It is true that the provisions of sec. 51 were referred to and there is an observation by Mr. Justice Field that it is a provision of procedure; but they held that the provisions of that section could not affect any liability which might be incurred by a Ward in respect of any contract entered into by him or her and do not operate to remove or destroy the personal liability of such a person. So in both these cases there was a personal contract entered into by the Ward. In the present case on the other hand there was no personal contract by the Petitioner nor was there any personal liability against her. The Plaintiff sought to recover a certain sum of money alleged to be due from the husband of the Petitioner and the suit did not relate to the property which has not been taken charge of by the Court of Wards. Had the suit been so framed and had the Plaintiff sought for recovery of money to be realised from the particular property in the possession of the Petitioner which has not been taken charge of by the Court of Wards, the case would have come within the principle of the decision in the case of *Krishna Prosad* v. *Gosta Behary* (1) cited above. As it is, the suit had no reference to the property which had been left out by the Court of Wards, and the decree was for money to be realised from the assets of the deceased debtor. That being so, sec. 51 is applicable to the case and the suit as framed is not maintainable. It appears that the property which was left in the possession of the Petitioner has been taken charge of by the Court of Wards subsequent to the decree passed in the suit.

The rule is made absolute and the decree of the Court below is set aside. We think, however, that the Plaintiff may be allowed to amend the plaint. We accordingly

(2) L. R. 33 I. A. 118 : s. c. 10 C. W. N. 849 (1906).

(3) I. L. R. 8 Cal. 620 (1882).

(1) 5 C. L. J. 434 (1907).

direct that the Plaintiff, Opposite Party be allowed to amend the plaint by describing the Defendant in accordance with the provisions of sec. 51 of Act IX of 1879; and the Court will try the suit after such amendment. The costs of this Rule will abide the result. We assess the hearing fee in this Court at one gold mohur.

Rule made absolute.

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

LORD SHAW.
SIR GEORGE FARWELL.
SIR JOHN EDGE.
MR. AMEER ALI.

1915,
8, June.

RAJWANT PRASAD PANDE and ors., Appellants,
v.
MAHANT RAM RATAN GIR and ors., Respondents.

Decree of competent Court, if may be challenged in a fresh suit—Fraud practised on the Court, to be proved—Ex parte mortgage decree set aside against one Defendant—Re-hearing, fresh decree against all—Application for order absolute in respect of later decree, opposed by Defendants against whom previous decree not set aside—Objection overruled and decree absolute made—Suit to set aside decree on same grounds if competent—Merger of first decree in second, whether there is—First decree whether impliedly set aside.

Upon an application to set aside an ex parte *mortgage decree passed against P, R and B, it was found that there was no proper service of summons upon B, and upon a re-hearing, a new and comprehensive decree against all three Defendants was passed. The decree-holder's application for an order absolute in respect of this decree was opposed by R on the ground that he was no party at the re-hearing and that the previous decree against him never having been set aside, a second decree in respect of the same matter could not be legally made against him. The objections were overruled and a decree absolute was made against all the Defendants. R then brought the present suit for a declaration upon the same grounds that the second decree was ineffectual and void as against him,*

Held—*That the suit was equivalent to a suit for the rescission and [illegible] of a former decree of a competent Court—a relief which could not be obtained except on the ground of fraud practised upon the Court which made the decree.*

A challenge of the method of the exercise of the jurisdiction of a Court—a challenge which has reference to the merits of the case—can never in law justify a denial of the existence of such jurisdiction.

This was an appeal from a decision of the High Court of Allahabad, dated the 23rd February 1911, reversing a decree passed by the Additional Subordinate Judge of Gorakpore on 17th August 1909.

The facts of the case shortly were as follows :—

Mahant Ram Ratan Gir on 30th April 1897 obtained an *ex parte* decree in a suit brought by him against Prag Dat Pande and his two sons Rajwant Prasad and Bhagwant Prasad amongst others on the basis of a mortgage executed by Prag Dat in 1884 in respect of certain joint family properties. An order absolute was made on 22nd September 1900. In 1909, upon an application made under sec. 108 of the Civil Procedure Code of 1882, it was found that notice of the suit had not been served on Bhagwant Prasad and as regards him the decree was set aside, but on 22nd September 1902, the Court upon a re-hearing passed a joint decree against Bhagwant and other members of the joint family. On 23rd June 1903, the decree-holder applied for execution of the original decree against the Defendants other than Bhagwant. In 1906, the decree-holder applied for an order absolute in respect of

the second decree. This application was opposed by Rajwant Prasad on the ground that an order absolute had already been made against him and others on the 22nd September 1900, and that a second decree absolute could not be made against them as they were no parties to the case upon the re-hearing which resulted in the decree of 22nd September 1902. These objections were overruled by the Subordinate Judge and an appeal to the High Court was dismissed.

The present suit was instituted by Rajwant Prasad with a view to obtain a declaration that the decree, dated the 22nd September 1902, to which he was in fact no party though it purported to have been made against him, was ineffectual and null and void. The Subordinate Judge decreed the suit holding that the said decree was made without jurisdiction. The High Court on appeal reversed this decision and dismissed the suit.

Hence this appeal to His Majesty in Council.

Mr. Lowndes for the Appellant submitted that a suit to rectify a decree, was maintainable in *Jogeswar Atha* v. *Ganga Bishnu Ghattak* (2), and the decree was wrong at least in so far as it allowed interest at the mortgage rate up to the date of realisation, *Sunder Koer* v. *Sham Krishen* (3) and *Maharaja of Bharatpur* v. *Rani Kanno Dei* (4).

Messrs. DeGruyther, K.C., and *Bhugwandeen Dubé* for the Respondents submitted that rightly or wrongly the Courts in making the later decree had decided that the previous decree having been set aside, a fresh decree against all the Defendants was necessary—and it had made it. The only remedy was by appeal and that was resorted to but without success. These very objections had been raised in that suit and decided against Appellant. They had been taken in execution proceedings as well and similarly rejected. The following cases were cited *Ashfaq Husain* v. *Gauri Sahai* (5), *Mungul Prosad* v. *Girija Kant* (6), *Ram Kripal* v. *Rup Kuari* (7), *Malkarjun* v. *Narhari* (1), *Prosunno Kumar* v. *Kali Das* (8) and *Prannath* v. *Mohesh Chandra* (9).

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a decree of the 23rd February 1911, of the High Court of Judicature for the North-Western Provinces (Allahabad), which reversed a decree, dated the 17th August 1909, of the Court of the Additional Subordinate Judge of Gorakpur. The Court of first instance allowed the Plaintiffs' claim. On appeal the claim was dismissed.

The object of the present suit is, by its terms, declared to be three-fold. But upon examination the substantial and only object is for a declaration in favour of the Plaintiffs against the Defendants to the effect that the Plaintiffs are no party to a certain order which was passed *ex facie* against them on the 22nd September 1902. Further declarations are asked that the decree is ineffectual, and null and void against them, and so forth. In substance, as has been said, the object of the present suit is for a declaration that a decree pronounced by a Court of competent juris-

(1) L. R. 27 I. A. 216 : s. c. 5 C. W. N. 10 (1900).
(2) 8 C. W. N. 473 (1904).
(3) L. R. 34 I. A. 1 : s. c. 11 C. W. N. 249 (1906).
(4) L. R. 28 I. A. 35 : s. c. 5 C. W. N. 137 (1900).
(5) L. R. 38 I. A. 37 : s. c. 15 C. W. N. 370 (1911).
(6) L. R. 8 I. A. 123 : s. c. I. L. R. 8 Cal. 51 (1881).
(7) L. R. 11 I. A. 87 (1883).
(8) L. R. 19 I. A. 166 (1892).
(9) I. L. R. 24 Cal. 516 (1897).

diction on the 22nd September 1902, and bearing to apply to the present Appellants, does not in fact apply to them.

The circumstances of the case are these. In 1884 Prag Dat Pande executed a mortgage over certain family property, of which he was himself manager, in favour of the predecessor-in-title of the Respondents. He had two sons, Rajwant Prasad and Bhagwant Prasad. In 1897 a suit for sale under the mortgage and directed against, *inter alia*, these three persons, was instituted. It was heard *ex parte*, and on 30th April 1897 a decree was made allowing the Plaintiffs' claim. An order absolute was made on the 22nd September 1900.

In 1901, however (to put aside altogether the proceedings at the instance of Prag Dat, and to keep to the actual relevant challenges made in the course of these litigations), Bhagwant and his two sons obtained an order under sec. 108 of the Code of Civil Procedure, 1882, to have the decree of the 30th April 1897 set aside, on the ground that there had been insufficient service upon them. It was found that the objection taken on the point of service was sound. The Court in India was accordingly confronted with this situation, that in regard to a mortgage over a joint property a suit had been instituted and decree had been taken against all of the joint family, but that one member thereof had been properly served with the suit and another had not. A certain embarrassment arose in consequence, and these proceedings, so protracted, ensued.

So far as Rajwant, the present Appellant, was concerned, the original suit was found to have been properly initiated, and the summons properly served. The Courts below adopted the view that the decree obtained in those circumstances was a decree practically final as regards Rajwant, and that with regard to the subsequent stages therein occasioned by Bhagwant's application, Rajwant had no right of compearing. Their Lordships are of opinion, however, that such questions, confusing as they appear, have no relation whatsoever to the point which is to be considered in this appeal.

On the 22nd September 1902 the Subordinate Judge delivered judgment, and he made another decree. Notwithstanding the decree which had already, as has been stated, been pronounced in April 1897, he granted a complete decree to the Respondents in this appeal, against all the members of the joint family. The situation that thus arose was that in September 1902 a decree was comprehensively directed against all the joint family of which Rajwant, the Appellant, was one member, Rajwant, however, being already bound by the decree which was passed in April 1897.

It would have been clear to the Board that there must have been, and could have been, no intention upon the part of the Plaintiffs to put in operation the earlier decree of 1897; but the Board is surprised to observe that on the 23rd June 1903, namely, after the second and comprehensive decree had been obtained, an application was actually made for execution of the decree—not the second and comprehensive one of 1902—but the original decree of 1897. Their Lordships think it right to record that in that application this statement was made :—

"In the beginning the name of Bhagwant Parshad also is entered as a Defendant, but on his application this decree was set aside against him, and consequently his name was not entered in the column of judgment-debtors. Another decree has been passed as against him. It will be executed separately."

Under those circumstances their Lordships are not surprised to find that in the year 1906, when an order was asked to

make the decree of September 1902 absolute as against all the members of the joint family, the Appellants took steps to have the situation cleared up. Accordingly, on the 7th July 1906, that application having been made, Rajwant preferred objections to it. Those objections, however, were disallowed, and the decree was made absolute by the Subordinate Judge on the 3rd November 1906. Their Lordships are clearly of opinion that in that suit each and all of the points stated upon this appeal were, or ought to have been, brought before the Court below. But if any doubt existed in their Lordships' minds on that topic it would be removed by a perusal of the terms of the judgments of the Subordinate Judge and of the High Court; because after the Subordinate Judge had made his order on the 3rd November 1906 the objectors, the present Appellants, appealed to the High Court, and did so upon the same arguments as they now propone in support of the present appeal to this Board. The grounds of judgment of the High Court make it clear beyond all question that the very points which are now urged were points then taken. The objections were disallowed.

It is contended before their Lordships, however, that this matter cannot be dealt with as *res judicata;* that it is open to suitors in India, who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit, or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree. Their Lordships have no sympathy with this procedure. It is radically incompetent.

The objections can be stated *seriatim*. The objections that are now taken are, first, that the decree of 1897 has never been set aside, and that, accordingly, the later decree of 1902 cannot stand. The answer made is that the former has been impliedly set aside by the latter. The second objection is practically to the same effect. The matter of the second decree was *res judicata*, and, therefore, they are two decrees against the same Indian subject. The answer made to that, in the view of the High Court, is that there is a merger by the second decree of the first. The third objection is that the latter decree is for a definite sum of money, larger than the sum of money contained in the former. The answer is that the interest accounts for the difference, and, *secondly*, that the doctrine of merger also applies.

Their Lordships are of opinion that upon none of those points ought they to make a pronouncement in this case. The judgment of the Court below has been particularly canvassed on the doctrine of merger, as there treated. Their Lordships desire to make it clear that in the judgment now given no affirmance is given of the doctrine or application in the High Court of merger, either in a general sense or in the sense of a *vox signata*. The decree of the 26th February 1908 sufficiently covers each and all of the points which have just been enumerated. The case under which these objections were brought forward was competently before the Court; it had jurisdiction to entertain them.

It is said that the Court below decided the objections wrongly, and that the decree was erroneous. Their Lordships think it is very trite and very familiar that a challenge of the method of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction. The former has reference to the merits of the case, and the merits of

this case have been in all points directly and substantially determined between the same parties as are now in contention at their Lordships' Bar. The familiar principle is laid down in a series of cases, of which the judgment of Lord Hobhouse in *Malkarjun* v. *Narhari* (1) is not a very remote examp'e. Their Lordships cannot countenance the laying aside of all that has happened in previous litigations, the allowing of a process to become final, and the institution of a fresh suit, the object of which is to declare that, although in terms it was applicable to a particular subject of the King who was a party to the proceedings, still, upon a new application to Courts of Justice, a different result should be reached, and it should be decided that the proceedings and decree did not apply to him.

This suit, in their Lordships' judgment, is equivalent to a suit for the rescission and destruction of a former decree of a competent Court. That rescission and destruction could be obtained on the ground of fraud "practised on the Courts below"; but fraud has been eliminated from this case. And accordingly these proceedings are, in their Lordships' judgment, a mere colour for a fresh suit on matters already competently settled by law.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor: *Mr. Douglas Grant* for the Appellants.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the first Respondent.

B. D. *Appeal dismissed.*

(1) L. R. 27 I. A. 216: s. c. 5 C. W. N. 10 (1900).

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 175 OF 1914.

D. CHATTERJEE, J. WALMSLEY, J. 1914, Heard, 6, July. Judgment, 22, July.	AHAMADULLA CHOWDRY, Petitioner, *v.* PRAYAG SAHU and others, Opposite Party.

Bengal Tenancy Act (Act VIII of 1885), sec. 170 (3)—Occupancy-holding, purchaser of, if may deposit, when holding put up to sale in execution of rent-decree against his vendor—"Interest voidable on the sale."

An unregistered purchaser of a non-transferable occupancy-holding is entitled to make a deposit under sec. 170, (3) of the Bengal Tenancy Act when the holding has been advertised for sale in execution of a rent-decree obtained subsequently to his purchase by the landlord against the registered tenant—and this even though he has been in possession of the holding for less than twelve years.

TARAK DAS PAL *v.* HARISH CHANDRA BANERJEE (1) *and* DAYAMAYI *v.* ANANDA MOHAN ROY (2) *referred to.*

He has an interest in the holding which is voidable on the sale.

This was a Rule granted on the 6th February 1914 against an order of S. M. K. Rahman, Esq., Munsif at Katihar, dated the 3rd November 1913.

The Petitioner Ahamadulla brought a suit for rent in 1912 against Harihar Sahu who was an occupancy raiyat. The suit was decreed *ex parte*. In July 1913, he applied for the execution of the decree, and the holding was attached and sale proclamation was issued. The Opposite Party applied under sec. 170, (3), to deposit the decretal amount, alleging that he had purchased the holding by a regis-

(1) 17 C. W. N. 163: s. c. 16 C. L. J. 548 (1913).
(2) 18 C. W. N. 971 (1914).

AHAMADULLA CHOWDRY *v.* PRAYAG SAHU.

tered *kobala*, dated 1st Magh 1315 B. S., and had been in possession ever since. The Munsif relying on the decision of *Tarak Das* v. *Harish Chandra* (1) cited by the appli[illegible]owed him to deposit the decretal amount.

Against this order the decree-holder obtained this Rule.

Babu Kali Kinkar Chuckerbutty for the Petitioner.

Babus Jogendra Nath Mukerjee and *Karunamoy Ghosh* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner is the landlord. He obtained a decree for arrears of rent against his registered tenant in August 1912 and advertised for sale the occupancy-holding in arrear. The Opposite Party deposited the decretal amount under sec. 170, (3) of the Bengal Tenancy Act on the allegation that he had purchased the holding from the judgment-debtor in January 1909 and had been in possession ever since. The Petitioner opposed the deposit but the learned Munsif allowed it and relied on the case of *Tarak Das Pal* v. *Harish Chandra Banerjee* (1). It is contended before us that the said case is distinguishable as the purchaser had been in possession for more than 12 years to the knowledge of the landlord, whereas in the case the possession did not exceed three or four years. The learned Judges, however, did not rely on the possession for more than 12 years : They say "it is not material for the purpose to consider * * whether he has acquired by possession for a period longer than 12 years the status of a tenant of a non-transferable holding." The learned vakil for the Opposite Party contends that the ruling of the Full Bench in the case of *Dayamayi Dasi* v. *Ananda Mohan Roy* (2) and the analogous cases supports his right : One of the questions referred was "whether a right of occupancy which is not transferable by custom or local usage is a right which can be transferred at all"? and it was answered in the affirmative subject however to the qualification that "where the transfer is a sale of the whole holding, the landlord in the absence of his consent is ordinarily entitled to enter on the holding." The landlord therefore can terminate the purchaser's interest at any time and his right to do so is independent of an execution sale. We do not think however that on that account the interest is not one which is voidable on the sale. The effect of the sale is to give the auction-purchaser the right to oust the transferee and it has been held in the case of *Tarak Das Pal* v. *Harish Chandra Banerjee* (1), that that fact makes the interest of the purchaser one that is voidable on the sale. If that be so the purchaser has an interest which is voidable on the sale and the deposit was quite competent. The Rule is therefore discharged with costs one gold mohur.

Rule discharged.

(1) 17 C. W. N. 163 : s. c 16 C. L. J. 548 (1912).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 580 OF 1913
WITH RULE No. 280 OF 1914.

N. R. CHATTERJEA, J.
GREAVES, J.
1914,
Heard, 17, December.
1915,
Judgment,
5, January.

ABDUR RAHAMAN SARKAR, Appellant,
v.
PROMODE BEHARY DUTT and others, Respondents.

Civil Procedure Code (Act V of 1908), Or. 21,

(1) 17 C. W. N. 163 : s. c 16 C. L. J. 548 (1912).
) 18 C. W. N. 971 (1914).

ABDUR RAHAMAN SARKAR *v.* PROMODE BEHARY DUTT.

r. 89—Non-transferable occupancy-holding Purchase at mortgage sale—Subsequent rent sale and purchase by landlord—Right of first purchaser to set aside sale by deposit—Bengal Tenancy Act (VIII of 1885 as amended by E. B. and A. C Act I of 1907), sec 170 (4).

Where (in a case governed by Act I of 1907 E. B. and A. C.) the landlord himself purchases a non-transferable occupancy-holding at a sale held in execution of a decree for rent obtained against the registered tenant of the holding, a person who had within 12 years purchased the whole holding at a sale in execution of a mortgage-decree is not entitled to set aside the sale by making a deposit under Or. 21, r. 89 of the Civil Procedure Code.

TARAK DAS PAL *v.* HARISH CHANDRA BANERJEE (3), DAYAMAYI DASI *v.* ANANDA MOHAN ROY (1) *and* AHAMADULLA CHOWDRY *v.* PRAYAG SAHU (2) *referred to.*

This was an appeal preferred on the 20th December 1913 against the order of Mr. M. Yusuf, District Judge of Zillah Rungpur, dated the 24th September 1913, affirming an order of Babu Prafulla Chandra Dutt, Munsif at Nilphamari, dated the 2nd August 1913.

The material facts will appear from the judgment.

Babu D. N. Bagchi for the Apellant.

Babu Atul Chandra Gupta for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal and the connected Rule 280 of 1914 (issued upon an application under sec. 115 of the Civil Procedure Code) arise out of an application under Or. 21, r. 89 of the Civil Procedure Code to set aside the sale of a holding in execution of a decree for rent.

No appeal lies in this case, and we have therefore to consider the question raised in the case, on the Rule.

The question for decision is, whether the Petitioner had a *locus standi* to make the application under Or. 21, r. 89 of the Civil Procedure Code. The Opposite Parties are the landlords of the holding which was sold in execution of a decree for arrears of rent due thereon against the tenant, and purchased by the landlords themselves. The Petitioner purchased the holding at a sale held in execution of a mortgage-decree against the tenant, prior to the sale for arrears of rent, and was in possession thereof. He applied to have the sale for arrears of rent set aside under Or. 21, r. 89 of the Code. The holding is an occupancy holding and not transferable without the consent of the landlord. The Courts below held that the Petitioner had no *locus standi* to make the application.

Now, under Or. 21, r. 89, where immoveable property has been sold in execution of a decree, any person either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside. The Petitioner having purchased the holding at a sale held in execution of a mortgage-decree acquired a title to the property. But he purchased an entire holding. The landlord was therefore entitled to eject him if he chose to do so. As against the landlord, he had not acquired any title to the property.

It is contended on behalf of the Petitioner that he has a title to the property so long as the landlords do not choose to enter on the holding. But it was the landlords themselves who were the purchasers at the sale sought to be set aside

(1) 18 C. W. N. 971 (1914).
(2) 20 C. W. N. 89 (1914).
(3) 17 C. W. N. 163 : s. c. 16 C. L. J. 548 (1912).

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and who would in ordinary course, obtain possession of the holding, though as purchasers, and they insist upon their right to refuse to recognise the title of the Petitioner under his purchase, and resist the application to have the sale set aside. The Petitioner is brought face to face with the landlords, and we do not see how under these circumstances the Petitioner can be said to be a person either "owning" the property, or "holding an interest therein by virtue of a title acquired" before the rent sale as against the landlords.

It will not be profitable to discuss the cases decided before the Full Bench case of *Dayamayi Dasi* v. *Ananda Mohan Roy* (1).

There is one case decided subsequently to the Full Bench decision; Rule No. 175 of 1914 decided on the 22nd July 1914, *Ahamadulla Chowdry* v. *Prayag Sahu* (2), which should be noticed. In that case it was held that the purchaser of a holding is entitled to deposit the decretal amount under sec. 170, (3), of the Bengal Tenancy Act. In that case the Court in referring to the decision in *Tarak Das Pal* v. *Harish Chandra Banerjee* (3) [where it was held that if the purchaser had been in possession for more than 12 years to the knowledge of the landlord, he was held entitled to make the deposit under sec. 170, (3)], observed that the learned Judges did not hold it material to consider whether the purchaser had acquired by possession for a period longer than 12 years the status of a tenant of a non-transferable holding. It is true, the learned Judges did not consider it material whether the purchaser had by such possession for 12 years acquired the status of a tenant, but the decision was based on the ground that the possession of the purchaser claiming to be a tenant for a period longer than 12 years to the knowledge of the landlord conferred on him the position of a person who had an interest in the holding within the meaning of sub-sec. 3 of sec. 170. In the present case the Petitioner's purchase was within 12 years of the suit. Then the learned Judges (in Rule No. 175 of 1914 cited above) referred to the Full Bench decision and observed as follows:—"One of the questions referred was 'whether a right of occupancy which is not transferable by custom or local usage is a right which can be transferred at all? And if was answered in the affirmative, subject, however to the qualification that where the transfer is a sale of the whole holding, the landlord in the absence of his consent is ordinarily entitled to enter on the holding.' The landlord therefore can terminate the purchaser's interest at any time, and his right to do so is independent of an execution sale. We do not think however that on that account the interest is not one which is voidable on the sale . . . . the purchaser has an interest voidable on the sale, and the deposit was quite competent."

The case was one under sec. 170, cl. (3), which relates to the deposit of the decretal amount prior to the sale, by a person "having an interest which is voidable on the sale." Or. 21, r. 89 of the Civil Procedure Code relates to deposit after sale, by a person either "owning" the property or "having an interest by virtue of a title acquired before the sale." However that may be, in the present case the landlords themselves, as stated above, have purchased the holding, and would in ordinary course enter into possession of it (though as purchaser) and they resist the application.

Under the circumstances of the present case, we do not think that the application

(1) 18 C. W. N. 971 (1914).
(2) 20 C. W. N. 39 (1914).
(3) 17 C. W. N. 163: s. c, 16 C, L, J. 548 (1912).

ABDUR RAHAMAN SARKAR *v.* PROMODE BEHARY DUTT.

should be allowed, and the landlords driven to eject the Petitioner as a trespasser.

The case comes from the District of Rungpur, and is therefore governed by the provisions of the Eastern Bengal and Assam Tenancy Act. It is pointed out on behalf of the Petitioner that Or. 21, r. 89 of the Civil Procedure Code (corresponding to sec. 310-A of the old Code), though made inapplicable to a holding attached in execution of a rent decree under the Bengal Tenancy Act is not so made inapplicable under the Eastern Bengal Tenancy Act (see sec. 170), and the fourth sub-section of sec. 170 of the latter Act lays down that the withdrawal of the amount deposited under sec. 310-A of the Code of Civil Procedure by the decree-holder landlord shall not operate as an admission of the transferability of the tenure or holding sold in execution of the decree, and it is contended that these provisions show that a person in the position of the Petitioner may apply under Or. 21, r. 89 of the Civil Procedure Code when a holding is sold in execution of a decree for arrears of rent under the Eastern Bengal Tenancy Act. But all that sub-sec. 4 says is that the withdrawal of the deposit by the landlord would not operate as an admission of the transferability of the holding. Notwithstanding the withdrawal it is open to the landlord to contest the validity of the transfer if he chooses to do so. The said sub-section does not debar the landlord when he has himself purchased the holding at a sale held in execution of a decree for arrears of rent due thereon, to challenge the right of the purchaser (who has not been recognised by him) to make the deposit on the ground, that as against him such purchaser has acquired no title and therefore cannot come under Or. 21, r. 89.

We are accordingly of opinion that the Petitioner in the present case has no *locus standi* to apply under Or. 21, r. 89 of the Civil Procedure Code.

The appeal must be dismissed and the Rule also will be discharged with costs one gold mohur.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2006 OF 1913.

RICHARDSON, J. MULLICK, J. 1915, Heard, 8, February. Judgment, 23, April.	HIRA LAL PAL, Defendant No. 1, Appellant, *v.* ETBAR MANDAL and ors., Plaintiffs, Respondents.

Remand order—Order of appeal Court directing Court of first instance to remit findings on issues not tried—Decision on other issues in the remand order is binds Judge or his successor at final hearing—Decision if preliminary decree, or interlocutory order—Civil Procedure Code (Act V of 1908), Or. 41, rr. 23, 25.

Where a suit for recovery of possession in which the Defendant besides denying Plaintiffs' title set up certain pleas in bar (limitation, etc.), was dismissed by the first Court on the merits, but the lower Appellate Court finding in favour of the Plaintiff on the merits, the case was remanded to the first Court for finding on the issues in bar which had not been tried by the first Court,

Held—*That upon receipt of the findings of the first Court on these issues, the lower Appellate Court was not bound to reconsider its findings on the merits and this whether the officer before whom the appeal finally came for hearing was the same or another officer.*

RICHARDSON, J.—*An opinion incidentally or provisionally expressed in a remanding judgment would not amount to a final*

HIRA LAL PAL *v.* ETBAR MANDAL.

adjudication so as to conclude the parties, but an adjudication by the remanding Judge would bind him or his successor at the final hearing.

One test which may be suggested for the purpose of determining whether such an adjudication is or is not final and conclusive so far as it goes is whether it does or does not amount to a preliminary decree.

Semble.—*The remand order in this case amounted to a preliminary decree in so far as it disposed of the merits of the case.*

Per MULLICK, J.—*It seems to be well settled that though it is open to a Court to revise after remand interlocutory decisions which were made either by itself or by an officer of co-ordinate jurisdiction yet as a matter of practice a Court will not and ought not to do so. When, however, the interlocutory decision amounts to a preliminary decree within the meaning of sec. 2 of the Civil Procedure Code, the Court is incompetent to revise that decree till it is duly set aside or amended according to law.*

That the decision on the merits contained in the remand order did not amount to a preliminary decree.

This was an appeal from a decree of Babu Dandadhari Biswas, Subordinate Judge, 24-Parganas, dated the 14th March 1913, reversing a decree of Babu Saroda Prosad Banerjee, Munsif, Baruipur, dated the 7th October 1909.

The appeal arose out of a suit for recovery of *khas* possession of 10 bighas of land. Upon the pleadings, the following issues were framed :—

First.—Whether the suit was barred by the two years' law of limitation?

Second.—Whether it was barred by misjoinder of parties?

Third.—Whether the Plaintiff had his alleged title to the land in dispute?

Fourth.—Whether the allegation of possession and dispossession was true?

The Trial Court found issues Nos. 3 and 4 against the Plaintiff and without recording any findings on issues Nos. 1 and 2, dismissed the suit. On appeal, the Subordinate Judge set aside the Trial Court's findings on issues Nos. 3 and 4 and remanded the suit for trial by the first Court by an order which appeared to have been made under r. 23 of Or. 41 of the Civil Procedure Code. On appeal to the High Court, this order was set aside as not being authorised by r. 23, and the High Court made an order under the terms of r. 25 directing the Trial Court to record findings on the first and second issues and return the same to the Subordinate Judge. The Subordinate Judge who had passed the order of remand, having been transferred, when the findings recorded by the Munsif arrived before his successor, the Respondents urged that he should try the issues Nos. 3 and 4 as his predecessor's decision was not final. Upon this the Court recorded the following order :—"The application of r. 25 virtually leaves my predecessor's finding on issues Nos. 3 and 4 untouched and I think I am not competent to interfere with my predecessor's decisions on issues Nos. 3 and 4 and try the same *de novo*. The hearing of the appeal is confined to issues Nos. 1 and 2."

In the result, he decided these issues also in favour of the Plaintiff and decreed the suit.

Against this decree the present second appeal was preferred.

Babus Mohendra Nath Roy, Mohini Mohan Chatterjee and *Probodh Chandra Dutt* for the Appellant.

Babu Provash Chandra Mitter for the Respondents.

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The JUDGMENT OF THE COURT was as follows :—

RICHARDSON, J.—On consideration we are of opinion that there is no sufficient reason for our interference. The point which was taken at the hearing was that the learned Subordinate Judge in the Court of Appeal below was wrong in treating the decision of his predecessor upon issues Nos. 3 and 4 in the suit as final so far as he was concerned and in refusing to reconsider those issues upon the evidence for the purpose of arriving at an independent determination in regard to them. Issues Nos. 3 and 4 relate to the merits of the dispute between the parties and what happened was this. The first Court originally decided those issues against the Plaintiff and dismissed the suit without deciding the remaining issues Nos. 1 and 2 which raised separate questions of limitation and misjoinder. Upon appeal the then Subordinate Judge in a judgment, dated the 31st May 1910, found in the Plaintiff's favour upon issues Nos. 3 and 4 and remanded the suit to the first Court with the direction that the Munsif was to "dispose of the suit after the trial of the first and second issues and according to the findings of this Court on the third and fourth issues." There was an appeal to the High Court from the order of remand and the High Court in its judgment of the 4th June 1912, held that the order was wrong inasmuch as it was passed apparently under r. 23 of Or. 41 whereas the case should have been dealt with under r. 25 of the same Order. In pursuance of directions given by this Court, the suit was then remitted to the first Court in order that the Munsif might try issues Nos. 1 and 2 and certify his findings thereon to the lower Appellate Court, upon whose file the appeal remained as a pending appeal. When the record again came up to that Court, the Subordinate Judge who had previously dealt with the appeal had left. His successor expressly refused to review the decision already arrived at on issues Nos. 3 and 4 and confined himself to a consideration of the first two issues in regard to which he accepted the findings of the Munsif which were in favour of the Plaintiff. It may be mentioned that those issues are quite independent of issues Nos. 3 and 4. The suit is a suit for ejectment. The parties are rival tenants. The true title is found in the Plaintiff. The defence to which issues Nos. 1 and 2 were directed was whether the Plaintiff had been dispossessed by the landlord, whether he ought to have been made a party and whether the limitation specially provided by the Bengal Tenancy Act for suits between landlord and tenant applied? These questions have been answered in the negative and upon the whole of the findings including those of his predecessor, the Subordinate Judge made a final decree in the Plaintiff's favour. The contention is that the decree is wrong because the Subordinate Judge refused to treat the issues decided by his predecessor as open to further discussion, and the contention is pushed to this point that if the appeal had come the second time before the Subordinate Judge who first dealt with it, he too would not have been bound by his previous judgment.

Now, I observe that the first Subordinate Judge evidently intended to dispose finally of issues Nos. 3 and 4. This is clear from the terms of the order of remand. It is equally clear that the High Cout in its judgment of the 4th June 1912, did not contemplate a re-hearing of these issues. Having pointed out that the Subordinate Judge ought "only to have sent the case back under r. 25 of Or. 41

in order that the Munsif might come to findings on issues Nos. 1 and 2," the learned Judges added :—"It would have been open to the parties then to argue on those two issues (namely issues Nos. 1 and 2) [redacted] lower Appellate Court should have then proceeded to deal with the case." There is no suggestion that issues Nos. 3 and 4 should be re-argued or re-heard. The High Court did not set aside the Subordinate Judge's judgment of the 31st May 1910, but merely altered the form of the remand. *Primâ facie* it would seem sufficient to say that in the subsequent proceedings the High Court's orders were properly understood and carried out. It was argued, however, that, nothing being expressly said about issues Nos. 3 and 4, the orders operated under the Civil Procedure Code to re-open them, and in support of this argument some reported cases were cited which must be briefly noticed.

The case of *Boncharee Ghose* v. *Ainooddeen Biswas* (1) is of no assistance to the Appellant. The case had been wrongly remanded by a Subordinate Judge and the High Court gave specific directions as to how it was to be dealt with, including a direction that when the case came again before the Subordinate Judge, with the findings of the Munsif upon the issues sent down to him for trial, the Subordinate Judge was to hear the appeal *de novo*. In the present case the High Court might no doubt have made a similar direction but did not do so.

In the cases of *Mubarak Hussain* v. *Bihari* (2) and *Hiatunnessa Bibi* v. *Kailash Chandra Saha* (3), it does not appear from the reports that there was any adjudication by the remanding Judge which would bind him or his successor at the final hearing. There is no doubt that an issue can be sent down in such a way that the whole appeal remains open. In such a case the appeal will be finally decided on the record as a whole and it may be possible to disregard the issue sent down and the finding upon it as otiose.

I doubt whether the case of *Ganendra Nath Ray Choudhury* v. *Surja Kant Ray Choudhury* (4) goes any further. It seems obvious that in remanding a case an opinion may be incidentally or provisionally expressed which would not amount to a final adjudication so as to conclude the parties.

On the other hand, in *Balvant Ram Chandra Natu* v. *Secretary of State* (5) it was recognised that a remanding judgment may be "conclusive on all points therein specifically decided beyond possibility of revision." In *Brojo Soondur Gossamee* v. *Juggut Chander Dey* (6) it was held that a District Judge has no authority, when hearing an appeal from a Munsif's decision, to vary or ignore the directions made by an Appellate Court of co-ordinate jurisdiction, such as that of the Subordinate Judge. The learned Judges observed :—"The District Judge in such cases ought to be guided by the practice which obtain in this Court, where, when one Division Bench sees fit to give certain directions, any other Bench before which the case may afterwards come on has to keep itself within those directions." This case was cited with approval in *Jammala* v. *Jammala* (7). The cases of *Surja Din* v. *Chatter* (8) and *Kharag* v. *Durdhari* (9) may also be referred to.

(1) 24 W. R 187 (1875).
(2) I. L. R. 16 All. 306 (1894).
(3) 16 C. L. J. 259 (1905).
(4) 17 C. W. N. 462 (1912).
(5) I. L. R. 32 Bom. 432 (1908).
(6) 21 W. R. 199 (1874).
(7) I. L. R. 32 Mad. 318, 320 (1908).
(8) I. L. R. 3 All. 755 (1881).
(9) I. L. R. 14 All. 348 (1892).

Moreover there is a catena of authorities which show that interlocutory orders may be, and often are, decretal and final in their character and therefore (subject of course to review by a superior Court in appropriate proceedings taken before it), binding as between the parties in subsequent stages of same litigation [*Mungul Pershad Dichit* v. *Girija Kant Lahiri* (10), *Ram Kirpal* v. *Rup Kuari* (11), *Abdul Majid* v. *Abul Aziz* (12), *Raja Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (13) and *Ahmed Musaji Saleji* v. *Ibrahim Saleji* (14)].

The observations in the case of *Lachman Prasad* v. *Jamna Prasad* (15) as to the possible difficulty of drawing up a final decree on the basis of separate judgments delivered at different dates had reference to the Civil Procedure Code of 1882. The difficulty disappears under the Code of 1908 which in sec. 2 defines the term "preliminary decree" and by sec. 97 provides that if no appeal is preferred from a preliminary decree, its correctness cannot be afterwards disputed in an appeal from the final decree. One test, therefore, which may be suggested for the purpose of determining whether an adjudication such as that of the 31st May 1910, is or is not final and conclusive so far as it goes, is whether it does or does not amount to a "preliminary decree." In the case before us the order of that date was assumed in argument to be merely interlocutory in its nature or rather to be nothing more than an order of remand. It was appealed from as an order of remand and therefore treated as such in the judgment of this Court of the 4th June 1912. On that footing it would in our opinion, as we have already intimated, be sufficient to say that the lower Appellate Court has correctly carried out the directions of this Court according to their true interpretation. But if it be necessary to go further, I should be disposed to hold that the order was a formal expression of an adjudication which amounted to a preliminary decree and that no appeal having been preferred from that decree as such, the Appellant is now bound by it.

In the result this appeal must be dismissed with costs.

MULLICK, J.—I agree that the appeal must be dismissed on the ground that having regard to the manner in which the remand order of the High Court was expressed, it was not open to the Subordinate Judge to revise the decision of his predecessor (the remanding Subordinate Judge) on issues Nos. 3 and 4. But even if there had been no appeal to the High Court, the Subordinate Judge was in my opinion not bound to re-hear the parties on these issues; for it seems to be well-settled that though it is open to a Court to revise after remand interlocutory decisions which were made either by itself or by an officer of co-ordinate jurisdiction yet as a matter of practice a Court will not and ought not to do so. When however the interlocutory decision amounts to a preliminary decree within the meaning of sec. 2 of the Civil Procedure Code the Court is of course incompetent to revise that decree till it is duly set aside or amended according to law. In the present case I would hesitate to say that the findings on issues Nos. 3 and 4 amounted to preliminary decrees. Issue No. 4 does not decide any question of right. Issue No. 3 does decide the question of title to the land in suit, but as

(10) L. R. 8 I. A. 123 (1881).
(11) L. R. 11 I. A. 37 (1883).
(12) L. R. 24 I. A. 22 at p. 32 (1896).
(13) L. R. 27 I. A. 209 : s. c. 5 C. W. N. 52 (1900).
(14) L. R. 42 I. A. 91 : s. c. 19 C. W. N. 449 (1915).
(15) I. L. R. 10 All. 162 (1887).

that decision is subject to the decision of issues Nos. 1 and 2 which relate to limitation and non-joinder of parties it seems doubtful whether the remanding Subordinate Judge did conclusively determine the rights of the parties. But it is not necessary to go into this question any further because for the reason already given the appeal must be dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1563 OF 1913.

JENKINS, C. J. N. R. CHATTERJEA, J. 1915, 9, June.	HIRANMOY KUMAR SHAHA, Plaintiff, Appellant, *v.* RAMJAN ALI DEWAN and ors., Defendants, Respondents.

Res judicata—Ex parte *decree for rent—Value of, for determining question of relationship of landlord and tenant in a subsequent suit—Presumption of continuance of relationship conclusively established by decree.*

A decree for rent passed ex parte *is not merely an item of evidence but is conclusive as to the relationship between the parties at the time to which the suit referred.*

Under illustration (d) *to sec. 114 of the Evidence Act, it is open to the Court in a subsequent suit between the parties to presume that that state of things has continued.*

This was an appeal from a decision of Babu Debendra Bejoy Basu, Subordinate Judge, Burdwan, dated 21st February 1913, affirming a decree of Babu Benode Behari Mukerjee, Munsif of Kalna, dated 30th May 1912.

The facts of the case material to the report sufficiently appear from the judgment.

Babu Khirode N. Bhuiya for the Appellant.

Babu D. N. Bagchi for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is a suit for arrears of rent. It was necessary for the Plaintiff to establish that he was the Defendants' landlord. He proposed to do that by utilizing among other things a decree for rent which he had obtained in a prior suit against these Defendants. The lower Appellate Court has rejected the decree as an item of evidence, apparently on the ground that it was *ex parte*. This is manifestly erroneous. The decree is not merely an item of evidence but is conclusive as to the relationship between the parties at the time to which the previous suit referred. That does not mean that in the circumstances of this case, it is conclusive as to the present relation between the parties. But it is good and valuable evidence in so far as it establishes the relationship at a time that has passed. Its value becomes more apparent when the terms of sec. 114 of the Evidence Act and illustration (*d*) are borne in mind which does not compel but certainly permits the Court to make a presumption as to the continuance of the state of things. The decree has been excluded from consideration by the lower Appellate Court in error.

We must therefore reverse the decree of the lower Appellate Court and send back the case in order that it may be determined according to law. Costs hitherto incurred will abide the result.

Case remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1646 OF 1913.

D. CHATTERJEE, J.		NISTARINI DASYA and ors., Plaintiffs, Appellants.
CHAPMAN, J.		*v.*
1915,		SARAT CHANDRA MAZUMDAR, Defendant, Respondent,
Heard, 11, May.		
Judgment, 21, May.		

Civil Procedure Code (Act XIV of 1882), Or. 1, r. 10—Suit instituted by administratrix after power as such had terminated—Bonâ fide mistake—Due care and attention if must be established—Substitution of beneficiaries for administratrix after time—New Plaintiff—Limitation Act (IX of 1908), sec. 22.

For a bonâ fide *mistake as contemplated by Or. 1, r. 10 of the Civil Procedure Code, it is not necessary that the party who committed it should have exercised due care and attention. Where it is not deliberately but honestly made, the mistake is* bonâ fide.

Where the widow of a deceased person G was appointed administratrix of his estate until G's eldest son should attain majority, and a suit was instituted by the widow after the eldest son of G had attained majority under a bonâ fide *belief that she was competent to sue as administratrix, but on discovering her mistake, she prayed that the three sons of G, for whose benefit she had been appointed administratrix, be substituted as Plaintiffs and the substitution was made at a time when the suit if instituted would have been time-barred.*

Held—*That this was not the addition of a new Plaintiff within the meaning of sec. 22 of the Limitation Act.*

DHURM DAS *v.* SHAMA SUNDARI (4), HARI SARAN *v.* BHUBANESWARI (5) *and* PEARY MOHAN *v.* NARENDRA NATH (3) *referred to.*

(3) 9 C. W. N. 421 (1905).
(4) 3 M. I. A. 229 (1843).
(5) I. L. R. 16 Cal. 40 (1888).

This was an appeal preferred on the 28th May 1913 against a decree of Babu Devendra Nath Pal, Subordinate Judge of Zillah Jessore, dated the 17th February 1913, reversing a decree of Babu Ashutosh Mukherjee, Munsif of that place, dated the 18th December 1911.

Babus Brojo Lal Chuckerbutty and *Harendra Nath Ganguly* for the Appellants.

Babus Sarat Ch. Ray Chaudhury, Satya Ch. Sinha and *Bhudar Haldar* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit upon a registered bond. The Munsif decreed the suit. In the Court of first appeal the suit has been dismissed on the ground of limitation. The Plaintiffs appeal now to this Court.

The bond was executed in October 1895, the due date being in April 1900. It was executed in favour of one Gopal Chandra Dey. The suit was brought on the 29th April 1911, shortly before the expiration of twelve years after the due date by the widow of Gopal Chandra Dey who had been appointed administratrix to his estate. On the 30th November 1911, the widow presented a petition supported by an affidavit stating that her pleader had discovered that her powers as administratrix had come to an end before the suit was instituted. It appeared that under the Letters of Administration her appointment as administratrix was to terminate when the eldest son of Gopal Chandra Dey attained majority and this had occurred some years prior to the institution of the suit. She prayed that the three sons of Gopal Chandra Dey who were his heirs should be added as Plaintiffs. The Munsif made the order prayed for. It will be observed that the three sons were added as Plaintiffs

some months after the period of limitation had expired.

The order of the Munsif was made under cl. 1, r. 10, Or. 1 of the first schedule to the Code of Civil Procedure. The Munsif held in the terms of the clause that the suit had been instituted through a *bonâ fide* mistake in the name of the wrong person as Plaintiff and accordingly ordered that the right persons namely the three sons be added as Plaintiffs. He held that the suit was not barred by limitation and decreed it on the merits.

The learned Subordinate Judge has held in first appeal that the mistake was not *bonâ fide*. In his opinion *bonâ fide* means with due care and attention and he held that with the least care and attention the Plaintiff could well understand that her powers had come to an end. He inferred that the suit must be taken to have been instituted when the three sons came in as Plaintiffs. He accordingly dismissed the suit without going into the merits.

We are of opinion that the Court of first appeal erred in the interpretation of the word *bonâ fide*. Where a mistake is not made deliberately and where it is honestly made the mistake is *bonâ fide*. The widow was illiterate and *pardanashin*. The eldest son was 26 when the suit was brought but it is clear from his deposition that he is not very intelligent. He says that for the last five or seven years he looks after his suits and collection of rent but it is not said in whose name these suits to which he refers were instituted. The management was really done, it seems, by agents. No dishonest motive can be suggested; the mistake was brought to notice by the widow herself. We hold that the mistake was *bonâ fide* and that the order adding the three sons as Plaintiffs was properly made under cl. 1, r. 10, Or. 1.

It is then contended that the provisions of sec. 22, Indian Limitation Act, apply, which are to the effect that where after the institution of a suit a new Plaintiff or Defendant is substituted or added the suit shall, as regards him, be deemed to have been instituted when he was made a party. The contention is that even though it be held that the three sons were properly added as Plaintiffs yet, inasmuch as this was done after the period of limitation had expired, the suit must under the provisions above referred to, be held to be barred.

In the present case, however, when the suit was originally instituted within the period of limitation it was instituted by the widow not for her own benefit but as administratrix for the benefit of the three sons. They were the real persons throughout who were to benefit. The change that was made after the period of limitation was one of form only not of substance.

In the case of *Subodini Debi* v. *Ganada Kanta Ray* (1) it was held that where a suit was originally instituted in the name of a manager and the names of the employers were subsequently substituted as Plaintiffs after the period of limitation, the suit was not barred. It is true that the decision rests partly on a consideration of the wording of the Code as it then stood but the learned Judges say "The answer is that this suit is the original suit and was brought in time." This is a general observation, the principle of which is applicable to the present case.

In the case of *Munni Kasaundhan* v. *Crooke* (2), where the suit was brought originally against a Municipal Committee represented by the Secretary, instead of by their President, as it should have been, and where the Plaintiff applied after the expiry of the period of limitation for substituting the name of the President for that

(1) I. L. R. 14 Cal. 400 (1887).
(2) I. L. R. 2 All. 296 (1879).

of the Secretary it was held that by reason of such substitution the suit could not be deemed to have been instituted against the Municipal Committee when such substitution was made. The judgment was referred to in the case of *Peary Mohan* v. *Narendra Nath* (3) in which the learned Judges stated the rule to be that where relief is originally claimed against a party who has to be represented by some person, the proper representation of that party subsequently made has not the effect of adding a "new Defendant" to the suit. We are of opinion that a similar principle is applicable to a case such as the present where by a *bonâ fide* mistake it is erroneously supposed that a Plaintiff should be represented in a particular way and subsequently the Plaintiff is permitted to rectify the mistake and appear personally. This is not the addition of a new Plaintiff within the meaning of sec. 22 of the Limitation Act.

That in matters of this kind the substance is to be looked to rather than the form will be apparent from the judgments of the Privy Council in the cases of *Dhurm Das* v. *Shama Sundari* (4) and *Hari Saran* v. *Bhubaneswari* (5). In both these cases a minor was treated as if he had been a party to the litigation, although in fact he never had been made a party and the litigation had been prosecuted by his mother in her personal capacity. "The suit must," their Lordships say in the first case, "be considered to have been prosecuted by her in her name for the minor's benefit." So, in the present case, the suit must be considered to have been originally instituted by the widow for the benefit of her sons and there was thus no introduction of new Plaintiff when the sons were brought on the record.

We hold that the suit was not barred by limitation. We set aside the judgment and decree of the learned Subordinate Judge and remand the case for disposal on the merits. Costs to abide the result.

Appeal allowed.

(3) 9 C. W. N. 421 (1905).
(4) 3 M. I. A. 229 (1843).
(5) I. L. R. 16 Cal. 40 (1888).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 192 OF 1912.

MOOKERJEE, J. BEACHCROFT, J. 1914, Heard, 11, 12 and 14, August. Judgment, 17, August.	LOKE NATH SINGH and ors., Defendants, Appellants, *v.* DHAKESHWAR PROSAD NARAYAN SINGH, Plaintiff, Respondent.

Partition suit for, by co-sharer—Suit if maintainable without proof of actual or constructive possession—Possession by co-sharer if and when may be adverse—Evidence necessary to establish adverse possession by co-tenant—Ouster of co-tenant how may be effected to create adverse possession—Land Registration Act, registration of name under, effect of, if necessarily implies possession—Partition as distinguished from ejectment—Costs in partition suit before preliminary decree when Defendants successfully contests Plaintiff's claim for partition.

The Plaintiff sought partition of an estate of which he claimed to own an one anna share by purchase. He alleged that after his purchase he had his name registered under the Land Acquisition Act in place of his vendor and was in possession since the date of his purchase. The lower Court found that the Plaintiff was in possession of his share and made a preliminary decree for partition. The Defendants appealed.

Held—*That although as a general rule the possession of one co-tenant is not deemed adverse to the other co-tenants the existence of the relation of co-tenancy does not preclude one co-tenant from establishing an*

adverse possession in fact as against the other co-tenants; and though the co-tenant enters in the first instance without claiming adversely his possession afterwards may become adverse.

In order to render the possession of one co-tenant adverse to the others not only must the occupancy be under an exclusive claim of ownership in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants either by express notice or by such open and notorious acts as must have brought home to the other co-tenants knowledge of the denial of their rights.

The evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct.

The ouster of the other co-tenants in order to render the possession adverse need not be by violent or intimidating expulsion or repulsion; nor need notice of the adverse holding be actually brought home to the other co-tenant by personal or formal communication, but it is sufficient, if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed,

Held—*That the registration of the name of a person under the Land Registration Act is some evidence of possession but the weight to be attached to this fact must depend upon the circumstances of each case.*

The fact that the Plaintiff was able to get his name substituted in the place of his vendor does not necessarily show that he is in possession of any share of the estate.

That the Plaintiff having failed to prove that he had possession actual or constructive of any share of the disputed property was not entitled to maintain a suit for partition.

That the remedy of the Plaintiff was by a suit for joint possession and partition and on the plaint in a suit so framed court-fees must be paid ad valorem.

That partition is not a substitute for ejectment because partition implies an existing joint possession and enjoyment to be converted into possession in severalty.

That although ordinarily in a suit for partition pure and simple the parties have to bear their own costs of the suit up to the stage of the preliminary decree the Plaintiff must in this case pay the costs of the Defendants who have successfully contested his claim for partition.

This was an appeal from a decision of Babu Sasi Bhusan Sen, Subordinate Judge, Gaya, dated 11th June 1912.

The facts of the case will appear from the judgment.

Dr. Rash Behary Ghose, Babus Jogesh Chandra Roy and *Bankim Chandra Mukherjee* for the Appellants.

Mr. S. P. Sinha, Babus Umakali Mukherjee, Hari Bhusan Mukherjee, Ganesh Dutt Singh and *Ambika Pada Choudhuri* for the Respondent.

The Judgment of the Court was as follows :—

This appeal is directed against the preliminary decree in a suit for partition of joint property. The subject matter of the litigation is Village Pasraila, an estate which bears No. 2562 on the revenue rolls of the Collector of Gaya. The case for the Plaintiff is that one Gomti Koer had an one anna share in this estate in respect whereof she was registered under the Land Registration Act, that on the 12th January 1910, she conveyed her interest to him for a consideration of Rs. 3,500, that he has

LOKE NATH SINGH *v.* DHAKESHWAR PROSAD NARAYAN SINGH.

got his name substituted in the place of that of his vendor in the register, and that he has been in possession since the date of his purchase. He consequently seeks partition of the estate, so that separate lands may be allotted to him in respect of his share. The Defendants resist the claim on the ground, amongst others, that neither the Plaintiff nor his vendor had any title to the property and, that, in any view, the Plaintiff cannot sue for partition as he was not in possession of his alleged share at the date of the institution of the suit. On these pleadings, six issues were framed of which the first two raised the question whether the Plaintiff had possession of the share sought to be partitioned and whether the suit was maintainable. The other issues raised the question of title and limitation. The trial was not restricted to any special issue, so far as we can gather from the order-sheet. The Subordinate Judge, however, has dealt with the case in his judgment, as if only one issue had been raised, namely, whether the Plaintiff was in possession of an one anna share. On this question he has found in favour of the Plaintiff and has made a preliminary decree for partition according to the shares stated in the plaint. The Defendants have appealed to this Court, and have contended that, on the evidence, it should have been held that the Plaintiff was not in possession of his alleged share, and the suit for partition should consequently have been dismissed. The first point for investigation is, whether the Plaintiff was, at the date of the suit, in possession of the share of the estate claimed by him.

The oral evidence adduced by the Plaintiff to prove his possession is extremely unsatisfactory. The first witness who pledged his oath in support of the allegation that the Plaintiff was in possession of the share purchased from Gumti Koer, had no concern with the village, and was a casual visitor though he gradually committed himself to assertions that he had seen the collection from tenants and had even supervised them. The Plaintiff does not, however, produce any collection papers and the tenants from whom rent is said to have been collected have come forward on the side of the Defendants to deny that they ever paid rent to the Plaintiff. The second witness who alleged that he actually collected rent from tenants named by him is equally unreliable. He does not produce collection papers, which, if he is to be believed, were actually prepared. He admits that he was imprisoned in a criminal case. The third and last witness is a solitary tenant who alleges that he and others pay rent to the Plaintiff. This evidence in its sum-total is not very convincing and is valueless when contrasted with the evidence on the side of the Defendants. Five of the tenants mentioned by the witnesses of the Plaintiff depose that they have never paid rent to the Plaintiff. They are supported by the *patwari* who proves collection of the entire rent on behalf of the Defendants from the tenants and produces collection papers to corroborate his story. The genuineness of these papers does not appear to have been seriously contested in the Court below. The oral evidence, as a whole, negatives the assertion that the Plaintiff was in possession of a share of the estate.

The conclusion derivable from the oral evidence accords with the indication furnished by the fact of two criminal cases. The purchase by the Plaintiff is, dated the 12th January 1910, and an order by the Revenue Authorities as made on the 21st November 1910 to substitute his name in the place of that of his vendor. But disputes arose at once between the Plaintiff

and the Defendants, with the result that proceedings were instituted under sec. 144 of the Criminal Procedure Code, on the 23rd December 1910. On the 25th March 1911, the Magistrate held that the zemindary *kachari* to which the dispute related, was in the possession of the Defendants. About the same time, one of the men under the Plaintiff, instituted a case against the present Defendants under secs. 147 and 379 of the Indian Penal Code, arising out of a dispute as to possession of some *khud khast* land in the village. On the 24th March 1911, the Magistrate held that there was great doubt whether the master of the complainant had any land in the village, and refused to take steps against the accused. The present suit, it is significant, was instituted immediately afterwards on the 31st May 1911.

On behalf of the Plaintiff it has been strenuously argued, however, that the possession of the Plaintiff is proved by the circumstances that his name was registered under the Land Registration Act. In support of this position, reliance has been placed upon the cases of *Ram Pershad* v. *Lakhpati Koer* (1) and *Shyama Sundari* v. *Mahamed Zarif* (2). It may be conceded that the registration of the name of a person under the Land Registration Act is some evidence of possession but the weight to be attached to this fact must depend upon the circumstances of each case. In the present instance, the name of the vendor of the Plaintiff was on the register, and consequently, under sec. 50 of Act VII of 1876, notice would issue to the transferer alone when the Plaintiff applied to have his own name substituted. There is nothing to show that the Defendants had notice of the application by the Plaintiff or opportunity to contest it. We know, on the other hand, that when the Plaintiff attempted to obtain a footing in the village purchased by him, the Defendants offered resistance, leading to criminal proceedings which terminated in their favour. The mere fact that if the Plaintiff were to sue the tenants for rent, they might have no defence to the claim in view of the provisions of sec. 78 of the Land Registration Act and sec. 60 of the Bengal Tenancy Act, does not show that the Plaintiff had possession at the date of institution of the suit by receipt of rent from the tenants. We hold accordingly that the fact that the Plaintiff has been able to get his name substituted in the place of that of his vendor does not necessarily show that he is in possession of any share of the estate.

It has finally been argued on behalf of the Plaintiff that inasmuch as, he is a co-sharer with the Defendants in respect of the property in suit, he must be deemed in possession through the latter, because there can *primâ facie* be no adverse possession between co-tenants. In support of this proposition, reference has been made to the cases of *Baroda* v. *Anmoda* (3), *Ittapan* v. *Manavikram* (4), *Ujalvi* v. *Umakanta* (5), *Jogendra Nath* v. *Baldeo* (6) and *Sashi Bhusan* v. *Jotindra Nath* (7). This position has been controverted on behalf of the Defendants, and it has been contended that there may be adverse possession by one tenant in common against his co-tenants if there is exclusion or ouster, and that whether there has been exclusion or ouster in any concrete case must be determined in view of the relationship of the parties, their position, the

(1) L. R. 30 I. A. 1 : s. c. I. L. R. 30 Cal. 231 ; 7 C. W. N. 162 (1902).
(2) 9 C. L. J. 91 (94) (1907).
(3) 3 C. W. N. 774 (1898).
(4) I. L. R. 21 Mad. 158 (1897).
(5) 9 C. W. N. 32 : s. c. I. L. R. 27 Cal. 972 (1904).
(6) I. L. R. 35 Cal. 961 : s. c. 12 C. W. N. 127 (1907).
(7) I. L. R. 38 Cal. 681 (1911).

mode of life in the particular community to which they belong, the character of the property and other circumstances of a like nature. In support of this position, reliance has been placed upon the cases of *Bandacharyya* v. *Shriniwasacharyya* (8), *Gangadhar* v. *Parashram* (9), *Amrita* v. *Shridhar* (10), *Ayenenussa* v. *Isuf* (11), *Doe* v. *Prosser* (12) and *Culley* v. *Doe* (13). We are of opinion that the proposition formulated on behalf of the Plaintiff is too widely stated and is not supported by the cases cited.

Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow-tenants or otherwise deny to them some right to which they are entitled as co-tenants; and they, on their part, may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co-tenant, and is in law the possession of all the co-tenants, and not adverse to any of them. It cannot be questioned however, that one co-tenant may oust the others and set up an exclusive right of ownership in himself; and an open, notorious and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted. Thus, although as a general rule, the possession of one co-tenant is not denied adverse to the other co-tenants, the existence of the relation of co-tenancy does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants; and though the co-tenant enters in the first instance without claiming adversely, his possession afterwards may become adverse. In order to render the possession of one co-tenant adverse to the others, not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants knowledge of the denial of their rights. The same principle is involved in the familiar statement that to enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive, and hostile character as to amount to an ouster of the other co-tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants. No comprehensive formula can be framed to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenants. But it has been stated that the evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title, and the hostile intent of the co-tenant in possession must be shewn by unequivocal conduct. It is indisputable that acts which might properly be held to show adverse possession as between strangers, do not necessarily have such effect as between tenants in common; acts of ownership by one co-tenant may not in themselves amount to the disseisin of the other co-tenants, and may, indeed, be so explained as to show a consistency with the joint title. But the ouster of the other co-tenants, in order to render the possession adverse, need not be by violent or intimidating expulsion or re-

(8) 5 Bom L. R. 742 (1903).
(9) I. L. R. 29 Bom. 300 : s. c. 7 Bom. L R. 252 (1905).
(10) I. L. R. 33 Bom. 317 : s. c. 11 Bom. L R 51 (1908).
(11) 16 C. W. N. 849 (1912).
(12) 1 Cowper 217 (1774).
(13) 11 A. & E. 1008, 1014 (1840).

pulsion; nor need notice of the adverse holding be actually brought home to the other co-tenant by personal or formal communication, but it is sufficient, if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. From this point of view, it has been maintained that sole possession by a co-tenant becomes adverse to his fellow-tenants by his repudiation or disavowal of the relation of co-tenancy between them; and any act or conduct signifying his intention to hold, occupy and enjoy the premises exclusively and of which the tenant out of possession has knowledge or of which he has sufficient information to put him upon enquiry, amounts to an ouster of the co-tenants; but what is essential is that the overt acts which constitute a definite and continuous assertion of an adverse right must be of an unequivocal character, clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other co-tenants. No useful purpose would be served by an elaborate analysis and examination of the various cases in which these principles have been applied; but reference may be made to the more important amongst them. *Doe* v. *Prosser* (12), *Wynne* v. *Styan* (14), *Holt* v. *Horrocks* (15), *Culley* v. *Doe* (13), *Thornton* v. *France* (16), *Draper* v. *Lawley* (17), *Ballin* v. *Hobday* (18), *Sanders* v. *Sanders* (19), *Burroughs* v. *McRight* (20), *Murphey* v. *Murphey* (21), *Doe* v. *Bird* (22), *Townsend's* case (23), *Doe* v. *Taylor* (24) *Hovenden* v. *Annesley* (25), *Thomas* v. *Thomas* (26) and *Corea* v. *Appuhamy* (27). Among recent cases in Indian Courts, reference may, in addition to the cases already mentioned, be made to *Amrita* v. *Sridhar* (10), *Bhaiji* v. *Haji Maiya* (28), *Jog Jivan* v. *Bai Amba* (29), *Tajuddi* v. *Ali Sahib* (30), *Sellam* v. *Chinnamal* (31), *Chiranji* v. *Nathia* (32), *Parbati* v. *Ram Prosad* (33) *Har Charan* v. *Bindu* (34), *Mihin Lal* v *Badri Prasad* (35), *Raj Bahadur* v. *Bharat* (36), *Muhammad* v. *Nathu* (37) and *Faizuddin* v. *Raju* (38).

Tested in the light of these principles the contention of the Plaintiff that even if the Defendants be found to be in exclusive possession of the property, their possession must be deemed to be on his behalf in respect of his share, proves wholly groundless.

The case for the Plaintiff is that he was in possession of his share. That case has completely failed. The possession of his share by the Defendants (assuming that he has acquired a title thereto), is presumably adverse to him; when the specific case made by him has failed, he cannot turn round and contend that the Defendants

(12) 1 Cowper. 217 (1774).
(13) 11 A. & E. 1008, 1014 (1840).
(14) 2 Phil. 303.
(15) 1 C. & K. 566 (1844).
(16) [1897] 2 Q. B. 143.
(17) 13 Q. B. 954 (1834).
(18) 31 W. R. Eng. 9 (1882).
(19) 19 Ch. D. 373 (1881).
(20) 1 J. & L. 290; 7 Ir. Eq. R. 49 (1841).
(21) 15 Ir. C. L. R. 205.
(22) 11 East 49 (1809).
(10) I. L. R. 33 Bom. 317: s. c. 11 Bom. L. R. 51 (1908).
(23) 4 Leon. 52.
(24) 5 Bar. & Ad. 575 (1833).
(25) 2 Sch. and Lep. 682 (1806).
(26) 2 K. and J. 79 (1855).
(27) [1912] A. C. 230.
(28) 14 Bom. L. R. 314 (1911).
(29) I. L. R. 25 Bom. 362: s. c. 3 Bom. L. R. 47 (1900).
(30) [1913] Mad. W. N. 361.
(31) I. L. R. 24 Mad. 441 (1901).
(32) 4 All. L. J. 473 (1907).
(33) 5 All. L. J. 511 (1908).
(34) I. L. R. 32 All. 389: s. c. 7 All. L. J. 298 (1910).
(35) I. L. R. 27 All. 436 (1905).
(36) I. L. R. 27 All. 348 (1904).
(37) 10 All. L. J. 59 (1912).
(38) 20 I. C. 584 (1913).

were in occupation on his behalf and for his benefit. He does not belong to the same family as the Defendants, and no conceivable hypothesis has been suggested in support of the view that the possession of the Defendants was permissive; there was no fiduciary or quasi-fiduciary relation between the parties. We hold, accordingly, that the Plaintiff has failed to prove that he had possession, actual or constructive, of any share of the disputed property. He is consequently not entitled to maintain a suit for partition. *Bidhata Roy* v. *Ram Charitar Roy* (39). In that case, it was pointed out that the fundamental rule is that partition is not a substitute for ejectment, because partition implies an existing joint possession and enjoyment, to be converted into possession in severalty. The remedy of the Plaintiff is by a suit for joint possession and partition, and on the plaint in a suit so framed, Court fees must be paid *ad valorem*.

The Plaintiff has, as a last resort, prayed that if the Court should hold that he was not in possession at the date of the suit, he may be permitted to amend the plaint. This application, as we have already intimated to the parties, may be granted but only on terms as to payment of costs.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and the case remitted to him. The Plaintiff is allowed leave to amend the plaint according to his prayer in the petition presented to this Court, copy whereof will be forwarded to the Court below. But the Plaintiff will have this indulgence only on condition that he deposits in the Court below, to the credit of the Defendants, the costs incurred by them up to this stage in both Courts. The deposit must be made within one month after the arrival of the record in the Court below has been notified to the Plaintiff. If the deposit is not so made, the suit will stand dismissed with costs throughout. If the deposit is made, the plaint will be amended, and the Defendants will be allowed to file a fresh written statement; the issues will also be re-settled, and the suit will then be retried on fresh evidence to be adduced by both parties.

As regards the amount of costs allowed by the lower Court, we observe that the hearing fee has been calculated on the basis of the value of the entire estate. The controversy between the parties, however, related really to an one anna share, and the hearing fee will be reduced accordingly. The hearing fee in this Court is assessed at twenty gold mohurs. Although, ordinarily, in a suit for partition, pure and simple, the parties have to bear their own costs of the suit up to the stage of the preliminary decree, the Plaintiff must, in this case, pay the costs of the Defendants, who have successfully contested his claim for partition. *Nawab Dildar Ali* v. *Bhowani* (40), *Satya Kumar* v. *Satya Kripal* (41) and *Landell* v. *Baker* (42).

The amount of costs payable by the Plaintiff to the Defendants under our order will be specified in the decree of this Court.

Appeal allowed.

(39) 12 C. W. N. 37; s. c. 6 C. L. J. 651 (1907).

(40) 5 C. L. J. 642 (1907).

(41) 10 C. L. J. 503 (1909).

(42) L. R. 6 Eq. 268 (1868).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 397 OF 1914.

MOOKERJEE, J.
BEACHCROFT, J.
1915,
Heard, 19 and 20, July.
Judgment, 2, August.

KALI CHARAN NATH and anr., Decree-holders, Appellants,
v.
SUKHODA SUNDARI DEBI and others, Objectors, Respondents.

Civil Procedure Code (Act V of 1908), sec. 47—Suit for money—Death of Defendant during suit leaving Will—Heirs substituted in ignorance of Will and decree against heirs—Execution against estate—Objection by executor upheld—Executor, if bound—Appeal—Remedy of decree-holder—Suit upon judgment, if lies—Limitation Act (IX of 1908), Sch. I, Art. 122.

M, the Defendant in a suit for recovery of money having died during its pendency leaving a Will whereby he had appointed the wives of his sons executrices to his estate, the Plaintiff who was unaware of the existence of the Will substituted his sons in his place on the records without objection, and got a decree. Execution of the decree against the estate of M was opposed by the executrices:

Held—*That the executrices were not bound by the decree and the decree could not be executed against the estate in their hands.*

Quære.—*Whether the order of the executing Court dismissing the application on the objection of the executrices was not an order under sec. 47, merely because the executrices could not in popular language be called representatives of the sons of the deceased debtor.*

Held.—*That the executrices were not representatives of the judgment-debtors inasmuch as they were not bound by the decree.*

That the remedy of the decree-holder was either (i) *to have the decree vacated, the suit restored, the executrices brought on the record and a new decree made against them; or* (ii) *to institute a suit on the judgment and obtain a decree thereon against the executrices.*

ASHIBHUSAN *v.* PELARAM (4) *and* PROSUNNO CHANDER *v.* KRISTO CHAITANYA (5).

Quære.—*Under what circumstances a suit lies upon a judgment passed by a Court in British India.*

Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action to enforce the judgment may be maintained provided the judgment cannot be enforced in some other way.

The Limitation Act cannot give rise to a cause of action where none exists independently of the provisions thereof.

This was an appeal preferred on the 28th July 1914 against the order of G. B. Mumford, Esq., District Judge of Zillah Dacca, dated the 16th March 1914, affirming the order of Babu B. Ghatak, Munsif, 3rd Court at that place, dated 3rd January 1914.

The facts of the case will appear from the judgment.

Babus Satis Chandra Ghosh and *Smritish Chandra Ghosh* for the Appellants.

Babu Upendra Lal Roy for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

This is an appeal by the decree-holders against an order in execution proceedings, and illustrates what has been often stated before, that the difficulties of a litigant begins when he has obtained his decree. On the 16th September 1911, the Appellants instituted a suit against one Mahim Chandra Chakrabarti for recovery of a

(4) 18 C. L. J. 362; s. c. 18 C. W. N. 179 (1913).
(5) I. L. R. Cal. 362 (1872).

large sum of money. During the pendency of the suit, the Defendant died on the 27th November 1911. On the application of the Plaintiffs, the three sons of the deceased, who were ostensibly his heirs and representatives were brought on the record in his place. They did not object to the adoption of this course. The case was tried on the merits, and on the 8th May 1912 a decree was made against the persons supposed to be the heirs and representatives of the original debtor. The decree directed as usual that the judgment debt be realised out of the estate of the deceased in the hands of the substituted Defendants. On the 9th June 1913, the decree-holders applied for execution of their decree, and notices were duly issued. Thereupon the wives of the three sons of the deceased intervened, and stated that execution could not proceed as Mahim Chandra, their father-in-law, had made a testamentary disposition of his properties on the 1st May 1911, whereby they had been appointed executrices. They alleged that the Will had been duly proved in 1913 but that the probate had not been actually issued, as the question of valuation of the estate was still under investigation by the Collector. The Court held that the decree had been obtained against persons who were not the true representatives of the deceased debtor and could not be executed against the estate in the hands of the executrices. The application for execution was consequently dismissed. The decree-holders appealed to the District Judge but the appeal has been dismissed as incompetent. The decree-holders have now appealed to this Court and have contended that the appeal should have been heard on the merits by the District Judge and execution allowed against the estate in the hands of the executrices. It is plain that the answer to the question, whether the order of the primary Court was appealable or not, depends upon the question, whether the decree is capable of execution against the estate in the hands of the executrices; if the latter are representatives of the parties to the suit, the order falls within the scope of sec. 47 of the Code and is appealable as a decree; if they cannot be deemed such representatives, the order is not covered by that section and cannot be challenged by way of appeal.

We may at the outset deal with a narrow ground assigned by the Respondents in support of the view that the executrices are not representatives of the parties to the suit; they have argued that they are the representatives of the original debtor, but are in no sense representatives of the sons of the debtor, who were brought on the record of the suit as his successors-in-interest. This contention is based on a limited view of the meaning of the term "representatives." The sons of the deceased Defendant were brought on the record as his representatives-in-interest; they were unquestionably his representatives to all appearances; the Will had not been proved at that time, nor were the Plaintiffs even aware of its existence. Consequently they were the only persons who could be brought on the record as the successors-in-interest of the deceased. Since then the Will has been proved, and the probate, by a legal fiction, takes effect retrospectively from the date of the death of the testator. Consequently the estate which was then ostensibly represented by the sons and heirs of the deceased is now represented by the executrices. Without undue stretch of language, the view may, in these circumstances, be maintained that the executrices are representatives of the parties to the suit who were themselves before the Court in a representative character. Reference

may in this connection be made to the decision in *Premmoyi* v. *Priyanath* (1) where an analogous question arose for consideration. There a Hindu widow had instituted a suit as representative of the estate of her husband; on her death during the pendency of the suit, the reversionary heirs were brought on the record. It was contended that they were not her representatives, as they derived title not from her, but from her husband. This contention was negatived, and it was ruled that as the widow and the reversioners successively represented the same interest, the reversioners might be treated as representatives of the widow. We are, therefore, not prepared to hold that the order of the primary Court is beyond the scope of sec. 47 merely because the executrices cannot in popular language be called representatives of the sons of the deceased debtor. Whether they can be deemed representatives of parties to the suit or not, depends, in our opinion, upon the answer to a more fundamental question.

It was explained by a Full Bench of this Court in *Ishanchandra* v. *Beni Madhab* (2), that the term representative includes not merely a legal representative such as heir, executor or administrator, but also a representative-in-interest, that is a representative of the decree-holder or judgment-debtor who so far as such interest is concerned is bound by the decree [*Gulzari Lal* v. *Madho Ram* (3)]. We are thus brought back to what must be deemed the root of the matter in this case, namely, are the executrices bound by the decree? We are of opinion that the decree as it stands cannot be executed against the estate in their hands and that the remedy of the decree-holders is, either, to have the decree vacated, the suit restored, the executrices brought on the record and a new decree made against them, or, to institute a suit on the judgment and to obtain a decree thereon against the executrices. This is clear from the decision in *Ashibhusan* v. *Pelaram* (4). There a decree had been obtained for mesne profits against an alleged adopted minor son as the representative of the wrong-doer. The adoption was subsequently declared invalid, whereupon the decree-holder sought to proceed in execution against the real representative. It was ruled that the decree-holder could not proceed against the judgment-debtor on the record as he had not received any assets of the wrong-doer; nor could he ask the Court to substitute the name of the real representative in the decree, because the result would be really a new decree in his favour against such representative. At the same time, it is clear that a suit can be brought against the executrices on the basis of the judgment already obtained. Reference may be made to the decision of Markby, J., in *Prosunna Chander* v. *Kristo Chaitanya* (5) where, under circumstances somewhat similar to those of the present case, it was held that if the decree could not be executed against the estate in the hands of the executor, it was at any rate sufficient to enable the Plaintiff to bring a suit against the executor to have the decree satisfied. We are not now concerned with the question of the binding character of orders made or sales held in execution of a decree obtained against persons who, as subsequent events show, are either not the proper representatives of the deceased Defendant or constitute only some of his representatives. There has been some diver-

(1) I. L. R. 23 Cal. 636 (1896).
(2) 1 C. W. N. 36: s. c. I. L. R. 24 Cal. 62 (1896).
(3) I. L. R. 26 All. 447 (1904).
(4) 18 C. L. J. 362: s. c. 18 C. W. N. 178 (1913).
(5) I. L. R. 4 Cal. 642 (1878).

gence of judicial opinion upon this matter, as is clear from an examination of the decisions in *General Manager, Durbhanga Raj* v. *Ramaput Singh* (6), *Assamathem Nessa* v. *Luchmiput* (7), *Chunilal* v. *Osmond Beeby* (8), *Baswantapa* v. *Ranu* (9), *Janaki* v. *Dhanulal* (10), *Chathakelan* v. *Govinda* (11), *Kadir* v. *Muthukrishna* (12), and *Ramaswami* v. *Oppilamani* (13), on the one hand, and *Sitanath* v. *Luchmipat* (14), *Harish Chandra* v. *Puridas* (15) and *Lalbehari* v. *Nagendra Nath* (16) on the other hand. These decisions do not directly touch the question in controversy now before us, *viz.*, whether the decree obtained against the ostensible representatives should be allowed to be executed against the estate in the hands of the executrices though objection is taken before execution has been issued, or whether the decree-holders should be limited to their remedy by way of a decree against the executrices, either by reopening the suit or by instituting a fresh suit on the judgment previously obtained. The decision in *Rameshwar* v. *Jaweshwari* (17) which bears on the subject is clearly distinguishable, in view of the special circumstances under which the decree in the first suit was obtained. There cannot we think be a reasonable doubt that a suit would lie on the judgment; this, indeed, is to some extent borne out by Art. 122 of the Schedule to the Indian Limitation Act, which shows that the legislature contemplated the possibility of suits upon judgments obtained in British India, though we are not unmindful, that the Limitation Act cannot give rise to a cause of action where none exists independently of the provisions thereof; as Sir Richard Couch observed in *Hurrynath* v. *Mothoor Mohon* (18) the intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right: [*Khunnilal* v. *Govind Krishna* (19)]. It is not necessary, for our present purpose, to enter upon a discussion of the circumstances under which a suit lies upon a judgment in British India. An examination of the cases, specially those of *Sender* v. *Jomir* (20), *Attermoney* v. *Hurrydass* (21), *Golam Arab* v. *Curcembux* (22), *Bhabanishankar* v. *Pursadri* (23), *Merwanji* v. *Ashabai* (24), *Ramayya* v. *Venkata* (25), *Annoda* v. *Nobokishore* (26), *Mallesam Naidu* v. *Jugala* (27) and *Periasami* v. *Seetharama* (28), shows that there is considerably divergence of judicial opinion upon the subject, and that the Courts are by no means agreed as to the circumstances under which a suit may be instituted in this country on what may be called a domestic as distinguished from a foreign judgment. It is well-known that in England there has been divergence of judicial opinion on the subject (Freeman on Judgments Chap. XVII; Black on Judgments,

(6) 14 M. I. A. 605 (1872).
(7) I. L. R. 4 Cal. 142 (1878).
(8) I. L. R. 30 Cal. 1044 (1903).
(9) I. L. R. 9 Bom. 86 (1884).
(10) I. L. R. 14 Mad. 454 (1891).
(11) I. L. R. 17 Mad. 186 (1893).
(12) I. L. R. 26 Mad. 230 (1903).
(13) I. L. R. 33 Mad. 8 (1909).
(14) 11 C. L. R. 298 (1883).
(15) 12 C. L. J. 561 (1910).
(16) 16 I. C. 690 (1912).
(17) 18 C. W. N. 129: s. c. 19 C. L. J. 18 (1913).
(18) L. R. 20 I. A. 183 (1893).
(19) L. R. 38 I. A. 87: s. c. 15 C. W. N. 545 (1911).
(20) 9 W. R. 399.
(21) I. L. R. 7 Cal. 74 (1881).
(22) I. L. R. 5 Cal. 294 (1879).
(23) I. L. R. 6 Bom. 202 (1882).
(24) I. L. R. 8 Bom. 1 (1883).
(25) I. L. R. 17 Mad. 122 (1893).
(26) 9 C. W. N. 252 (1905).
(27) I. L. R. 28 Mad. 202 (1899).
(28) I. L. R. 27 Mad. 342 (1903).

KALI CHARAN NATH *v.* SUKHODA SUNDARI DEBI.

Chap. XXIV), and it is only in recent years that the principle has been adopted that although an action lies on a judgment which finally establishes a debt, whether the judgment be English or foreign, it is an abuse of the process of the Court to bring an action upon an English judgment if it can be enforced in some other way. *Pritchett* v. *English and Colonial Syndicate* (29), *Grant* v. *Easton* (30), *Nouvion* v. *Freeman* (31), *Pemberton* v. *Hughes* (32) and *Hodsoll* v. *Baxter* (33). The principle on which an action is allowed to be maintained on a judgment was concisely explained by *Baron Parke in Williams* v. *Jones* (34). "The principle is that where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." No mischief can result from the acceptance of this principle, if it is adopted subject to the qualification recognised in Modern English Law, *viz.*, that an action is permissible only where the judgment cannot be enforced in some other way; and beyond this, it is not necessary for our purpose to proceed.

We hold accordingly that the decree-holders are not entitled to execute their decree against the estate in the hands of the executrices. The appeal is consequently dismissed, but there will be no order for costs.

Appeal dismissed.

(29) [1899] 2 Q. B. Rep. 428.
(30) 18 Q. B. D. 302 (1888).
(31) 15 App. Cas. 1 (1889).
(32) [1898] 1 Ch. 781.
(33) E. B. and E. 884.
(34) 13 M and W. 628; 67 R. R. 767 (1845).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 833 OF 1915.

SHARFUDDIN, J. CHAPMAN, J. 1915, 29, July.	BHUTA SANTAL, Accused, Petitioner, *v.* DAMA SANTAL, Complainant, Opposite Party.

Criminal Procedure Code (Act V of 1898) sec. 181, cl. (4)—Kidnapping committed outside British India—Jurisdiction of British Courts "when person kidnapped" detained within British India—Moyurbhunj not in British India.

A person charged with having committed the offence of kidnapping in Moyurbhunj which is outside British India cannot be tried by a Court in British India within the local limits of which the person kidnapped may be conveyed or concealed or detained.

This was a Rule granted on the 28th June 1915 calling on the District Magistrate, to show cause why the proceedings pending before Mr. T. R. Godfrey, Deputy Magistrate of Balasore against the Petitioner should not be quashed.

The facts as they appear from the petition on which the Rule was issued were as follows:—

On the 12th May last, one Dama Santal of Rajpur, Thannah Jellasore, laid an information at the G. R. Police Station at Balasore to the effect that he had seen the Petitioner Bhuta in the company of a girl named Gurubari who was a minor aged 13 years at the Jellasore Railway Station, that the Petitioner had enticed her away from a *hât* in village Muruda without the knowledge of her parents and with a view to send her as a cooly to an Assam tea garden and he charged the Petitioner with having kidnapped in the said village the said girl from lawful guardianship.

The Police held an enquiry and submit-

ted a charge-sheet against the Petitioner under sec. 363 of the Indian Penal Code.

On the 11th June the Petitioner filed a petition before the Deputy Magistrate before whom he was placed for trial, stating that Muruda where the offence was alleged to have been committed lay within the Native State of Moyurbhunj and therefore the Court at Balasore had no jurisdiction to enquire into the offence, and praying that the proceedings might be quashed on that ground, but the Deputy Magistrate overruled the objection and held that he had jurisdiction under sec. 181, (4), of the Criminal Procedure Code.

The Petitioner thereupon prayed for an adjournment to enable him to move the High Court to quash the said proceedings or for a transfer thereof and the Deputy Magistrate was thereupon pleased to adjourn the case to the 2nd July next.

Babu Monmotho Nath Mukherjee for the Petitioner.

Mr. Sultan Ahmed for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

This Rule was issued on the District Magistrate to show cause why proceedings against the Petitioner should not be quashed; or why such other order should not be passed as to this Court may seem fit. The ground on which the Rule was issued was that the Petitioner was prosecuted for an offence of kidnapping which was committed not within the British Territory but within the jurisdiction of the Moyurbhunj State which has been held in *Queen-Empress* v. *Keshab Mohajan* (1) to be outside British India.

The District Magistrate seems to rely on cl. (4) of sec. 181, Cr. P. C., which provides that the offence of kidnapping may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped, was kidnapped or was conveyed or concealed or detained. He seems to think that although a man may have kidnapped outside British Territory, he may be prosecuted within the British Territory. It was pointed out in the above case and recently pointed out in an unreported case in the matter of *Maheswar Prasad Sing Deo* v. *The Emperor* (2) that we cannot extend the operation of the Criminal Procedure Code beyond British Territory and allow a case to be tried within the British dominion for an offence committed in a State beyond British India.

The Rule is made absolute. The proceedings are quashed.

Rule made absolute.

(1) I. L. R. 8 Cal. 985 (1882).

[CRIMINAL REVISIONAL JURISDICTION.[

REV. No. 877 OF 1915.

CHAPMAN, J.
WALMSLEY, J.
1915,
Heard,
10, August
Judgment,
17, August.

GANGADHAR PRADHAN,
Petitioner,
v.
KING-EMPEROR,
Opposite Party.

Code of Criminal Procedure (Act V of 1898), sec. 476—"Naraji" petition filed in Court impugning police report declaring information false if can be made over to another Magistrate for enquiry and report—Proper procedure to be followed—Order for prosecution, when and by whom should be made—Sec. 537, scope of;—Irregularity not occasioning failure of justice.

The Petitioner lodged an information with the Police who reported to the Sub-divisional Magistrate that the information was false. The Petitioner filed a petition before the Sub-divisional Magistrate impugning the police report and praying for the trial of the accused. The Sub-divisional Magistrate referred the petition to a

(2) Unreported. Decided on 21st May 1914.

GANGADHAR PRADHAN *v.* KING-EMPEROR.

Sub-Deputy Magistrate for enquiry and report with instructions to submit a proceeding under sec. 476, Cr. P. C., in case the police report was found to be correct. The Sub-Deputy Magistrate reported the charge to be false and submitted a proceeding under sec. 476, Cr. P. C., whereupon the Sub-divisional Magistrate entered the Petitioner's case as false and tried and convicted him under secs. 182 and 211, I. P. C.

Held—*That a petition impugning the correctness of a police report and praying for the trial of the accused should always be treated as a complaint and should not be referred to another Magistrate for enquiry and report. If sent to another Magistrate it must be sent for disposal. The other Magistrate can then after enquiry and making a proper order dismissing the complaint pass an order under sec. 476, Cr. P. C.*

The Code does not permit a Magistrate to refer a complaint to another Magistrate for enquiry and report. An order under sec. 476 made by the other Magistrate in such a case would be without jurisdiction.

That the trial by the Sub-divisional Magistrate was, however with jurisdiction inasmuch as he derived his jurisdiction to try the charge under sec. 211, I. P. C., not only from the order, if any, under sec. 476, but also from the police report.

QUEEN-EMPRESS *v.* SHAM LAL (1) *followed.*

That it is a matter of discretion not of statutory provision that such a petition should be finally disposed of as complaint before the prosecution under sec. 211 commences and in the present case no failure of Justice having been occasioned the irregularity was cured by sec. 537, Cr. P. C.

This was a Rule granted on the 5th July 1914 against an order of Babu S. L. Gupta, Sub-divisional Magistrate of Kendrapara, dated 10th May 1915, convicting Petitioner under secs. 211 and 182, I. P. C., and sentencing him to undergo six months' rigorous imprisonment which order was on appeal affirmed by Mr. H. Allanson, Sessions Judge of Cuttack, on the 25th May 1915.

The material facts will appear from the judgment.

Babus Biswanath Bose and *Khirendra Nath Dutt* for the Petitioner.

Mr. Sultan Ahmed for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner laid an information at a police station to the effect that his house had been broken into at night. The Police investigated and reported that the charge was false. They requested that the Petitioner be prosecuted under sec. 182, I. P. C. The report was received by the Sub-divisional Magistrate. Upon the same date the Sub-divisional Magistrate received a petition from the Petitioner impugning the police report and asking that the persons whom he accused should be put on their trial. The Sub-divisional Magistrate referred this petition to a Sub-Deputy Magistrate for enquiry and report intimating that if the Sub-Deputy Magistrate agreed with the view taken of the case by the police he might submit a proceeding under sec. 476, C. of Cr. P., to the Sub-divisional Magistrate for prosecution of the Petitioner under sec. 211, I. P. C. The Sub-Deputy Magistrate examined the Petitioner and his witnesses and held a local investigation. He also examined the Police Officer. He reported that the charge was false and submitted a proceeding under sec. 476, for the prosecution of the Petitioner under sec. 182 and sec. 211, I. P. C. to the Sub-divisional Magistrate.

(1) I. L. R. 16 Cal. 630.

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REPORTS (*See* Index).

Retirement of Counsel during hearing of cases.

Their Lordships sitting in the Appellate Court for hearing appeals from the Original Side of the High Court intimated last week in the course of hearing of an appeal that they would be reluctant to allow a second counsel to take up the argument of another counsel where the latter had been arguing the appeal but had left before finishing his argument. Of course if counsel was ill or had been prevented by some unavoidable cause from appearing the case would be different. But what we understood their Lordships to mean was that counsel had accepted another engagement, their Lordships were of opinion that a second counsel would not be allowed to continue his predecessor's argument. Their Lordships at the same time intimated that they always heard two counsel on the same side and they would allow a second counsel to follow the leader, and that they did not intend making any departure from this practice. But what they would not allow in future was, if one counsel had not finished his argument, that another should come in and take up his argument from where he left. We think that what their Lordships took exception to is contrary to the most approved practice. This practice if allowed to grow would prove prejudicial to the parties and also inconvenient to Judges as the continuity of the argument might be broken, and as it also might lead to repetition, loss of time and even to confusion.

We are of opinion that the observations made by their Lordships are equally applicable in original suits heard before Courts of first instance. Instances have been known in these Courts where before a counsel has finished the examination-in-chief or cross-examination of a witness another counsel appears and takes up the examination of the witness. Similar laxity has prevailed at times also in the Criminal and Civil Appellate Benches. No doubt the Judges have been always very considerate, accommodating and no less willing to consult the convenience of the profession than the interests of the parties. But the profession also owe a duty to the Court and to their clients. It seems to us therefore that if the rule laid down by the Appellate Court is followed in all Courts, making exceptions only in cases of the absence of counsel through illness or other unavoidable causes, it would promote alike the interests of justice, of the parties and of the profession at large. In Criminal cases we have always understood the rule to be so very stringent that when a counsel has accepted an engagement the Court may not allow him to retire from the case even if the client cannot continue to remunerate him for his professional services.

System of Legal Education at Oxford.

We publish below a very interesting note on the system of Legal Education at Oxford supplied to us by Sir John Trevelyan, *ex*-Judge of the Calcutta High Court and at present Reader of Indian Law at the University of Oxford and the well-known author of standard works on Hindu Law, Law of Minority and Guardianship in India and many other legal works. This note was sent to us some time ago but unfortunately it got mislaid amongst other papers and we owe Sir John an apology for delay in its publication. As the subject is of abiding interest to law students and members of the legal profession in India, the delay does not make the note in any way out of date. In addition to the outlines of legal education as given in the note we may here convey to our readers an idea of the system of tutorial work done at the Oxford University.

Upon a student joining a College at Oxford for the purpose of studying law, he is sent to the college law tutor. The tutor at the beginning of the term tells him from the printed list of University and Inter-Collegiate lectures, which of the lectures he is to attend. For attending such lectures he has not got to pay ordinarily any separate fees. Besides attending such lectures the student receives private instruction from the college tutors once or twice a week or more according to his requirements and the progress in his studies. These instructions consist chiefly in giving him guidance in the study of one or more of the subjects. For instance a student who is studying the doctrine of "Entail" in the English Law of Real Property is asked by the tutor to study certain chapters from works dealing with the history of the doctrine and others dealing with the limitations imposed on it by judicial decisions and statutes. Then he is required to write what is termed "an essay" at Oxford on the subject and bring it to the tutor when he comes to see him next. The tutor reads his essay and can judge whether his pupil has acquired a clear idea on the subject. The tutor by the selection of the theme and its treatment by the student can at once ascertain whether the student has actually consulted the works to which he gave him reference or shirked work and collated his "essay" from what he found in ordinary text books. An Oxford tutor is in no sense a "coach", and he is of no assistance to a student who wishes to get up his subject by "cramming." For such purposes, if the student so desires, he may take up a "coach." But "coaching" does not form a part of the college system of instruction and the student has to make his own arrangement and pay for the "coach" separately himself. Ordinarily a student at Oxford attaches more importance to independent studies under the guidance of his tutor than to assistance to "cramming" by a "coach."

Prosecutions under sec. 476, Cr. P. C., out of stale judicial proceedings.

Sec. 476 of the Code of Criminal Procedure empowers a Court to direct a prosecution for certain offences committed before it or brought to its notice in the course of a judicial proceeding. This section in its practical application has presented many difficulties and has often been the subject of judicial decisions in the different High Courts. One of the questions arising in connection with it on which there is no uniformity of opinion is whether it is incumbent on the Court to take action simultaneously with the disposal of the case which gives rise to the occasion for the exercise of the jurisdiction under the section or it is competent to the Court to take action any time it chooses.

Sec. 476 of the Code re-enacts in an amended form two acts of Geo. II and Geo. III for rendering prosecutions for perjury and subornation of perjury more easy and effectual and there can be no doubt that the provisions of the section when first enacted as sec. 171 of the Code of 1861 were suggested by the provisions of secs. 19 and 20 of the Criminal Procedure Act 1851 (14 and 15 Vict. c. 100) and it is therefore relevant to consider in this connection the English enactment on the subject. As pointed out by Sir Arnold White, C. J., in *Rahimadulla Sahib* v. *Emperor*, I. L. R. 31 Mad. 140, so far as the present question is concerned, no distinction can be drawn between the language of the English Statute and that of sec. 476 of the Code. In this case which was decided by a Full Bench of the Madras High Court the opinion of the majority of the Judges was that an order of commitment cannot be properly made under the English enactment as an independent proceeding after the close of the case in which the offence is alleged to have been committed and the intention of the Indian Legislature in enacting sec. 476, Cr. P. C., was that an order should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is part of the proceeding. This view was to a large extent based on certain observations of a Full Bench of the Calcutta High Court in *Begu Si[illegible]* *Emperor*, I. L. R. 34 Cal. 551. In *Aiya [illegible]* v. *Emperor*, I. L. R. 32 Mad. 49, a subsequent Full Bench of the Madras High Court [illegible] prising of Sir Arnold White, C. J., [illegible] J., Miller, J., Sankaran Nair, J., and Pinhey, J., affirmed (Miller, J., dissenting) the same view. It was pointed out that sec. 476, Cr. P. C., is a self-contained section, sub-sec. (1) giving the Court power to put the law in motion and sub-sec. (2) providing the procedure to be followed when the law has been put in motion and though the final order under the section may not issue at once the Court must at least commence to take action under the section promptly in which case it may be considered as a continuation of the proceedings.

In the Calcutta case above referred to, *Begu Sing* v. *Emperor*, I. L. R. 34 Cal. 551, the point that was directly referred to the Full Bench was whether the successor in office of the Judge who tried the original case has power to make the order for prosecution under the section and it was held that he could not inasmuch as the power conferred by the section was properly exerciseable only at or immediately after the conclusion of the trial. Maclean, C. J., remarked that if months after the trial the Court might act under sec. 476 it was difficult to appreciate the necessity of sec. 195. This decision of the Full Bench has been subsequently overruled by a Special Bench of the Calcutta High Court in *Bahadur* v. *Eradatullah Mallik*, I. L. R. 37 Cal. 642 and it was laid down that there was nothing in the section to warrant withholding from the word "Court" its natural meaning with the sense of continuity it implies notwithstanding any change of officers. Their Lordships however distinctly expressed the view that action under sec. 476 of the Code should as far as possible be prompt and expeditious. In a later case *Bhim Lal Shah* v. *Bisu Sing*, 17 C. W. N. 290 decided after the decision of the Special Bench, Sharfuddin and Coxe, JJ., condemned a belated order for prosecution made a month and a half after the disposal of the original case holding that this belated order did not represent the independent judicial opinion of the Magistrate concerned.

Long before the Special Bench of the Calcutta High Court upset *Begu Sing* v. *Emperor*, the Bombay High Court (Chandavarkar and Knight, JJ.), in *In re Lakhidas Lalji*, 32 Bom. 194 refused to accept the view taken by the Full Bench of the Calcutta High Court and came to a conclusion ultimately arrived at by the Special Bench in *Bahadur* v. *Eradatullah Mallik*, I. L. R. 37 Cal. 642 and Mookerjee and Newton, JJ., who made the order of reference to the Special Bench strongly relied on this decision in advocating the opposite view to that laid down in *Begu Sing* v. *Emperor*.

In *Girwar Prosad* v. *King-Emperor*, 6 A. L. J. 392 the Allahabad High Court declined to follow the decisions of the Madras High Court referred to above and held that a Munsif had jurisdiction to take action under sec. 476 eighteen months or more after the conclusion of the case in which the offences were said to have been committed. Then in *In the matter of the petition of Nawal Sing*, I. L. R. 34 All. 390, Mr. Justice Banerji upheld the order of a Subordinate Judge passed under sec. 476 several years after the conclusion of the case in which the offences were said to have been committed. In a recent case *Emperor* v. *Tilak Pandey*, I. L. R. 37 All. 344, Chamier and Piggot, JJ., after a review of all the authorities have held that there is nothing in sec. 476 which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. Thus we have drifted far from the moorings of the principles of English Law on the subject and we must now look to the Legislature to decide whether it is desirable to start prosecutions under the section out of stale judicial proceedings. The obvious objection to such belated prosecutions is that after a lapse of time evidence for the defence may not be available.

LEGAL EDUCATION AT THE OXFORD UNIVERSITY.

It may interest Indian readers, especially those who are contemplating entering the legal profession to know something about the Law School at the University of Oxford. Nowhere will be found a more distinguished staff of Professors, and nowhere can a student obtain a more sound and competent knowledge of English Law. The names of some of the Professors are known far beyond the limits of the University. Professor Dicey who has returned from the Vinerian Professorship of English Law, still lectures on the subject of which he is the most masterly exponent. Lectures on International Law are delivered by Professor Holland who is recognised as the most distinguished English writer and teacher of that branch of the law. Dr. Goudy the Regius Professor of Civil Law has raised the study of Roman Law at Oxford to a very high standard. The new Vinerian Professor of English Law Mr. Geldart has for some years been a very successful law tutor at Trinity College. There are Readerships in Roman Law and in English Law and each college has its law tutor. It might be invidious to make any special remarks with regard to them. Suffice it to say that they are barristers distinguished for learning and capacity of teaching, and what is perhaps better still, they are all very keen on their work, and spare no pains

to interest their pupils in the study of the law. All college tutors and lecturers give private instruction as well as lectures to their pupils, and some Professors and Readers give informal instruction in addition to their lectures.

Jurisprudence is taught by Professor Vinogradoff, who before he came to Oxford was a Professor at Moscow. He worthily fills the chair which was vacated in 1903 by Sir Frederick Pollock. There is also a Reader in Indian Law, whose lectures are mainly intended for the I. C. S., and Indian Forest Service probationers.

The examinations in law consist of the preliminary examination in the School of Jurisprudence, the Honour School of Jurisprudence, and one of the groups in the Pass School at the second public examination. These are avenues to the B.A. degree. In addition there is the examination for the degree of Bachelor in Civil Law. Work for this is done by Oxford men after they have taken their B.A. degree, but graduates of Indian and Colonial Universities are admitted to read for it without going through the ordinary course of education at Oxford, provided they satisfy the Board of the Faculty of Law that they are competent to enter upon an advanced course of law.

The preliminary examination is not obligatory upon candidates in the Final Honour School of Jurisprudence.

This examination includes 1. (*a*) the Outlines of English Constitutional and Political History after A. D. 1066 or (*b*) the Outlines of European History from A. D. 800 to A. D. 1494. 2. The Institutes of Gaius (portions of Books I, II and III). There is also translation from Latin into English, and either (1) logic or the first book of Bacon's *Novum Organum* or (2) a portion of a prescribed Greek, French or German author. Special privileges are given to Indian "senior" or "junior" students, exempting them from examination in Greek or Latin.

The subjects for the Final Honour examination are—

I. General Jurisprudence and the Theory of Legislation.

II. Roman Law: (1) the Institutes of Gaius, the Institutes of Justinian, (2) Digest IX, 2, *ad legem Aquiliam*. The latter may be omitted by those who do not aim at a place in the first class.

III. English Law: (1) of Real Property; (2) Contract; (3) of Torts and (4) Constitutional Legal History.

IV. International Law. This subject is optional for candidates who do not aim at a first class.

In the Pass School the law subjects are:—

Either the Principles of the English Law of Contracts or the Institutes of Justinian (omitting certain parts), or the Hindu Law of the Family, Family Property and Inheritance or Military Law.

The B. C. L. Regulations include the following subjects:—

I. Jurisprudence. All candidates will be examined in Jurisprudence and the Theory of Legislation.

II. Roman Law. All candidates will be examined in:—

1. The Principles of Roman Private Law as set forth in the Institutes of Justinian.

2. One special subject, to be selected by each candidate for himself from the following:—

(1) Ownership and Possession.

(2) The Theory of Contract generally.

III. English Law. All candidates will be examined in—

1. Real and Personal Property.

2. Common Law (including Contracts, Torts, Criminal Law, and the Procedure of the High Court).

3. Equity (with special reference to Trusts and Partnership).

4. One special subject to be selected by each candidate from the following list:—

(1) Agency.
(2) Sale.
(3) Easements and *Profits-à-prendre*.
(4) Specific Performance.
(5) Criminal Law.
(6) Evidence.
(7) The History of English Law.

IV. International Law. All candidates will be examined either in—

1. International Law; or in
2. The Conflict of Laws.

GANGADHAR PRADHAN *v.* KING-EMPEROR.

The Sub-divisional Magistrate directed that the case should be entered as false. The Sub-divisional Magistrate thereupon tried the Petitioner upon charges under secs. 182 and 211, I. P. C. The trial ended in conviction.

It has been held by this Court that a petition such as that presented by the Petitioner to the Sub-divisional Magistrate is a complaint. The latter should therefore either have made over the complaint to the Sub-Deputy Magistrate (not for enquiry and report) but for disposal or he should have examined the complainant himself, recorded reasons for distrusting the truth of the complaint, held the enquiry himself and then himself passed a formal order dismissing the complaint. The important points to notice are *first* that such a petition should always be treated as a complaint and *secondly* that the petition should not be referred to another Magistrate for enquiry and report. If sent to another Magistrate it must be sent for disposal. The other Magistrate can then after enquiry and making a proper order dismissing the complaint pass an order under sec. 476. The Code does not permit a Magistrate to refer a complaint to another Magistrate for enquiry and report. An order under sec. 476 made by the other Magistrate in such a case would be without jurisdiction. We have been somewhat particular in setting out the above details because the law on the subject is very imperfectly understood. In most Subdivisions the Magisterial staff consists of a Sub-divisional Magistrate and a Sub-Deputy Magistrate and it is not unnatural that the Sub-divisional Magistrate knowing that he will have to try the charges under secs. 182 and 211 himself, should send the case in the first instance to the Sub-Deputy Magistrate for enquiry and report. The motive is not improper but the procedure does not have the sanction of the Code and it frequently gives rise to legal difficulties.

It has been held however by a Full Bench of this Court in the case of *Queen-Empress* v. *Sham Lal* (1) that in such a case the Sub-divisional Magistrate derives his jurisdiction to try the charge under sec. 211 not only from the order, if any, under sec. 476 but also from the Police report. There can be no doubt therefore that the trial was with jurisdiction.

The Sub-divisional Magistrate would have exercised a better discretion if he had acted in the manner which we have indicated above. But it is a matter of discretion not of statutory provision. There is no statutory provision requiring that such a petition shall be finally disposed of as a complaint before the prosecution under sec. 211 commences. Now after conviction a breach even of a statutory provision can be remedied by the application of sec. 537 of the Code of Criminal Procedure which says that subject to the provisions of the Code no sentence shall be reversed on revision on account of any error, omission or irregularity in the proceedings before trial unless a failure of justice has in fact been occasioned. The words "in fact" have at the last amendment been added to the section to emphasize the reality of this requirement. We are quite unable to say that any failure of justice has in fact been occasioned in the present case.

The Rule is discharged.

Rule discharged.

(1) I. L. R. 14 Cal. 707 (1887).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 29 OF 1914.

JENKINS, C. J.
WOODROFFE, J.
MOOKERJEE, J.
1915,
25, May.

J. I. J. HYAM
v.
M. E. GUBBAY.

Specific performance of contract—Agreement to reduce terms into writing—Contract if complete before writing—Contract completed subject to insertion of "usual terms and conditions," if specifically enforcible—Vendor if may waive such terms and enforce others—Earnest-money, payment of, if conclusive of completed contract—Uncertainty—Variance between pleading and proof.

In a suit for specific performance of a contract for sale and purchase of immovable property where the purchaser agreed to buy the property at a certain price and agreed to certain terms and conditions as he understood them and paid earnest-money and the terms of the contract were sought to be proved partly by evidence in writing and partly by oral evidence and it appeared that the parties contemplated a formal written agreement to be approved and afterwards executed embodying the special terms and conditions already supposed to have been agreed upon and the "usual terms and conditions" of sale and purchase and it appeared that there were a number of terms and conditions admittedly not agreed to or discussed between the parties which were afterwards embodied in a draft agreement prepared by the vendor's solicitor and submitted for the approval of the purchaser and which draft agreement the purchaser did not approve,

Held—*That there was no completed contract between the parties capable of being specifically enforced.*

Per JENKINS, C. J. *It being expressly pleaded in the plaint that it was a matter of actual agreement and not merely the expression of a desire that the terms should be embodied in a written agreement there was, in the absence of such a formal contract in writing, no concluded contract between the parties.*

That where the terms of a contract are sought to be proved by oral evidence the provision for a prospective written agreement cannot be treated as negligible the more so where the supersession is of an oral by a written agreement and not merely of one writing by another.

That even in the case of a supersession of a written document by a more formal writing the circumstance that the parties do intend to make a subsequent agreement has been held to be strong evidence that they did not intend the previous negotiation to amount to an agreement.

That even if the main terms be substantially agreed upon and to that extent the purchaser may have considered that there was a contract and have used language appropriate to that position nevertheless where it appears that the prospective written agreement contemplated embodying the term agreed upon or supposed to have been agreed upon together with other terms and conditions described as "usual terms and conditions" the contract cannot be specifically enforced for uncertainty.

That the mere payment of earnest-money did not preclude the purchaser from pleading that there was no concluded contract.

Per WOODROFFE, J.—*The Court will not enforce specific performance of a contract the terms of which are uncertain.*

The question whether a contract is uncertain is a question of fact which arises on the documents and oral evidence tendered in support of it.

An Appeal Court is not bound to accept the first Court's appreciation of the facts of the case. Both the facts and law are open to the Court of Appeal. But Appellant should satisfy the Appeal Court that the judgment appealed against is erroneous.

The mere reference to a formal agree-

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ment will not prevent a binding bargain. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put into more formal shape does not prevent the existence of a binding contract.

The payment of earnest-money is itself evidence of a concluded contract.

Per MOOKERJEE, J.: *It is well settled that the fact that the parties intended to embody the terms of the contract in a formal written agreement is strong evidence that the negotiations prior to the drawing of such writing are merely preliminary and not intended or understood to be binding.*

If it is definitely expressed and understood that there is to be no contract until the formal writing is executed there is plainly no binding agreement formed until this provision is complied with.

It is also true that if all terms of the agreement have not been settled and it is understood that these unsettled terms are to be determined by the formal contract, there is no binding obligation until the writing is executed. But if the oral agreement or written memorandum is complete in itself and embodies all the terms to be inserted in the intended formal writing a binding obligation is fixed on the parties unless it is understood and intended that such contract shall not become operative until reduced to writing.

The question is mainly one of intention. If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract; if however it is viewed as the consummation of the negotiations, there is no contract until the written draft is finally signed.

To determine which view is entertained in any particular case several circumstances may be helpful, as for example whether the contract is of that class which are usually found to be in writing, whether it is of such a nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or usual contract, whether the negotiation itself indicates that a written draft is contemplated as a final conclusion of the negotiation.

If a written draft is proposed, suggested or referred to during the negotiations it is some evidence that the parties intended it to be the final closing of the contract.

The Court should refuse specific performance where there is substantial variance between the pleading and proof.

The draft agreement containing terms which were never settled before between the parties, the legitimate inference to be drawn is that the parties intended the written draft to be the consummation of their negotiations which were to be treated as concluded only upon the final execution of the written agreement.

Where many terms still remained undetermined it is a sure index that the contract had not yet been concluded.

Where there is ambiguity in any of the conditions of sale in restriction of the rights of the purchaser the condition should be construed more strictly against the vendor.

This was an appeal preferred on the 4th May 1914 against the judgment of Mr. Justice Chitty of this Court, dated 11th February 1914, passed in its order may Original Civil Jurisdiction.

The suit out of which this appeal arose was one for specific performance of an alleged agreement for the sale and purchase of a house property in Calcutta.

The plaint in the suit alleged that an agreement was made "on or about the 13th November 1912 between the Plaintiff

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through his representative and the Defendant through his broker" whereby the Plaintiff agreed to sell and the Defendant to buy the property in question upon certain terms and conditions set out in the plaint; the plaint also pleaded that this agreement was confirmed by the Defendant before the vendor's solicitor Mr. Gregory on the 15th November 1912 and the plaint further stated that it was also agreed that there should a formal written agreement drawn embodying the usual conditions of sale and purchase including the special conditions already agreed to.

The broker in the transaction, Mr. Owen Owen who was called on behalf of the Plaintiff, stated that he wrote a letter on the 13th November to Mr. Gregory the vendor's solicitor at the instance of the Defendant setting out the terms and conditions accepted by the Defendant. This letter was repudiated by the Defendant as being in excess of authority, and it was admitted by Mr. Owen that he did not show the letter to the Defendant when he wrote and sent it to the vendor's solicitor, and Mr. R. M. Cohen the Plaintiff's representative in Calcutta in his evidence also stated that the letter did not correctly set out the terms and that the agreement was completed on the 15th November personally between Mr. Cohen and the Defendant himself on terms somewhat different to the terms set out in the letter of the 13th November, and the vendor called Mr. Gareh an assistant of Mr. Cohen to prove the alleged agreement made on the 15th November as stated by Mr. Cohen.

Mr. Justice Chitty who tried the suit held in his judgment, dated the 11th February 1914, that there was a definite, complete and binding agreement between the parties and ordered specific performance of the agreement as pleaded in the plaint but his Lordship held that the agreement was made on the 15th November as alleged by Mr. Cohen.

The Defendant appealed from this judgment and the appeal was heard before Jenkins, C. J., and Woodroffe, J., on the 16th, 17th, 18th and 21st December 1914, when *Mr. S. Hyam* appeared for the Appellant and *Sir S. P. Sinha* and *Mr. Zorab* appeared for the Respondent and judgment was reserved. Then on the 16th, 19th, 20th and 21st April 1915 the appeal was re-argued before Jenkins, C. J., and Woodroffe and Mookerjee, JJ., when *Mr. S. Hyam* (with him *Mr. N. Ghatack*) appeared for the Appellant and *Mr. Zorab* (with him *Mr. J. Ingram*) appeared for the Respondent.

Mr. Hyam for the Appellant urged that the parties were not *ad idem* and therefore there was no agreement according to law. Even if there was an agreement according to law, the case sought to be made out in Court on behalf of the Plaintiff, Respondent, is a departure from the allegations in the plaint, and therefore there cannot be specific performance. Plaintiff can only succeed *secundum allegata et probata*. *Lindsay* v. *Lynch* (19), *Reynolds* v. *Waring* (21), *Mortimer* v. *Orchard* (20), and *Hawkins* v. *Maltby* (18), Fry Specific Performance, 5th Ed., §§ 634, and 635. Parties agreed to have a written agreement made embodying the special conditions agreed upon and "the usual conditions" of sale and purchase (para. 4 of the plaint), therefore on the face of the plaint itself there cannot be specific performance unless and until the "usual terms" are settled. *Rummens* v. *Robins* (3). The parties had agreed to have a written agreement drawn by the

(3) 3 DeG. J. and S. 88 (1865).
(18) L. R. 3 Ch. 188 at p. 194 (1867).
(19) 2 Sch. and Lef. 1 (1804).
(20) 2 Ves. 248 (1793).
(21) Younge 346; 34 R. R. 284 (1831).

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Plaintiff's solicitor and submitted for the approval of the parties embodying the terms which were ultimately to bind the parties. Such an agreement though submitted for the approval of the Appellant, he never approved of and the agreement was never executed. Therefore the Plaintiff's suit was premature and there cannot be specific performance of an agreement to make an agreement. *Hume* v. *Bull* (10) and *Von Hatzfeldt Wildenburg* v. *Alexander* (1). If the making of the prospective written agreement was not one of the very terms of the bargain, and if the written agreement was intended only to embody into legal language the terms already agreed upon and no more, then whether the written agreement is executed or not will not matter. But the intention of the parties here was to settle all the terms that were to bind the parties finally and the making of the written agreement was one of the very terms of the bargain. If the evidence as to this is not clear, then it becomes a matter for construction. The draft agreement contains admittedly other terms than those agreed upon or supposed to have been agreed upon. Therefore the intention was not merely to throw into legal language the terms agreed upon and no more. If the intention was merely to throw into legal language the terms already agreed upon and no more, Plaintiff's solicitor would have had no power to add to or vary the terms supposed to have been already settled between the parties, and the solicitor has done both. *Rossiter* v. *Miller* (4), *per* Lord Hatherly at p. 1143, *per* Lord Blackburn at p. 1151 and 1153, *per* Lord Gordon at p. 1151. And the mere fact of a solicitor intervening has been held to be cogent evidence that the intention of the parties was that the written agreement, when made, was to be the final agreement. *Ridgway* v. *Wharton* (2) *per* Lord Cranworth at pp. 263, 264 and 268, *per* Lord St Leonards at p. 288. There are no cases known where, when the terms of an agreement have to be gleaned from conversations, that a prospective written agreement contemplated by the parties has been disregarded and specific performance allowed. Apart from rules of construction, upon the fact that the Plaintiff's solicitor sent the draft agreement containing terms in addition to those already agreed upon, the Appellant was justified in refusing to accept the draft agreement. The draft agreement was really a counter proposal. *Jones* v. *Daniel* (9) and *Hajee Mahomed* v. *Spinner & Co.* (25).

The vendor purported to sell and the purchaser to buy an estate which is equivalent to an estate in fee simple in possession. It was admitted on behalf of the vendor that there were two existing leases, and the Appellant was therefore justified in objecting to specific performance. There was no stipulation regarding these leases and Appellant was entitled to vacant possession. *Lincham* v. *Cotter* (23). Existing leases amount to a defect in title. *Collier* v. *Jenkins* (22). A number of important terms were left to be settled afterwards in the written agreement, *e.g.*, as to possession, time for completion, and the manner in which conveyance was to be executed. Therefore there cannot be specific performance until the written agreement was completed. *Rossiter* v. *Miller* (4), *per* Lord O'Hagan at p. 1149. In any event purchaser is entitled to insist on the convey-

(1) L. R. [1912] 1 Ch. 284 (1911).
(4) 3 App. Cas. 1124 (1878).
(10. 7 Ch. Div. 29 (1877).
(2) 6 H L. C. 268 (1854).
(4) 3 App. Cas. 1124 (1878).
(9) [1894] 2 Ch. 332.
(22) Younge 295 ; 34 R. R. 268 (1831).
(23) 7 Ir. Eq Rep. 176 (1844).
(25) I. L. R. 24 Bom. 510 (1900.

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ance being drawn in strict accordance with the terms agreed upon or supposed to have been agreed upon. Further the decree is not in terms of the judgment. (Fry Specific Performance, 5th Ed., § 1208).

Mr. Zorab on behalf of Respondent.—The written agreement was intended merely to put into shape the terms agreed upon, therefore whether or not the written agreement was completed vendor was entitled to specific performance. *Rossiter* v. *Miller* (4), *per* Lord Hatherley at p. 1143. If the terms in the draft agreement, other than the terms agreed upon, are not usual terms they may be disregarded and specific performance can be had of the remaining terms which were already agreed upon. Appellant took objections to only three of the terms in the draft agreement and they were what were already agreed upon, therefore the Appellant may be taken to have waived his objections to the remaining terms of the draft agreement. The agreement sought to be specifically enforced was completed on the 13th November by the broker on behalf of the Appellant and the terms of the agreement are recorded in the broker's letter of the 13th November, only that two terms have to be read into that letter inasmuch as the terms were accepted by the broker but omitted to be put in the letter. Evidence given on behalf of the Plaintiff-vendor should be accepted as true, even if not true, specific performance should be granted of the agreement pleaded in the plaint.

Leases are not encumbrancés (cites Stroud's Judicial Dictionary). The objections taken to specific performance are not the objections of the Appellant since he never took them himself in his correspondence. Therefore they are not the true reasons for his refusal to perform the contract.

(4) 3 App. Cas. 1124 (1878).

Mr. Hyam in reply.—The making of the written agreement was one of the very terms of the bargain; besides, the intention of the written agreement was not merely to throw into legal language the terms already agreed upon but finally to settle all terms that were to bind the parties. In order to succeed Plaintiff-vendor must show not only that there was an agreement but also that the terms of the agrement were clearly settled. There is not a little doubt as to what these terms were. Therefore there cannot be specific performance where the terms of the agreement are not clear. A vendor cannot be heard to say that if the remaining terms in the draft agreement are not "usual terms" they may be disregarded. The settling of the "usual terms" was not only for the benefit of the vendor but also of the purchaser and therefore vendor cannot waive it. *Lloyd* v. *Nowell* (6). Appellant not specifically objecting to the remaining terms in the draft agreement does not amount to an acceptance of these terms. The draft agreement was really a counter offer and vendor could not throw upon the purchaser the duty of specifically objecting to the terms proposed, *Hajee Mahomed* v. *Spinner & Co.* (25), and it was for Appellant's solicitor to advise as to whether or not the remaining terms could safely be accepted by the Appellant, but the parties fell out over terms supposed to have been agreed upon and the time never arrived for Appellant's solicitor to be consulted. Even, if not specifically objecting be a waiver of objection, it can only mean to be a waiver conditional upon the removal of the specific objections taken. These objections were not removed and Appellant can take any and all objections. Dart's Vendor and Purchaser, 7th Ed., pp. 508 and 509 (note *b*). If the broker's

(6) [1895] 2 Ch. 744.
(25) I. L. R. 24 Bom. 510 (1900).

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letter of the 13th November is the agreement between the parties then no other terms can be added to it. (Sect. 92, Evidence Act.) Leases are encumbrances, only tenancies from year to year have been held not to amount to an encumbrance [Stroud's Judicial Dictionary, Dart's Vendor and Purchaser, 7th Ed., pp. 1086 and 1087, *Collier* v. *Jenkins* (22)], and purchaser is entitled to actual possession where there is no stipulation to the contrary. *Lineham* v. *Cotter* (23). It is not for the Court to embark upon an enquiry as to what are the true reasons for objecting to specific performance, the Court should only consider whether the objections taken are valid or not. Dart's Vendor and Purchaser, 7th Ed., p. 509 (c).

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—This appeal arises out of a suit for specific performance brought by the Plaintiff who claims to have entered into a concluded contract for the sale to the Defendant of immovable property in Calcutta. Negotiation is not denied, nor is there any dispute as to the identity of the property or as to the price, but it is contended by the Defendant that there is no concluded contract and certainly not one that should be specifically enforced. The defence failed before Mr. Justice Chitty, and he passed the decree for specific performance from which this appeal is preferred.

The property in dispute belongs to the Plaintiff, Mr. Gubbay, who lives in London. Mr. R. C. Cohen, acting on his behalf, instructed Mr. Owen, a house-broker, to find a purchaser. The price ultimately asked was Rs. 1,33,000. Mr. Owen found a person ready to purchase at that price in the Defendant, Mr. Hyam, who is in the habit of buying property, with a view to subsequent building operations. Mr. Hyam was told by Mr. Owen that there were certain conditions on which Mr. Cohen insisted. As the precise limits of those conditions is a matter in dispute between the parties, I will describe them generally as designed, (1) to prevent the building of a temple or mosque on the land, and (2) to secure to the Jewish school, which occupied a part of the premises, a continuance of their possession for a year. To these terms Mr. Hyam expressed his assent in the sense in which he understood them. On the 13th November Mr. Owen wrote to Mr. Gregory, the Plaintiff's attorney, as follows :—

Calcutta 13th Nov. 1912.
7/1 and 8 Pollock St. and
1 Mansook Lane.

Gal. Gregory, Esq.

DEAR SIR,

With reference to our conversation of date in regard to the above premises, my principal accepts your client's offer made by you to me for rupees one lac and thirty-three thousand only. My principal agrees to have no temple or mosque built on these premises or to cause any nuisance to the Jewish Synagogue. He further agrees that he will not ask the Jewish school to vacate for 12 months from the date of execution of the conveyance. The time to execute and complete the conveyance shall be for six weeks from the date of the contract, subject to approval of titles, by my principal's solicitor. Please ask your client to confirm this to-day, if possible.

Yours faithfully,
OWEN OWEN.

On the 14th Mr. Cohen confirmed the arrangement orally to his attorney, Mr. Gregory, subject to the purchaser paying Rs. 5,000 as deposit money. Up to this

(22) Younge 295 ; 34 R. R. 268 (1831).
(23) 7 Ir. Eq. R. 176 (1884).

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time Mr. Hyam had not orally discussed matters with Mr. Cohen or Mr. Gregory, nor was he known by them to be the intending purchaser.

On the 15th, however, there were several interviews at which Mr. Cohen, Mr. Gregory, Mr. Hyam and Mr. Owen, or some of them were present.

According to the Plaintiff there were four such interviews, *first*, one at Mr. Gregory's office at which Mr. Gregory, Mr. Owen and Mr. Hyam were present, then *one* at Mr. Cohen's office where Mr. Cohen, Mr. Hyam, Mr. Owen and Mr. Gareh met, a *third* at Mr. Gregory's office attended by Mr. Gregory, Mr. Hyam, Mr. Owen and Mr. Gareh, and *fourth* and last, an interview at Mr. Gregory's office between Mr. Gregory and Mr. Gareh.

Mr. Hyam and Mr. Owen have no recollection of the first of these interviews, but there purports to be a record of it in Mr. Gregory's day-book, which was written up by a clerk at the close of the day. But whether Mr. Hyam was present or not, nothing of importance happened at this interview, and neither Mr. Hyam nor Mr. Owen can have had any reason for falsely denying Mr. Hyam's presence.

The second interview is one of importance, for, according to the Plaintiff's case as developed at the hearing, it was then that the Defendant accepted the Plaintiff's view of the scope of the conditions.

The third admittedly took place and to a considerable extent the Defendant admits that its purport is correctly recorded in the day-book.

The Defendant knows nothing of the fourth, and it is not suggested he was present.

Mr. Gregory prepared a draft agreement on the 15th and sent it for approval to Mr. Cohen, who returned it approved on the 20th. On this last date it was forwarded for Mr. Hyam's approval.

On the 28th December a power-of-attorney was received from the Plaintiff, and Mr. Hyam was informed of this and asked to return the draft agreement approved. On the 15th January Mr. Gregory wrote to Mr. Hyam offering to send the title deeds for approval. On the same date the Defendant wrote to Mr. Gregory as follows :—

4, Middleton Row.
Calcutta the 15th Jany., 1913.

G. Gregory, Esq.,
Solicitor.
Re Pollock Street,
Premises No. 7/1 and 8.

DEAR SIR,

I am returning the draft agreement *re* above. Will you be so good as to re-draft the same in regard to the following particulars, *viz.* :—

1. As to the covenant not to build a mosque or temple, I agree to make this a personal covenant, but not to make it a covenant that will run with the land. But I do not bind myself as to the use of the premises for any other purpose.

2. As to the school remaining for a year, I agree to this, but the purchase is not to be completed before a year also.

3. As to the payment of interest on the purchase money, the interest shall be at the normal rate of 6 per cent. and not 9 per cent.

I did not write to you earlier because I was willing to let the Jewish school purchase the property, but as I now understand Mr. Gubbay is not willing to sell to the school on the terms offered by them, I am returning the draft agreement as stated above.

Yours faithfully,
J. I. J. HYAM.

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It seems probable that these two letters of the 15th crossed.

On the 17th Mr. Gregory replied to Mr. Hyam in the following terms :—

J. I. J. Hyam, Esq.,

17th January 1913,

Re 7/1 and 8 Pollock Street.

DEAR SIR,

I have communicated with my client's agent with reference to your letter of the 15th instant. They are not a little surprised at the objection you now raise, which they certainly decline to entertain.

The draft agreement submitted to you for approval is merely formal agreement, setting out the terms of the concluded contract entered into by you with my client through Mr. Owen Owen the broker, and there can be no doubt that the objections you now put forward are an after-thought on your part simply with a view of delaying the completion of your purchase.

As regards your first objection, my clients cannot understand your stating, that you agree to make the covenant restricting the erection of the mosque or temple, a personal covenant. This point was discussed and you made no qualification restricting the covenant. The covenant must, therefore, be a covenant running with the land and be binding on you and your assigns, otherwise there would be no necessity for making it one of the conditions of the sale. There is nothing in the draft agreement restricting the use of the premises except what was agreed, namely, that you are to cause no nuisance to the Jewish Synagogue.

Your second objection is most inconsistent with your agreement to allow the Jewish school to remain in occupation of the premises for 12 months from the date of the execution of the conveyance, which was fixed for the 6th January instant. If, as you say, the purchase is not to be completed before a year, there would have been no occasion to make such a stipulation. This objection also my client most emphatically declines to entertain.

As regards the third objection, I admit there was no rate of interest fixed at the time, and under my advice my client will have no objection to reduce the rate of interest from 9 per cent. to 6 per cent., provided you complete you purchase without any further delay.

The proposal on behalf of the Jewish school to purchase the property has nothing whatever to do with your contract to purchase, and you were fully aware at the time that the terms offered on behalf of the Jewish school, had been rejected by my client long before your contract, otherwise he would not have entered into the contract with you and received the earnest-money from you.

I again send you the draft agreement for your approval, and unless you return the same approved within 24 hours from this date or agree to complete your purchase on or before the first proximo (in which case the execution of the formal agreement may be dispensed with), my instructions are most peremptory to file a suit against you for the specific performance of your contract.

Yours faithfully,

G. GREGORY.

On the 22nd, Mr. Hyam wrote to Mr. Gregory as follows :—

4 Middleton Row,

Calcutta the 22nd January 1913.

G. Gregory, Esq.,

Re 7/1 and 8 Pollock St. and 1 Mansook's Lane.

DEAR SIR,

Yours of the 17th instant on the subject of the above matters to hand.

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I must repudiate your suggestion that my objections to certain terms in the draft agreement you sent me are an afterthought, or that they were put forward simply with the view of delaying the completion of the purchase of the premises in question.

With regard to the question of the covenant, not to erect a mosque or temple, being made a personal one in the conveyance, or one running with the land, with reference to which you say that the point was discussed and that I made no qualification restricting the covenant, I entirely did not discuss the point with your client or any one on his behalf, nor did I authorize any one to do so on mine. When Mr. Owen Owen reported to me that Mr. Cohen wanted to be assured that I would not pull down the existing building and erect in its place a mosque or temple, I told Mr. Owen that I certainly would not build either a mosque or a temple and told him to assure Mr. Cohen of that. Beyond this there never was any other discussion on the point, nor did any occasion arise for me to make any such qualification as you advert to in your letter regarding the covenant before you sent me the draft agreement, when for the first time I saw that the covenant was sought to be made to run with the land, and I at once objected to the same, and I deny your allegation that there was any agreement to cause no nuisance to the Synagogue which you have introduced in your draft agreement, and to which you refer at the end of the 3rd para. of your letter under reply.

With regard to the question of the occupation by the Jewish school of the premises for another year, the suggestion made to me was that although the school had no lease of the premises, nevertheless, in order not to work hardship on an institution which was charitable and Jewish, I was agreed to let the school remain on for a year to enable it in the meantime to find another habitation, and I agreed to this suggestion which I considered reasonable and agreed to defer the completion of the purchase for one year, until your client could give me vacant possession of the premises. The school was to remain on for a year, not from the date of the conveyance but from the date of the agreement for sale and purchase which was to be executed in writing, and this was so because I wanted and did insist on vacant possession, for I would have none of the trouble, worry and expense, not to mention the odium of having to turn out a charitable and communal institution from the premises which, I am informed it has made its home for the last 40 years. Mr. Cohen as one of the elders of the community and at one time the Honorary Secretary of the very school in question, I believe, would be in a position better than any one else to get the school vacated without unpleasantness, and I consented to the reasonable request of Mr. Cohen to let the school remain on for a year, provided the conveyance was similarly delayed and vacant possession given to me as above stated.

I deny that the 6th January instant or any particular date was fixed for the execution of the conveyance as you allege, or that I was aware at all that the school offered to purchase the premises, or that the said offer was rejected by your client.

In the circumstances it is open to your client as he pleases, either to accede to my terms which were agreed upon but which your client now wishes to vary, or to file his action which under instructions you threaten me with, but on my part, I shall insist on your client performing his

part of the contract upon the terms agreed as hereinbefore stated.

Yours faithfully,
J. I. J. HYAM.

On the 22nd, Mr Gregory wrote to Mr. Hyam demanding a return of the draft agreement, and on the 23rd, he wrote to him as follows :—

23rd January 1913.

J. I. J. Hyam, Esq.
Re Pollock St. and
1 Mansook's Lane.

DEAR SIR,

In continuation of my letter to you of yesterday's date, I am instructed to state, that as you have declined to complete your purchase upon the terms agreed upon, there is no necessity to prolong this matter by further correspondence. My client denies that there has been any variation on his part or that he is attempting to vary the terms of the contract, and as you decline to complete your purchase in terms thereof, my client has no other alternative left but to institute proceedings against you for the specific performance of your contract, etc., and which I am instructed to do without any further reference to you.

I have again to request you to return the fair draft agreement which was submitted to you for approval.

Mr. Hyam has explained that his delay was due to the pendency of negotiations for the purchase of the property on behalf of the Jewish school.

On the 8th February 1913 the plaint in the present suit was filed, and, among other matters, it is thereby alleged as follows :—

3. On or about the 13th November 1912 an agreement was made in Calcutta between the Plaintiff through his representative and the Defendant through his broker, whereby the Defendant agreed to purchase from the Plaintiff the said several premises free from incumbrances subject to approval of title at the price of Rs. 1,33,000 on special conditions following, namely : (1) that the said premises and the site thereof should not be used for the purposes of a mosque or a temple, or for carrying on any noisy or offensive trade or business, or for any purpose which might cause nuisance or annoyance to the Jewish Synogogue in Pollock Street, Calcutta, situate opposite the said premises : (2) that the said Calcutta Jewish School should be allowed to continue in occupation of the said premises No. 8 Pollock Street for one year, from the date of execution of the conveyance of the said property, on the same terms and conditions under which they were then occupying the same : (3) that the Defendant shall accept a conveyance of the said several premises executed under a special power-of-attorney on behalf of the Plaintiff.

4. On or about the 15th November 1912 the Defendant personally called and saw the Plaintiff's solicitors and confirmed the said agreement and paid Rs. 1,001 as earnest money therefor, and it was agreed that the Plaintiff's said solicitors should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase, including the special conditions agreed upon as aforesaid and submit the same to the Defendant for approval, it being further agreed that the said sale should be completed within six weeks from the date on which the title-deeds of the said premises should be delivered to the Defendant or his solicitors, and that in the event of the title not being approved, the Plaintiff would pay no costs.

5. A draft agreement embodying the said terms and conditions, was duly prepared by the Plaintiff's solicitors and sent to the Defendant for approval on the 20th

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November 1912, with a letter requesting the Defendant to name his solicitors to whom the title deeds of the said premises should be sent for approval on his behalf, but the Defendant never replied to the said letter. The said draft agreement is now in the possession of the Defendant and copy thereof is hereto annexed and marked "A" to which the Plaintiff refers as part of this his plaint.

Counsel for the Plaintiff experienced great difficulty in stating when the contract, on which his client sues was made. Nor is this to be wondered at, for the evidence discloses no clean-cut agreement. It has to be spelt out, if at all, from the conflicting versions given in the witness-box of what passed at several interviews, and the confusion is increased by the fact that the several interviews were not all between the same persons.

At one time the case made was that the letter of the 13th November was preceded by an oral agreement of which it was but an imperfect record, and that the imperfection was cured by what passed between the parties at the interviews of the 15th.

Ultimately the case selected by the Plaintiff for our acceptance was that the parties came to a concluded agreement on the 13th of November; but Mr. Zorab at the same time expressed his wish not to abandon such advantage as he might be able to derive from the interviews of the 15th November, and in particular the interview between Mr. Cohen and Mr. Hyam on that day. The case made in the plaint appears from the paragraphs I have already read. They allege an agreement between the Plaintiff through his representative and the Defendant through his broker on or about the 13th November and a confirmation by the Defendant to the Plaintiff's attorney on the 15th.

It is noticeable that the agreement of the 13th as alleged in the plaint does not correspond with the letter of that date, but this Mr. Zorab explains by the suggestion that the letter was an imperfect record of the contract, and that the fuller exposition of the plaint is merely a statement of that which was inherent in the letter and might properly be read into it, if regard were had to all the circumstances. Has then the Plaintiff made out that there was a concluded agreement on the 13th November?

The ultimate conclusion of Mr. Justice Chitty is expressed in these words: "I hold that there was a definite, complete and binding agreement arrived at between the parties on 15th November 1912 by which the Defendant agreed to buy the property in question for Rs. 1,33,000 subject to the three conditions set out in para. 3 of the plaint."

This certainly does not affirm a concluded contract on the 13th November and if it was the intention of the learned Judge to negative a concluded contract on the 13th, I agree with him.

This appears to me to be the meaning of the entry in Mr. Gregory's day-book of the 15th November, which contemplates that even on that date it still remained for terms to be settled. This too is borne out by the evidence both of Mr. Gregory and Mr. Cohen, from which it is clear that matters had not taken definite and final shape on the 13th; in fact so far were terms from being fixed that Mr. Cohen on the 15th informed the Defendant that he might "leave or take" his conditions. In support of this view that there was no concluded agreement, the Defendant points to such matters as the dispute regarding the scope of the special restrictive conditions. The amount of the earnest-money and the date for completion, the uncertainty involved in the stipulation

that the written agreement should contain the "usual terms and conditions of sale and purchase," the agreement that there should be an agreement in writing, and the conflict of view as to whether the contract was for a sale with vacant possession or not.

All this and also the subsequent negotiations and conduct of the parties, in my opinion, afford clear indication that there was no concluded contract on the 13th.

The next question is whether there was a concluded contract on the 15th. This is regarded by Mr. Justice Chitty as "the important date in the case," and he seems to have thought that a final agreement was concluded between Mr. Cohen and the Defendant on that day. This is not the case made in the plaint. It is however, alleged in para. 4 that on the 15th "it was agreed that the Plaintiff's said solicitors should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase including the special conditions agreed upon as aforesaid and submit the same to the Defendant for approval."

If then, as I hold, there was no concluded contract before the 15th, it is manifest on the face of the plaint that the preparation of a formal agreement in writing embodying the usual terms and conditions of purchase was an integral part of the negotiations of that day and was actually a matter of agreement between the parties. That it was an essential term of a bargain between the parties that there should be a written contract is, I think, clear even apart from the definite allegation in the plaint. Thus Mr. Owen's letter refers to the time for completion as a matter to be determined by the "date of the contract," and on his evidence he explains that the time for completion was fixed at "six weeks after the execution of the agreement." The day-book, too, shows that a written agreement was to be prepared, and the evidence on the point is to the same effect. And in fact a draft agreement in writing was actually prepared and submitted by the Plaintiff's attorney.

Can it then be said that in the absence of such formal contract in writing for none has been executed—there is a concluded contract between the parties?

In *Von Hatzfeldt Wildenburg* v. *Alexander* (1), it was said by Lord Parker as he now is, "it appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either, because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the more formal document may be ignored."

Here it is expressly pleaded in the plaint that it was a matter of actual agreement, not merely the expression of a desire, that the terms should be embodied in a written agreement. And there is the further fact that this written agreement was to take the place not of a previous writing but of previous conversations, of the uncertain character disclosed by the evidence.

I am aware of no case where a provision for a written agreement in place of oral conversations has been treated as negligible: none has been cited to us. Though there may be no presumption of law hega-

(1) L. R. [1912] 1 Ch. 284 at p. 289 (1911).

tiving legal obligation in the absence of writing where there is a stipulation for a written agreement, still, from the nature of things, the inclinaton of decision must be stronger in that direction where the supersession is of an oral by a written agreement, and not merely of one writing by another.

In *Ridgway* v. *Wharton* (2), Lord Cranworth expressed the view that the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement, and he there was dealing with the supersession of written negotiation by formal writing. While Lord Wensleydale in the same case said "These cases often occur in Courts of Law and the question then always is whether the parties mean to embody the contract made by parol in writing? If they do, nothing binds them until it is written. If they enter into a contract with a view to a written agreement, nothing will bind them but that written agreement." In the absence of a written agreement, therefore, I hold there was no enforceable contract, and in the view I take, this is sufficient to dispose of the appeal.

But in my opinion, apart from this, there are fatal objections to the success of this suit, for I think it is not established that the parties were at one. Thus the scope of what have been termed the special conditions was not definitely settled, nor were the parties agreed as to whether vacant possession was to be given on completion. I would here digress for a moment to point out that the parties might well not be in exact accord as to the precise mode in which effect should be given to the special conditions, though they were agreed as to their general character. Thus Mr. Hyam might be wanting to postpone completion for a year so as to accommodate the Jewish school and yet be unwilling to pay the purchase price borrowed for the purpose at interest until he got possession, for to him the transaction was a matter of business.

Similarly the Defendant may have been willing to bind himself personally as to the building on the land and have been unwilling to impose a restriction that might be a blot on the title. And as he intended himself forthwith to build, he might have supposed that would be accepted as sufficient. But to return to the difficulties in the Plaintiff's way, I would next point to the allegation in the plaint, that it was agreed that the Plaintiff's solicitors should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase (paragraph 4).

A draft agreement has been submitted after approval by Mr. Cohen, and its terms presumably represent what was regarded as usual.

A perusal of the document demonstrates the uncertainty of the expression "usual terms," and by way of illustration I may point to the provision in the draft that the sale is subject to tenancies, that interest at 9 per cent. is charged on the balance of the purchase money, that a right to rescind is reserved to the vendor if he is advised not to remove or comply with any objection or requisition, that the property is sold subject to all outgoings and easements though none are particularized, and that time is to be deemed in all respects to be of the essence of the contract.

If this draft represents the Plaintiff's idea of what are "usual terms," that can be introduced into an agreement for sale without discussion, it cannot be a matter

(2) 6 H. L. C. 268 (1854).

of surprise if the Defendant is not at one with him as to that.

Indeed the circumstances of this case illustrate forcibly the mischief against which the decision in *Rummens* v. *Robins* (3) was directed. There in reference to a similar provision Lord Justice Knight Bruce asked "what are the usual clauses in a contract for the sale of land? They differ almost incessantly: they differ according to the state of the title, the conveniences, the fancies and the wishes of mankind, and the particular situation, convenience and inconvenience belonging to the estate." And in view of the uncertainty of the provision it was held that there was not a contract capable of being specifically enforced.

The Plaintiff asserts, as is obligatory, that he was ready and willing to perform and carry out the agreement. Presumably the draft agreement embodied his conception of his obligation and indicates what he was ready and willing to perform. But if that be so, his readiness and willingness did not correspond with his obligations under the alleged agreement, either of the 13th or 15th November. Nor does it mend matters that the Plaintiff may have been willing at the trial to waive any of the stipulations of the draft.

No doubt as to the main features of the transaction, *i.e.*, the sale, the identity of the property, the price, and even the imposition of restrictions in some form or another, the parties were substantially agreed, and to that extent the Defendant may well have considered that as between man and man there was a contract, and have used language appropriate to that position. But that is not enough to create a concluded contract between the parties.

Nor is the Defendant precluded from pleading that there was no concluded contract merely because he paid earnest money, more especially as the mode in which the Plaintiff's agent dealt with the money shows that even he did not treat the matter as governed by a concluded agreement at the time of payment.

The conclusion then to which I come is that the learned Judge should not have decreed specific performance.

I would, therefore, allow the appeal, reverse the judgment of the first Court and dismiss the suit with costs throughout, including the costs of the appeal.

WOODROFFE, J.—This appeal, in my opinion, raises a question of fact, the principles of law applicable to such facts admitting of no doubt. The Court will doubtless not enforce specific performance of a contract, the terms of which are uncertain. If the Court does not clearly know what the contract is which the parties entered into, it cannot obviously enforce it. But the question whether a contract is in this sense uncertain is a question of fact which arises upon the documents and oral evidence tendered in support of it. In the present case the alleged contract was for the sale of the premises mentioned in the first and second paragraphs of the plaint free from encumbrances, subject to approval of title at the price of Rs. 1,33,000 on the special conditions mentioned in the third paragraph of the plaint. Those terms appear to me to be free from uncertainty in themselves, and the Defendant's agreement to them has been established by evidence which the learned Judge has accepted and which, for reasons which I later give, I also accept. This evidence is partly documentary and partly oral. There is no law in this country which in this case requires an exclusively written record, and if we were to insist upon it as a condition for the grant of specific performance, we should be requiring from the

(3) 3 DeG. J and S. 88 (1865).

parties more than the law demands. Moreover, there is in this case a document, *viz.*, the broker's acceptance of the contract. The broker was admittedly agent for both parties. Necessarily in this case as in other cases the oral evidence for the Plaintiff and the Defendant is in conflict. But we have to sift that evidence and to see which is to be believed. If upon such examination the nature of the agreement is left in doubt, the Plaintiff must fail, but if the evidence is believed to be true, we must, I think, given effect to it. If the evidence given for the Plaintiff is accepted, it, in my opinion, leaves no doubt as to what the facts are. Moreover this is an appeal and we are asked to reverse the judgment of the learned Judge on a question of fact. The Defendant in his evidence insinuates that the letter of the broker Mr. Owen was due to something more than misunderstanding. He contests both the truth and accuracy of the evidence of the latter and other witnesses; charges that the evidence of Mr. Cohen is "absolutely false" and says that he returned the draft agreement which had been sent to him by Mr. Gregory, the Plaintiff's solicitor, as he "suspected that the latter had drawn up an agreement, the terms of which were not the same as the broker's letter which he knew was the basis of it. His grievance on the facts is that the learned Judge has not accepted these charges or the evidence on which they are made. I have never held that the Appeal Court is bound to accept the first Court's appreciation of the facts. In my opinion both the law and facts are open to us. Still this being an appeal on the facts the Appellant has to satisfy us that the judgment appealed against is erroneous, and this he has failed to do. On the contrary, for reasons I later state, it seems to me that the learned Judge has arrived at a correct finding on the evidence before him. He points out that the Defendant's evidence stands alone, and as against it there is the evidence of the four witnesses—Owen, Cohen, Gareh and Gregory, the letter of the 13th November 1912 and other documentary evidence. It would, in my opinion, require a strong case which would justify us in accepting the Defendant's evidence alone as against all the other evidence which has been accepted by the Judge of first instance.

It is then alleged in the plaint as it stands that on the confirmation of the agreement and payment of the earnest-money it was agreed that the Plaintiff's solicitors should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase including the special conditions above mentioned, and should submit the same to the Defendant for approval. On the strength of this allegation and certain answers given by the Plaintiff's witnesses it is contended that there has been no completed contract between the parties and that the suit is premature. Here again the law applicable seems to me to admit of no doubt. It is well established that the mere reference to a future formal contract will not prevent a binding bargain. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put into a more formal shape, does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. "If" said Lord Cairns in *Rossiter* v. *Miller* (4), "You find not an unqualified acceptance subject to the condition that an agreement is to be prepared and agreed upon between

(4) 3 A. C. 1124 (1878).

the parties, and until that condition is fulfilled no contract is to arise then you cannot find a concluded contract." In other words the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract. The question in this suit is whether the case falls within one or other of these alternatives. So James, L. J., said in *Bonnewell* v. *Jenkins* (5) each case depends on its own special circumstances.

What then are the circumstances here? I will deal with this point at once, as it is one which if disposed of in favour of the Appellant establishes his case. This contention of the Appellant appears to me to be an after-thought. It first appears in the written statement filed in March 1913, the contract for sale having been, it is said, entered into in November 1912. It has been argued that the Defendant is a layman and could not appreciate the advantages which, it is contended, the law gives him. We are not asked to say that the Defendant is incapable of understanding or looking after his own interests, and the point here is a simple one for the party himself whatever may be the difficulties which the Court has in some cases in ascertaining what was passing in the minds of others. The Defendant has, however, only to ask himself whether it was agreed that he was in no wise to be bound until he had approved and signed a contract. If this had been the fact, it seems to me incredible that it should not at once have occurred to the Defendant, and when he was pressed by the Plaintiff we should have expected the reply :—"There is no contract. I have not signed and refused to sign any agreement."

What then are the facts? On the 15th November 1912 the Defendant admittedly paid earnest-money of Rs. 1,001. This payment was in itself evidence of a concluded contract. It is suggested that it is not, but that payment of earnest-money is merely a sort of guarantee that the buyer will seriously negotiate. This, I think, is not the case. If this earnest-money was not concluding a contract, why do we find no provision for its disposal and refund? Reliance is placed on the fact that it was not cashed directly by Mr. Cohen, but made over to his solicitor and cashed later. This, however, may well be due to the fact that Mr. E. M. D. Cohen intervened, when he found that the property on which the Jewish school was placed was going to be sold away. From the letter of the 5th December 1912 it appears that Messrs. Sassoon & Co., informed Mr. Gubbay that Mr. E. M. D. Cohen was writing to him about it. Mr. Gregory's day-book shows that Mr. Cohen accepted the Rs. 1,001 as earnest-money, the amount of which was admittedly the previous subject of discussion, and that it was after that arranged, that an agreement should be prepared and submitted to Mr. Hyam for his approval the purchase to be completed within six weeks. That Mr. Hyam considered the acceptance of the earnest money closed the transactions, appears on his evidence. That Mr. Cohen and Mr. Gregory considered the matter concluded is shown by their action in at once taking steps to get a power-of-attorney executed. On the 20th November 1912 a draft was sent to the Defendant for approval. After this the parties appear to have been waiting for the receipt of instructions from Mr. Gubbay as to whether he was prepared to cancel the sale seeing that Mr. E. M. D. Cohen of the Jewish school, which was thereby likely to be displaced, was objecting to it. Mr. Gubbay, however, refused to cancel,

(5) L. R. 8 Ch. Div. 70, 78 (1878).

and on the 28th December Mr. Gregory informed Mr. Hyam of the fact "that he will not cancel the contract for sale" and asked for the return of the draft approved, without delay. The Defendant was also informed of the arrival of the power-of-attorney authorising Mr. Cohen to act for Mr. Gubbay. To this the Defendant gave no reply. According to his case all that he had to do was to write back and say, "there is no sale to cancel until I have approved the draft contract." He did nothing and was again written to on the 2nd January asking for return of the draft. He did nothing, and having given no reply he was again written to, to the same effect on the 7th. He did nothing, and on the 13th January, Mr. Gregory wrote insisting on the sale and asking for return of the draft. This letter was not more successful than the rest and on the 15th January Mr. Gregory wrote again referring expressly to the agreement and saying that "Mr. Gubbay will not cancel the contract as you requested him to do." Legal proceedings were then threatened. With reference to this letter I may observe that Mr. Gregory says that Mr. Hyam spoke to him about cancelling the contract. The Defendant who appreciates the inference which may be drawn from the use of the word "cancel" denies that he ever used that term to Mr. Gregory. It is noteworthy, however, that if this be so he did not deny what Mr. Gregory stated in the reply which he at length sent on the 15th January 1913. I will refer to this letter later. Its only importance here is the explanation which it gives of the delay to which I have referred. According to Mr. Hyam he did not read the draft until about this date. He then states "I did not write to you earlier because I was willing to let the Jewish school purchase the property, but, as I now understand, Mr. Gubbay is not on terms offered by them willing to sell. I am returning the draft." As the learned Judge has pointed out, Mr. Hyam has not called Mr. E. M. D. Cohen to support his story and I am unable to understand how he could have thought that there was a possibility of sale to the Jewish school, seeing that he had been definitely informed on the 28th December that Mr. Gubbay refused to cancel the sale. This is followed by an important letter of the 17th January, in which Mr. Gregory alleges that the draft sent was merely the formal expression of a "concluded contract" and asking for its approval. To this the Defendant replied on the 22nd January in which letter he also assents to the position that there was a concluded contract though he disputed its terms; for he says "In the circumstances it is open to your client as he pleases either to accede to my terms which were agreed upon but which your client now wishes to vary or to file his action, but on my part I shall insist on your client performing his part of the contract upon the terms agreed." In the face of these express words it does not seem to me to be possible to say that there was then no contract between the parties. In fact, as the learned Judge points out, it is the case of both parties that a definite agreement to sell was arrived at, the difference between them being as to its terms. Mr. Cohen also evidently thought that the contract was concluded for, as above stated, he at once set about to get the power-of-attorney under which the conveyance was to be executed. It was, however, both his wish and that of the Defendant that what is called in the evidence "the usual earnest agreement" should be drawn up, and on Mr. Cohen's answers on this point reliance is placed. Mr. Cohen says that this agreement was to embody the special conditions,

as contained in Mr. Cohen's letter and stated by the Defendant himself on the 15th, and the usual terms as written by solicitors. He says that the sale was concluded with Mr. Hyam personally on the 15th and that all that was to be done was to insert the usual condition. Mr. Hyam says in answer to the question "you contemplated a written contract"?—"Yes." It may be admitted that this was the intention of both parties. The question is whether there was to be no concluded contract until the formal agreement was signed? That the parties did not then, whatever the Defendant may now do, trouble about the other conditions is shown by Mr. Hyam's letter of the 15th January in which no attention is paid to these matters and the statement in his evidence that these were no part of his business but of his attorney. Mr. Gregory says that the Defendant told him on the 15th November that terms had been finally arranged with Mr. Cohen who had accepted the earnest-money and that the remaining clauses were the usual clauses in an earnest agreement. He denies the suggestion that he understood "that this matter was subject to the preparation and approval of a formal contract" and says that the formal contract was only to include and did in fact include the ordinary conditions of sale and purchase. If this be not the fact, the Defendant could have called evidence to show that the terms proposed to be inserted were not, as he for the first time in the written statement alleges, usual conditions of sale in Calcutta. The written statement (§ 2) admits that the Defendant agreed to purchase "upon the usual terms of such purchases and sales." Here I may observe upon the Defendant's allegation that the draft contains terms which are not usual, that if it were necessary to decide this question it would be sufficient to point out that the evidence is all one way, there being nothing to controvert Mr. Gregory's statement on this point. It does not, however, seem necessary to decide this point, for the Plaintiff does not insist upon specific performance of the draft, conceding that if it be the fact, which is not admitted, that there are any terms therein which are not usual, the same could not be enforced against the Defendant. It is obvious that specific performance could not be enforced except as to terms agreed upon namely those in the third paragraph of the plaint. The draft was not signed and accepted. It is noteworthy in this connection that though the Defendant does now object to some of such terms, he did not do so in his letter of the 15th January. Like the objection that the execution of a formal agreement was a condition of the contract, this objection appears for the first time in the written statement. I should here mention that counsel for the Respondent stated that the terms of paragraph 4 of the plaint should run as follows:—"Should prepare a formal agreement in writing embodying the said terms and conditions and submit the same to the Defendant for approval," instead of "should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase including the special conditions agreed upon as aforesaid and submit the same to the Defendant for approval" and he asked that three documents should be admitted in evidence, *viz.*, the instructions for the plaint, original draft plaint in counsel's handwriting and a fair copy plaint. I thought that this application which was made after the close of the reply, came too late and moreover that the point was immaterial to the decision. The agreement of which specific performance is sought is that stated in paragraph 3 of the plaint and

stated to have been confirmed in the first three lines of paragraph 4. The Plaintiff as stated does not seek specific performance of the draft agreement with all its terms and the subsequent allegations as to the preparation of a formal agreement in whatever terms they are stated have only a bearing on the question which I have already discussed namely whether there was a contract at all until the formal agreement was drawn up. In a still more belated fashion, though the written statement does not allege uncertainty, but on the contrary willingness to complete upon the terms the "Defendant had agreed to," it was urged in argument that the contract is uncertain because the phrase "usual terms and conditions" is uncertain. [*Rummens* v. *Robins* (3)]. It would be sufficient to reply to this that there is unrebutted evidence what such conditions are, and therefore no uncertainty if we accept Mr. Gregory's evidence. But apart from this what the Plaintiff alleges is that the agreement sought to be enforced is that stated in paragraph 3 of the plaint, and the arrangement arrived at subsequent to and after the concluded contract there mentioned did not form part of it. This is a sufficient answer to the reply that the vendor cannot waive such stipulation for which the case of *Lloyd* v. *Nowell* (6) is cited. That case, moreover, is distinguishable, for there the contract was to sell "subject to the preparation by the vendor's solicitors and completion of a formal contract." This was, therefore, a term of the contract itself in that case where it was held not to be for the benefit of the vendor only and therefore could not be waived by him alone.

A new point has been raised on appeal that the sale was free from encumbrances whereas there were some leases on the property. It appears from Mr. Cohen's evidence that the property sold was subject to lease. The Jewish school were monthly tenants and the other leases expired in October 1913 that is before the expiration of the year when the Defendant was to get possession from the Jewish school and before the hearing of the suit. The first answer to this which is given by the Respondent appears to me conclusive, *viz.*, the point was not raised in the pleadings, nor was an issue directed to the point nor does Mr. Hyam anywhere say that he did not know of the existence of the leases and if he had known he would not have purchased. The Court is not called upon to raise an objection of this kind which the party himself has not raised. But it was submitted that Mr. Hyam could not raise the point as he was, it is suggested, unaware of the leases. I do not believe that he was unaware nor has he sworn that he was ignorant of them. Counsel for the Appellant stated that Mr. Owen was the common agent for both parties. Mr. Cohen swears that the possession was subject to the lease and that he told the broker, the common agent, of the tenancies affecting the properties. His evidence on this point is supported by Mr. Owen who swears that he told Mr. Hyam "exactly the terms which Mr. Cohen had proposed and he accepted them." Mr. Cohen says that the term that property should be taken subject to lease was one of his expressed conditions. Mr. Hyam says that nothing was said about encumbrances without however mentioning the leases. That Mr. Cohen's terms were as he states, is borne out by the draft agreement which he handed to Mr. Gregory on the 20th November. The draft was sent on to Mr. Hyam on the same date. Paragraph 1 of the draft expressly mentions that the property was sold

(3) 3 DeG. J. & S. 88 (1865).
(6) [1895] 2 Ch. 744.

free from encumbrances but "subject also to the existing tenancies affecting the same." Incidentally I may remark that Mr. Gregory was here distinguishing between encumbrances and leases, the two terms not being always synonymous. This agreement must have put Mr. Hyam on notice even if he had not had actual information before. That Mr. Hyam read this agreement before suit I believe for when he returned it on the 15th January 1913 he took specific exception to two terms of the draft, namely, the second touching interest and the last making the covenant not to build a mosque or temple to run with the land. It is noted further that the property which is the subject matter of the suit adjoins a property of Mr. Hyam who was therefore likely to know what was the state of it. Nor is it in the least degree likely that Mr. Hyam who is represented to be a person who speculates in land did not make full enquiries as to the state of the property which he proposed to purchase. Again Mr. Hyam must have known from the draft lease that the sale was subject to existing tenancies. If this had been for him the vital "defect in title" now alleged one would have expected him to have said at once. "There are leases on the property. I was not told of them. The negotiations are off," and this he would, one should have thought, have done the more readily seeing that on other grounds he had sought to get the sale cancelled. That he did not, points to the inference that he was aware of the leases from the beginning. Notwithstanding all this no objection on this point was taken in the written statement nor issue raised thereon. Even if we were to make the improbable assumption that Mr. Hyam was unaware of the leases until the point was mentioned in the evidence, Mr. Hyam gave his deposition after the witnesses of the Plaintiff and he does not even then say that he was unaware of the leases and that if he had known of them he would not have purchased. It is true that a somewhat similar statement was made by his counsel here but what counsel says is not evidence and is not accepted as such. Nor was the point sought to be made by amended defence nor was it according to the Respondent's counsel argued in the lower Court. That this statement is likely to be correct is shown by the fact that there is no mention of a point which has been made so much of in appeal in the judgment of the learned Judge, nor is the point specifically taken in the grounds of appeal. The point first arose in the last hearing before two Judges as a result of certain observations made by the Court which were subsequently adopted as his argument by counsel for the Appellant. The point, therefore, in my opinion cannot be taken now. Had it been taken in the first Court it might have been possible to lead evidence to show that it had no substance as the facts to which I have referred themselves suggest. But even if the points were open there does not appear to me to be any substance in it. If there had been it would have been taken. In answer to the Chief Justice, counsel for the Respondent whilst submitting that the question did not arise said that if required to answer the question he would say that the property was sold free from encumbrances but subject to the existing tenancies as the draft says but submitted that there was no contradiction having regard to the nature of the tenancies, the return on the money which they give, *viz.*, 5½ per cent. and the fact that the tenancies had expired before the hearing of the suit. Further, that even if the leases were encumbrances that was no defence if the Plaintiff discharged them and offered them free of encumbrances.

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As stated these tenancies have long ceased to exist and cannot be any real defence. The real objection as I point out later is that Mr. Hyam is unwilling to incur the odium of turning out the Jewish poor school now in possession of portion of the premises. Doubtless the point might have had a legal bearing on the question what was the contract between the parties if it had been raised. But it was not and as I have said there is no evidence by Mr. Hyam that when he entered into negotiations he believed he was negotiating for purchase of a property free of existing leases. Had this been the case and there was any substance in the objection it would have undoubtedly been properly raised. The Defendant can have possession now but he will not take it because he does not wish to incur the displeasure of his community by turning the poor school out as he would be entitled to do if he accepted the property.

As regards the evidence that the parties were not *ad idem* it is sufficient generally to say that this must depend on the view the Court takes of the facts. If the evidence given for the Plaintiff is accepted the parties were *ad idem* for that evidence shows that the Defendant understood what the terms were and gave his assent to them.

In my opinion these various objections fail and were an after-thought put forward to relieve the Defendant of the obligation into which he had entered should he fail on the substantial part of his case, to which I now turn. That question, is, assuming as I hold, that there was a concluded contract —What were its terms?

But before doing so, I will deal with a point advanced in the argument, namely, when and where the offer was accepted and whether Mr. Owen had authority to accept on the Defendant's behalf.

Mr. Owen's acceptance is contained in the letter of the 13th November 1912. Mr. Hyam swears that he "never gave him authority to write any such letter and that the first time he saw it was on the 24th January 1913; but that he never wrote repudiating his authority as he did not think it necessary." He denied Mr. Gregory's explicit statement that he showed him Mr. Owen's letter at the interview of the 15th. No doubt Mr. Gregory's veracity was impugned in cross-examination, it being suggested and denied that his day-books (in which this particular incident was not described) had been characterised as false entries in another case. It is also a circumstance in Mr. Hyam's favour that Mr. Owen does not recollect this incident. But it is easier in the case of an incident of this kind to forget it than to honestly suppose that it took place when it did not. It is hard to imagine any alternative to the acceptance of Mr. Gregory's positive statement than that he was telling an untruth. I am unable to hold this, nor has the learned Judge done so. The incident seems to be quite a probable one. Is it likely that a conversation should be had between Mr. Cohen, Mr. Gregory and the Defendant without any reference to the broker's letter which was the basis of the contract? I think not. It appears also to be the fact that Mr. Hyam's ignorance of the contents of the letter till the 25th January was not put in cross-examination to any of the Plaintiff's witnesses. Mr. Owen admits that after writing the letter he did not show it to the Defendant before sending it to Mr. Gregory, but he swears that he wrote it on Mr. Hyam's authority, who suggested to him its terms in the form and to the effect in which it now stands. It is said that Mr. Hyam did not previously take exception to Mr. Owen's authority. But I think there is nothing in this. For I think a fair reading of Mr. Hyam's evi-

dence is that Mr. Owen had authority to negotiate and settle but only on the terms which Mr. Hyam alleges. With this I deal later. For reasons which I give later also I hold that Mr. Owen had authority to bind the Defendant as he purported to do by his letter : and that (on Mr. Gregory's evidence) Mr. Hyam must be taken to have been aware of its terms. The question whether Mr. Owen was authorised to write the letter of acceptance is of secondary importance in this case for if the evidence of the Plaintiff be accepted the Defendant personally later on gave his assent to the conditions sought to be enforced against him.

This being so the facts stand as follows :—

Mr. Owen was informed by Mr. Gregory of the Plaintiff's terms on the 13th November. Mr. Cohen was then informed by Mr. Gregory of the result of this interview. Mr. Owen accepted by his letter of the 13th November of which Mr. Cohen was informed. The latter confirmed the arrangement to Mr. Gregory on the 14th November. Mr. Owen called at Mr. Gregory's office on the 15th with Mr. Hyam when they said that they would call on Mr. Cohen to settle the terms with him and would see him again later. They are then alleged to have seen Mr. Cohen in the presence of Mr. Gareh and the contract was confirmed. After this both Mr. Cohen and Mr. Hyam called at Mr. Gregory's office when Mr. Hyam told Mr. Gregory that he was agreeable to Mr. Cohen's terms. On the same day it is said that the 6th January was fixed for completion. On the 2nd Mr. Cohen handed the draft agreement approved to Mr. Gregory, who as stated, forwarded it to the Defendant on the 20th November. Now, if this evidence be true the result is that Mr. Owen on the 13th January accepted the Plaintiff's offer explicitly as regards all terms but two, and as to these implicitly. As regards these latter there was it is said an acceptance though an imperfectly expressed acceptance. These two terms were firstly (the Defendant having agreed that he would not ask the Jewish school to vacate for 12 months from the date of execution of the conveyance) that the school was to remain on the same terms as heretofore. This was not expressly stated but implicitly accepted because without it the condition would be nugatory since it would be open to the Defendant to nullify the condition by changing and enhancing the rent to a point at which the school could not pay and remain. This term was in any case according to the evidence later expressly accepted. Nor does the Defendant deny that the school were to have possession on the same terms; what he says is that he had no objection to that provided that the contract was not to be completed until after the expiration of 12 months. The second term imperfectly recorded was that there was to be a special power-of-attorney under which the conveyance was to be executed. This is indicated though not expressed by the reference to "six weeks." This arose out of the conversation with Mr. Gregory in which it was explained that as Mr. Gubbay was in England the contract could not as he proposed be executed in a month.

The matter is one of no importance and it is not contended that it is of any concern to Mr Hyam whether there was such a special power or not. The same remarks apply to the fixing of a definite date the 6th of January which was done on the 15th. These terms were further, it is alleged, confirmed by the Defendant personally on the 15th—with the evidence I deal later. It comes then to this either

there was an acceptance of the contract by Mr. Owen's letter expressly and implicitly as to the terms mentioned (other than the actual date for execution) and an acceptance of this last term by the Defendant personally on the 15th January and an express confirmation by him of the other terms on the same date; or if, as the Defendant alleges, Mr. Owen had no authority or his letter does not mean what the Plaintiff says he does; or if he says there was no implicit acceptance of the terms imperfectly recorded then there was an acceptance by the Defendant personally on the 15th in terms which have no ambiguity about them. I think the Plaintiff is entitled to rely as he does not only on Mr. Owen's letter which is regarded as the acceptance but on the subsequent oral conversations which if true more fully and clearly state and confirm that to which the letter refers. As first put before us there was some inaccuracy in the statement of the case by counsel for the Respondent which he subsequently corrected. As it now stands it is in my opinion in conformity with that pleaded. The Appellant has submitted that there is a variance between pleading and proof in two particulars. The plaint alleges an agreement on the 13th November 1912 between Mr. Cohen and Mr. Owen and a confirmaion to the Plaintiff's solicitors on the 15th. It is suggested that the case now made is an agreement with Mr. Cohen on the 15th. This argument is in my opinion without foundation. The Plaintiff relies on the agreement of the 13th namely the broker's letter. What he says is that two minor terms which were implied but not expressly stated in this letter, were clearly stated and confirmed on the 15th. Confirmation was given to the Plaintiff's solicitors on the return of the Defendant and broker from Mr. Cohen. The plaint omits, it is true, to state any reference to the interview with Mr. Cohen but this is an omission to plead evidence only. The confirmation to the solicitor alleged in the plaint is proved. Some reliance was placed on the fact that the learned Judge finds that an agreement was arrived at between the parties on the 15th. But this does not seem open to objection for the learned Judge had previously also held that the conditions had been previously agreed to when Mr. Owen wrote and gave Mr. Gregory the letter of acceptance on the 13th and when as the learned Judge holds both the solicitor and Mr. Cohen regarded the matter as concluded. The agreement evidenced by this letter was as to the terms expressed in the letter and with the two particulars so implicitly therein contained became, as the learned Judge holds, a definite, complete and binding agreement on the 15th November.

We are here led to a consideration of the question, what, if any, were the terms agreed upon by the parties? I will take them in the order in which they are stated in the broker's letter. The acceptance of the general offer for the sale of the premises in suit for Rs. 1,33,000 is not disputed. The first of the disputed special conditions is stated in the letter as follows :—"My principal agrees to have no temple or mosque built on these premises." As these words are not in any way qualified they mean in my opinion what they in effect say and that is that a temple or mosque is not to be built by any one whether the purchaser or others taking through him. This construction is strengthened by the wording of the next sentence "he will not ask the Jewish school to vacate, etc.," where the purely personal obligation is expressed as such. It is also supported by a consideration of the following facts : It cannot be matter of doubt

upon the oral evidence and the day-book of Mr. Gregory that the vendor who is a Jew was insisting that the premises should not be used as a mosque or temple and that no noisy or offensive business should be carried on there because the premises were near to the Jewish Synagogue. This is a permanent institution and it is therefore reasonable to suppose that the vendor at least intended that it should be permanently protected. If he had it in his mind to bind the immediate purchaser only the latter could have made the protection nugatory by selling the property the following day to some one else who might have built a mosque or temple or created a nuisance on the property. I think also that Mr. Hyam must have understood this. Whether he accepted the condition in this sense is another question to which I next refer. He must be taken to have done so for the following reasons: In the first place that is the construction which I put on the letter of Mr. Owen who in my opinion had authority from his principal. That the words of the letter as they stand mean this is to some extent indicated by Mr. Hyam's evidence. For he takes exception to the statement in the letter which would be unnecessary if it merely meant what he says he agreed to. But the matter does not rest there for the oral evidence for the Plaintiff if true shows both the meaning of the words in Mr. Owen's letter and that Mr. Hyam expressly agreed to the Plaintiff's conditions. Mr. Cohen expressly swears that the Defendant in his presence agreed to a clause being inserted in the conveyance binding the land that is the purchaser's assigns. This and other evidence of Mr. Cohen is charged by the Defendant as being false and unless it is displaced is conclusive of the matter. Before us it has been argued that as the plaint pleads a confirmation between Mr. Gregory and the Defendant the confirmation spoken of in the evidence between Mr. Cohen and the Defendant must be an invention. According to the Plaintiff's evidence it is a fact that the Defendant did confirm to Mr. Gregory the Plaintiff's special conditions. I may here refer to Mr. Gregory's evidence and his day-book. So far then the plaint is not at variance with the evidence. We are however asked to say that because the plaint did not plead confirmation to Mr. Cohen therefore such a confirmation did not take place. In the first place it is in a high degree unlikely that no confirmation was given to Mr. Cohen. This latter was not some stranger but the person acting for the vendor in England who knew the vendor's mind and intentions and had full authority to give effect to them. Mr. Gregory on the other hand was merely the solicitor of the vendor who in all matters would have to refer to the latter's agent Mr. Cohen. It is therefore in a high degree probable that the Defendant saw and spoke to Mr. Cohen and if he did it does not seem to me to be likely that at such interview, the latter would omit to discuss the special terms on which alone the sale was to take place. Mr. Cohen's evidence is further supported by that of Mr. Gregory and his day-book. The latter states that on the 15th November Mr. Owen and Mr. Hyam called on him and they said they would call on Mr. Cohen, settle the terms with him and see Mr. Gregory again. It is true that Mr. Owen does not seem to recollect having seen Mr. Gregory twice with the Defendant. But as against what is possibly a lapse of memory on his part we have a reliable contemporaneous record in the day-book. That they did see Mr. Cohen is sought to be proved by the latter evidence and that of Mr. Gareh. As regards

the latter's evidence it might have been a question had we been sitting as a Court of first instance whether it is sufficiently proved that Mr. Gareh was there. Mr. Gareh is a young assistant who would not ordinarily be present unless sent for. He himself says that he cannot remember whether he was present when the Defendant arrived or went in afterwards or whether he was sent for. Mr. Owen says Mr. Gareh was not there (that is during the interview) and that he was sent for at the conclusion to accompany them to Mr. Gregory. That he did this there is no doubt. Mr. Cohen on the other hand supports Mr. Gregory when he says Mr. Gareh was present. The learned Judge has accepted both Mr. Cohen and Mr. Gareh's evidence and I see no sufficient reason for differing from him, the more particularly that I disbelieve the Defendant's case as put in the cross-examination of Mr. Gareh "that no terms whatsoever (other than the amount of earnest-money) were discussed between Mr. Hyam and Mr. Cohen." Mr. Gregory also says, though this evidence is not of much account, that Mr. Gareh told him that the matter had been discussed before Mr. Cohen. Mr. Owen also says the terms were verbally agreed to between the Defendant and Mr. Cohen. Mr. Gregory next deposes that the Defendant came to him saying that they had arranged the terms finally with Mr. Cohen and that they were agreeable to his special conditions which to the best of his belief were mentioned in detail. Mr. Gregory says that on that day he had shown the Defendant Mr. Owen's letter and that the Defendant did not repudiate Mr. Owen's authority but said he would have no objection to give a personal covenant. He then naturally said that the Defendant must speak to Mr. Cohen direct on the subject as his own instructions on the point were peremptory. He says however that when they came back (and in this he agrees with Mr. Cohen) the Defendant agreed that the covenant should run with the land. As against this evidence there are two circumstances which are relied upon for the Defendant. Mr. Gregory's day-book runs "and that he would not convert the premises into a mosque or temple" and next in his letter of the 17th January 1913 he writes "This point (personal covenant) was discussed and you made no qualification restricting the covenant" no mention being made of the express agreement referred to in the evidence. Mr. Gregory's explanation is that in the day-book matters are not completely stated and that there was an omission in the letter. So far as they go it must be conceded that these two points favour the Defendant. The question is however whether in this appeal they are sufficient to displace the other facts to which I have in part referred including the positive direct testimony for the Plaintiff which is such that it must be either true or false. I cannot believe that all of it which the Defendant traverses was due to mis-recollection or mistake. Further Mr. Hyam says that he agreed to and understood there was to be a personal covenant and according to his evidence he expressed himself in these terms. It was then that Mr. Gregory said "no, no I must put it in the agreement." This appears to me to indicate what Mr. Gregory says about the question of the personal covenant. It was to go in the agreement because as Mr. Cohen says "it was to go with the title deeds binding him for ever." That it was at least so understood is shown by the fact that the draft was drawn up in this way on the 15th and was not repudiated by the Defendant to whom it was sent on the 20th

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November until the 15th January following. According to Mr. Hyam's evidence on the other hand when asked, "do you say Mr. Cohen, when asked, did not say a single word as regards the conditions?" he answers "absolutely nothing—not one word." As I have said that and the story that Mr. Gregory only said "what about the mosque and temple" does not seem to me a likely tale. I may here point out that whilst the Defendant asserts that what Mr. Cohen has said on this point is "absolutely false" such a case was not put in cross-examination to the latter. On the contrary Mr. Sircar's question at p. 37, L. 4 assumes that there was in fact a conversation between Mr. Hyam and Mr. Cohen on the subject of the mosque and temple though the parties were at variance as to the terms of it. If, as Mr. Hyam says, the question of building a mosque or temple was dropped directly it was ascertained that he a Jew was the purchaser, how is it that according to his evidence Mr. Gregory insisted upon the condition appearing in the draft and its appearance there? Mr. Hyam's suggestion that there were to be two agreements, seems a new case.

Some of the considerations above mentioned apply also to the second and other terms of Mr. Owen's letter. The second runs "or to cause any nuisance to the Jewish Synagogue." If these words stood alone they would in my opinion cover the condition as stated in the plaint. But they do not stand alone. Mr. Hyam's case is that the "question of nuisance was never discussed—never put to me." As against this we have the following facts: Mr. Gregory's day-book of the 13th November shows that Mr. Cohen was insisting that the purchaser would not "carry on any noisy or offensive business." This is however not repeated in the note made as regards the broker's visit which followed. Mr. Cohen spoke on the subject to Mr. Owen. The latter embodied it in his letter of the 13th November. He swears also that he told Mr. Hyam that the premises should not be made a source of nuisance to the Synagogue; that he told the latter all the terms Mr. Cohen proposed and that the Defendant accepted them. Mr. Cohen says the Defendant agreed to these conditions. Mr. Gregory enters in his day-book of the 15th November "that the Defendant agreed not to do any act which would be a nuisance to the Jewish Synagogue," and deposes to the same effect saying that the Defendant told him that "he would not cause any tin shop or any thing of that kind or other things to make a noise there which would be a nuisance." He embodies a provision in the draft regarding a subject which Mr. Hyam says was never discussed and subsequently asserts the agreement in his letter of the 17th January. It seems to be impossible on these facts to hold that all this evidence is either untrue or mistaken and that, as Mr. Hyam says, the subject was never discussed at all. The letter of Mr. Owen affords strong corroborative evidence that it was discussed and that the letter in this and other respects states the Plaintiff's case is shown by the Defendant's exception to it as disagreeing not only in form but in substance from what he gave Mr. Owen authority to accept.

The next term was "that he will not ask the Jewish school to vacate for 12 months from the date of execution of the conveyance." Learned counsel for the Respondent does not, having regard to the circumstances and time which has elapsed, insist upon this term but says it was agreed upon. The letter is imperfect in that it does not expressly state "on the same terms and conditions under which they (the school) were then occupying the

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same." I should myself, as I have said, have thought this was implied. For the obvious desire was to benefit and give time to the school and unless it was allowed to remain on the same terms the provision might have been rendered nugatory by asking a rent or imposing other conditions which would oblige the school to vacate. That, however, the Defendant agreed to this is shown by the evidence of Mr. Gregory and his day-book and of Mr. Cohen. Mr. Owen says he has no recollection whether the terms were discussed. He however speaks to the term "from the date of execution of the conveyance" and Mr. Gregory's evidence is that Mr. Owen's letter was shown to the Defendant and that the only term which the latter attempted to get conceded was the question of personal covenant not to build with which I have already dealt. The Plaintiff's case is also stated in Mr. Gregory's letter of the 17th January. The Defendant's contention is set out in his reply of the 22nd January where he says he agreed to defer completion of purchase for a year. But if so what had the Defendant to do with the school? He could not interfere with the tenants until his purchase was completed and he became owner of the property. And if so any stipulation on the point was unnecessary. Mr. Hyam's statement that "not a word" was said at the interview with Mr. Gregory about the school is contradicted by Mr. Gregory's evidence, his day-book and the letter he wrote on the 17th January. The last term was as to the date for completion of conveyance which was fixed in the broker's letter as six weeks from the date of execution and was subsequently fixed on the 15th November for the 6th January following.' This the Defendant denies but the Plaintiff's case made out as to the letter by Mr. Owen, and as to the 6th January by Mr. Gregory, his day-book, Mr. Gareh and Mr. Owen. According to the latter his letter was written under the Defendant's instructions. Six weeks from the date of the contract would expire by the beginning of January and so Mr. Gregory says the 6th January was fixed as the exact date. The last point which was somewhat faintly referred to is the term under which a conveyance was to be accepted under a special power-of-attorney, the vendor being in England. This is referred to in Mr. Gregory's day-book and his evidence.

In short the question presents itself to me as a question of fact and the credibility of the Plaintiff's witnesses. Mr. Owen the broker swears that he wrote the letter of acceptance under instructions from Mr. Hyam who "suggested to me the terms to write to Mr. Gregory." The first question is therefore whether Mr. Owen is to be believed on this and other points of the case. Nextly Mr. Cohen who so far as I can see has no personal interest in the matter swears that the Defendant personally agreed to the terms and Mr. Gregory the solicitor swears that Mr. Hyam confirmed the acceptance of these terms to him and that he (Mr. Gregory) further showed the Defendant the broker's letter. Again the question is whether these witnesses are speaking the truth or not. It is quite impossible that all these witnesses should be mistaken as to all the matters on which reliance is laid on behalf of the Plaintiff. Nor does Mr. Hyam suggest that for he expressly in his evidence charges Mr. Cohen's evidence to be "absolutely false" and seems to make the same suggestion against the latter's solicitor and his day-books which in cross-examination were alleged to have been characterised as false in another case. We are asked to disbelieve all this evidence on the strength of

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Mr. Hyam's denial. The learned Judge who heard the evidence has not done so, nor am I able to hold that he is in so holding wrong. The reasons which have led to that denial have in my opinion been correctly surmised by Mr. Justice Chitty.

Mr. Hyam though himself a Hebrew does not at first appear to have thought of or troubled himself about the consequences of his purchase on the Jewish poor school and as regards the covenant against building a mosque and temple he speaks of it as "personal to him," of Mr. Cohen who was "prejudiced." Later on as is stated in Ex. E. Mr. E. M. D. Cohen, the manager of the poor school, learning of the proposed sale went to Mr. Hyam "and had a big row with him" and so much so that the latter wished to cancel the contract. As appears from Mr. Gregory's day-book of the 29th November, Mr. Hyam called on the former and said that Mr. E. M. D. Cohen had raised obstacles in the way of his purchasing the property "that he was quite disgusted with the whole affair" and that he would be prepared to cancel the contract. This is admitted. Correspondence then took place with Mr. Gubbay, the Plaintiff, who however refused to cancel. On the 8th January 1913 the solicitor's day-book shows that Mr. Hyam again called and stated that he would rather not complete his purchase "as the whole of the Jewish community were against his doing so." Mr. Hyam in his evidence refers to Mr. E. M. D. Cohen speaking of the "curses of the Jews being heaped on his head." Then on the 22nd January Mr. Hyam wrote to Mr. Gregory that he insisted on vacant possession for "I would have none of the trouble, worry and expense not to mention the odium for having to turn out a charitable and communal institution from premises in which it had made its home for 40 years." It appears to be this and not the numerous objections taken later why the Defendant attempted to back out of his contract. It is true that he had previously taken an objection to the covenant running with the land but according to the evidence this objection was not persisted in. If it was why did the negotiations hang on from November 13th, 1912, till towards the close of January 1913. It is quite clear that the Plaintiff's agent was insisting on the covenant and if, as is suggested now, the point was vital to the Defendant and not given up by him, the negotiations would have come to a close. That they did not, supports the Plaintiff's case that the objection though taken was given up. Nor is there any evidence in support of the suggestion now made that Mr. Hyam would not have agreed to conclude the contract before he got possession of the school premises as his money would be lying idle. Mr. Hyam in his evidence does not take this objection. The real objection which he had was that stated to Mr. Gregory and the rest is an afterthought with a view to avoid an agreement which I hold is binding on him.

In my opinion the Appellant has established no sufficient ground for reversing the decision of Mr. Justice Chitty that the Plaintiff had proved and was entitled to have specific performance of the contract pleaded.

The Appellant has not in my opinion established grounds for the reversal of the judgment and decree against him and I would therefore dismiss this appeal with costs.

MOOKERJEE, J.—This appeal is directed against a decree made by Mr. Justice Chitty for specific performance of a contract for sale of land in Calcutta. The substantial question in controversy between the litigants is, whether there was a concluded contract in respect whereof specific

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performance may be directed by the Court. The trial Court has pronounced in favour of the Plaintiff. That decision has been assailed by the Defendant, and we have been invited to hold that there was no completed contract between the parties, as they contemplated a formal agreement which was never executed, and as they were not even of one mind with regard to material terms of the proposed agreement while the negotiations were in progress.

It is well settled that the fact that the parties intended to embody the terms of their contract in a formal written agreement, is strong evidence that the negotiations prior to the drawing up of such writing are merely preliminary and not understood or intended to be binding. If it is definitely expressed and understood that there is to be no contract until the formal writing is executed, there is plainly no binding agreement formed until this provision is complied with. It is also true that if all the terms of the agreement have not been settled and it is understood that these unsettled terms are to be determined by the formal contract, there is no binding obligation until the writing is executed. But if the oral agreement or written memorandum is complete in itself and embodies all the terms to be inserted in the intended formal writing, a binding obligation is fixed on the parties, unless it is understood and intended that such contract shall not become operative until reduced to writing. These principles, which in their application give rise to questions of considerable nicety, are illustrated by decisions of the highest authority, to some of which reference may usefully be made here. In *Chinnock* v. *Marchioness of Ely* (7), the Defendant's solicitors wrote to the Plaintiff, naming the price for an estate about which they had been negotiating, the Plaintiff wrote a letter in which he agreed to give the price named, and then added, "I shall be obliged if you will forward me the usual contract." In reply, the Defendant's solicitors wrote, "we have been instructed by the Marchioness of Ely to proceed with the sale to you of these premises. The draft contract is being prepared and will be forwarded to you for approval in a few days." Lord Westbury, L. C., held that so far the parties were in treaty merely, and that without the execution of the draft mentioned, there was no contract concluded. In *Bonnewell* v. *Jenkins* (5), the Defendant's agents offered certain premises for sale. The Plaintiff wrote to the agents, making an offer of £800 for the estate. The agents wrote in reply as follows:—"We are instructed to accept your offer of £800 for these premises and have asked Mr. Jenkin's solicitor to prepare contract." The Lord Justices of appeal held that there was a concluded contract. Thesiger, L. J. said:—"The mere reference to the preparation of an agreement by which the terms agreed upon would be put into a more formal shape, does not prevent the existence of a binding contract." In *Rossiter* v. *Miller* (8), there was much correspondence about a sale of certain lots of land, and the question arose whether the correspondence showed a completed contract without the formal draft which had been referred to in some of the letters. James, L. J., said:—"The reasonable view of the case is that the parties intended the signing of the formal contract to be a condition precedent." Coleridge, C. J., said:—"If a set of terms be agreed upon in writing, they constitute a contract, although it may be the intention of the parties that they should be put into a more formal shape; but here, a set of terms was never agreed to."

(7) 4 DeG. J. & S. 638 (1865).

(5) L. R. 8 Ch. Div. 70 (1878).
(8) 5 Ch. Div. 648 (1877).

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Baggallay, L. J., said :—"The letters left the Defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement." When the case of *Rossiter* v. *Miller* (4) was taken on appeal to the House of Lords, Lord Hatherley said :—"Although the correspondence may not set forth, in a form which a solicitor would adopt, if he were instructed to draw an agreement between the parties, yet if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters be clearly and distinctly stated, though only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because the letter may say, we will have this agreement put in due form by a solicitor." Lord O'Hagan said :—"The correspondence gives no colour to the suggestion that the contract was not final and was not considered to be final by all the parties to it, because the formal agreement embodying its already settled terms had not been furnished." Lord Blackburn said :—"The mere fact that the parties have expressly stipulated that there shall be afterwards a formal agreement prepared, embodying the terms, which shall be signed by the parties, does not by itself show that they continue merely a negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not, but as soon as the fact is established of the final mutual assent of the parties, so that those who draw up the final agreement have not the power to vary the terms already settled, I think the contract is completed." In the course of the same speech, Lord Blackburn further said :—"Parties do often enter into negotiation, meaning that when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if, on seeing the result in that shape, they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think the parties ought not to be held bound, till they have executed the formal agreement." In *Ridgway* v. *Wharton* (2), Lord Cranworth, L. C., said :—"If parties have entered into an agreement, they are not the less bound by that agreement, because they say, we sent it to a solicitor to have it reduced into form; but when the parties negotiate and do not say so, the mere fact that they do send it to a solicitor to have the matter reduced into form, affords, to my mind, generally cogent evidence that they do not intend to bind themselves till it is reduced into form. The circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement." Lord Wensleydale said in the same case :—"These cases often occur in Courts of law, and the question then always is, whether the parties mean to embody the contract, made by parol, in writing? If they do, nothing binds them till it is written. If they enter into a contract with a view to a written agreement, nothing will bind them but that written agreement, and that quite independently of the Statute of Frauds applying to all agreements. If the parties agree finally to be bound by any terms and then, for the sake of preserving a memorial, having regard to the original terms, they get a document

(4) 3 App. Cas. 1124 (1878).

(2) 6 H. L. C. 238 (1856).

drawn up, there is no doubt they are bound by the original terms. An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled; until those terms are settled, he is perfectly at liberty to retire from the bargain." In *Rummens* v. *Bobins* (3), where an offer to sell a piece of land at a certain price was accepted, it was ruled that there was no completed contract as the letter by which the offer was made stated that there would be the usual clauses in a contract and some limitations as to the length of the title and other minor details. Knight Bruce, L. J., said :—"What are the usual clauses in a contract for the sale of land? They differ almost incessantly; they differ according to the state of the title, the conveniences, the fancies and the wishes of mankind, and the particular situation, convenience and inconvenience belonging to the estate," To the same effect are the decisions in *Von Hatzfeldt Wildenburg* v. *Alexander* (1), *Lloyd* v. *Nowell* (6), *Jones* v. *Daniel* (9), *Winn* v. *Bull* (10), *Oxford* v. *Provand* (11), *Brini* v. *Seamson* (12), *Page* v. *Norfolk* (13), *Watson* v. *Mc. Allum* (14) and *Clark* v. *Robinson* (15). It is needless to multiply authorities, but reference may be made to the following observation of Lord Selborne in *Hussey* v. *Horne-Payne* (16) :—"A contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement." Lord Cairns, L. C., in the same case affirmed the important principle that where a Court has to find a contract in a correspondence, the whole of that which has passed between the parties must be taken into consideration; a line cannot be drawn at one point of the negotiations, conducted partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations, which may plainly show that terms of the intended agreement, of great practical importance and regarded on both sides as such, then remained unsettled and were still the subject of negotiation between them.

From these expressions of judicial opinion, it is clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed

(1) L. R. [1912] 1 Ch 284 (1911).
(3) 3 DeG. J. & S. 98 (1865).
(6) [1895] 2 Ch. 744.
(9) [1894] 2 Ch. 332.
(10) 7 Ch. Div. 29 (1877).
(11) L. R. 2 P. C. 185 (1868)
(12) 1 L R. Ir. 185.
(13) 70 L. T. 28 (1894).
(14) 87 L. T. 547 (1902).
(15) 51 W. R. 448 (1903).
(16) 4 A. C. 311 (1879).

in a written instrument, and attested by signature, then he will not be bound until the signatures are affixed. As was said in *Lyman* v. *Robinson* (17), the question in such cases always is, did the parties mean to contract by their correspondence or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up and by which alone they designed to be bound? The expression of this idea may be attempted in other words; if the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract, if however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed. To determine which view is entertained in any particular case, several circumstances may be helpful, as for example, whether the contract is of that class which are usually found to be in writing, whether it is of such a nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiation. If a written draft is proposed, suggested or referred to during the negotiations, it is some evidence that the parties intended it to be final closing of the contract. Still, with the aid of all rules and expositions of principles, the solution of the question in concrete cases is often difficult, doubtful and sometimes unsatisfactory. A good illustration of the uncertainty inherent in the subject is afforded by the case of *Rossiter* v. *Miller* (8), where Coleridge, C. J., James, L. J., and Baggallay, L. J., were clear that there was no contract for want of a formal draft, while Cairns, L. C., Lord Hutherly, Lord Blackburn and Lord Gordon, no less able and eminent jurists, were confident in the contrary opinion. We come now to the consideration of the circumstances and correspondence in this case in the light of the principles explained.

The Plaintiff Gubbay is the owner of premises, 8 and 7/1 Pollock Street and 1 Mansook Lane in Calcutta. The first of these is in the occupation of the Calcutta Jewish school as tenants at a monthly rent of Rs. 300; the others consist of a godown and a lower-roomed house. The Plaintiff resides in London, and employed R. M. Cohen to sell these premises for Rs. 1,33,000. Cohen instructed a house-broker Owen to find a purchaser. Owen negotiated with the Defendant Hyam, who was speculating in the purchase of landed property in Calcutta for the purpose of building operations. Owen appears to have intimated to Hyam that the sale would be subject to two conditions, *first*, that no temple or mosque would be built on the site, and *secondly*, that the possession of the Jewish school would not be disturbed for a year. Hyam agreed to these conditions as he interpreted them. On the 13th November 1912, Owen wrote to Gregory, the solicitor of the Plaintiff, and intimated to him that he had found a purchaser of the property who was willing to pay the price demanded and had agreed not to have a temple or mosque on the site, nor to cause any nuisance to the Jewish Synagogue Bethel and also not to ask the Jewish school to vacate for 12 months from the date of execution of the conveyance. The broker added that the time to

(17) 14 Allen 242.

(8) 5 Ch. Div. 648 (1877); 3 A. C. 1124 (1878).

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execute and complete the conveyance would be six weeks from the date of the contract, subject to approval of titles, and requested that confirmation by the vendor might be obtained in the course of the day, if possible. It is not quite clear on the evidence whether, before the institution of this suit, the Defendant was aware that a letter in the terms mentioned had been written by the broker to the solicitor. Gregory asserts that he read it out to Hyam in the presence of Owen, but the latter has no recollection of the incident; Owen, at any rate, did not show the letter to Hyam, who denies all knowledge of it before suit. Gregory wrote for instructions to Cohen, who, on the day following, verbally confirmed the arrangement, subject to the payment of Rs. 5,000, by the purchaser as deposit money, this appears from the entries in the day-book of the solicitor under dates 13th and 14th November; entries in this day-book, it may be added, were made by a clerk in the office of the solicitor at the end of each day. Up to this stage, Owen does not appear to have disclosed the name of the intending purchaser, and Hyam had not met either Cohen or Gregory. On the 15th November, there were, according to the Plaintiff, four interviews between various persons in connection with the proposed transaction: three of these are said to have taken place in the office of the solicitor and one in the office of Cohen. The first interview in point of time took place in the office of Gregory, where Owen, Hyam and Gregory are alleged to have been present, but Hyam cannot recollect that this interview did in fact take place. At the second interview, which took place in the office of Cohen, these are said to have been present Owen, Hyam, Cohen and Gareh, an assistant of Cohen employed to look after the properties of Gubbay. Owen and Hyam both deny that Gareh was present when the conversation took place; according to them, Gareh was sent for by Cohen, and merely asked to accompany Owen and Hyam to the office of Gregory; this version seems probable. The third interview was in the office of Gregory, when Owen, Hyam, Gregory and Gareh were present. The fourth interview was in the office of Gregory, between the Defendant, Gregory and Gareh, and the Defendant, as may be expected, denies all knowledge thereof. What is alleged by the different witnesses to have taken place at these interviews appear from their depositions and the version of Gregory may also be gathered from the entry in his day-book. There is a wide divergence between the witnesses in the accounts they profess to give of what was said by the different persons at these interviews; this is not surprising, as the witnesses were endeavouring to narrate conversations which had taken place nearly fifteen months before they deposed in trust. But this much is clear that Hyam paid a cheque for Rs. 1,001 as earnest-money, which Cohen and Gareh had agreed to accept, and it was arranged that Gregory should prepare an agreement to be submitted to Hyam for approval. Gregory appears to have prepared the draft agreement on that very day and sent it to Cohen for approval. Cohen returned the draft approved on the 20th November and Gregory sent it on to Hyam at once for his approval. The evidence does not show that there was any communication between the parties between that date and the 28th December when the power-of-attorney of Gobbay was received from England. Gregory informed Hyam of the receipt of the power-of-attorney and requested the return of the draft agreement with his approval. Hyam does not appear to have replied to this letter till the 15th

January 1913, and in explanation of his silence, he now states that he was waiting to see whether the Jewish school would acquire the property, as the Elders of the Jewish community had heard with evident concern that the property was about to change hands. On the 15th January 1913, Hyam wrote to Gregory and stated his willingness to complete the purchase subject to three conditions, *first*, that the covenant not to build a temple or mosque would be personal to him and not a covenant running with the land; *secondly*, that the purchase would not be completed for the year, during which the Jewish school were to be left in possession; and *thirdly*, that interest on the balance of purchase money would be charged at six instead of nine per cent. as stated in the draft agreement. On the same day, before this letter was received by Gregory, he wrote to Hyam offering to send title deeds for inspection and approval. On the 17th January, Gregory replied to the letter of Hyam, dated the 15th January, accepted the proposal about the interest on the balance of purchase money, but repudiated the suggestions about the personal covenant and the time for completion of purchase. On the 22nd January, Hyam wrote to Gregory, explained that he had understood the proposed covenants not to build and not to disturb the Jewish school in the sense indicated in his letter, dated the 15th January, and stated that he must insist on vacant possession. On the same day, Gregory demanded return of the draft agreement. On the next day, Gregory wrote to Hyam again, and stated that as Hyam had declined to complete the purchase on the terms which, he alleged, had been agreed upon between the parties, there was no necessity to prolong the matter by further correspondence. The present suit for specific performance was thereafter instituted on the 8th February 1913. In these circumstances, the question arises whether there was a completed agreement between the parties as alleged by the Paintiff.

In the third paragraph of the plaint, it is stated that the agreement was made on or about the 13th November 1912 between the Plaintiff through his representative and the Defendant through his broker for the sale of the premises, subject to approval of title and on three special conditions. In the fourth paragraph, it is stated that on or about the 15th November, the Defendant personally called, saw the solicitor for the Plaintiff, confirmed the sale agreement, paid Rs. 1,001 as earnest-money, and agreed that the solicitor should prepare a formal agreement in writing embodying the usual terms and conditions for sale and purchase including the special conditions aforesaid. The case for the Plaintiff, therefore, plainly is that there was a concluded agreement on the 13th November, which was confirmed two days later. A bold endeavour was made in this Court, after the conclusion of the arguments on both sides in this appeal, to obtain practically an amendment of the plaint, when the counsel for Plaintiff sought to introduce additional evidence to explain how the plaint had been originally drafted and how it had been transformed before it was filed in Court. The course attempted by the counsel for Plaintiff was so contrary to well-recognised rules of procedure that his endeavour was wholly unsuccessful and the merits of the controversy must be adjudged on the plaint as it stands, which has been accepted throughout as the basis of the investigation by the trial Court and the discussions before the Court of Appeal. When, then, was the agreement between the parties made? The counsel for the Plaintiff found this a very embarrassing

question to answer. Four alternative hypotheses are possible; *first*, that the complete contract is embodied in the letter of the 13th November from Owen to Gregory; *secondly*, that the contract was verbally made on that date, and that the letter embodies an imperfect narration thereof; *thirdly*, that the contract was made verbally in the course of the interviews on the 15th November; and *fourthly*, that there was never, in any stage, a completed agreement, as the parties intended that the agreement should be embodied in a written instrument which was drafted by the solicitor for the Plaintiff but disapproved by the purchaser. The counsel for the Plaintiff found it difficult to make his choice among the first three alternatives, although the plaint is founded upon the first hypothesis or possibly a combination of the first and second. The counsel for the Defendant has pressed the Court to accept the fourth alternative. Mr. Justice Chitty, if I appreciate his judgment correctly, has held that there was no concluded agreement on the 13th November. In that view, I concur without hesitation. The day-book of the solicitor, his evidence in Court, as also the deposition of Cohen, make it perfectly plain that there was no concluded agreement on the 13th November. Nothing had been settled at the time as to the amount of the earnest-money and the date for completion; even the scope of the restrictive covenants had not been settled, nor had the question of interest on the balance of purchase money been even mooted. In these circumstances, one can well understand why, even on the 15th November, Gregory should state in his day-book that Owen and Hyam had called to confer with him and had stated that they would call on Cohen "to settle the terms with him." This is consistent with the statement of Cohen that when on the 15th November Hyam offered to give a personal covenant not to build a mosque or temple on the site, he told him, "these are my conditions, leave or take." There is, in my opinion, no escape from the position that no agreement was concluded between the parties on the 13th November and that they were on that date still in the stage of negotiation. The specific case made in the plaint, consequently, fails; indeed, the case as sought to be developed by the Plaintiff in the course of the evidence is that the concluded agreement was made on the 15th November. It may be observed, in passing, that there is thus some force in the contention of the counsel for Defendant that the Plaintiff should not be allowed to succeed on a case different from that set out in the plaint, and that the Court should refuse specific performance when there is substantial variance betwen pleading and proof. [*Hawkins* v. *Maltby* (18), *Lindsay* v. *Lynch* (19) and *Mortimer* v. *Orchard* (20).] But, assuming that the Plaintiff is entitled to a decree for specific performance in the suit as framed, if he proves that the agreement was concluded on the 15th November, the question arises whether the Plaintiff has established the third hypothesis previously mentioned? The answer depends principally upon an examination of the oral testimony as to what passed at the four interviews said to have taken place on that date. Nothing material happened at the first interview, of which the Plaintiff has no recollection. As regards the other interviews, the witnesses are hopelessly in conflict with each other. Specially as to what was said about the covenant not to build a temple or mosque on the site, and there is that absence of certainty which is

(18) L. R. 3 Ch. App. 188 (194) (1867).
(19) 2 Sch. and Lef. 1 (1804).
(20) 2 Ves. 243 (1793).

fatal to a claim for specific performance. [*Reynolds* v. *Waring* (21).] Upon this point, the evidence of Gareh is not reliable, and it seems improbable that he should have been present throughout the interview between Cohen and Hyam : if he had been, he could not have failed to notice that Hyam at the time wrote out and tendered a cheque for the earnest-money. There is then a conflict between Cohen and Hyam. Cohen seeks to make out that Hyam at first pressed to make the covenant personal, but yielded ultimately, and agreed to make the covenant run with the land. Hyam denies this, and his version appears to me more probable in all the circumstances of the case. In any event, the parties agreed that Gregory would draw up a draft agreement for their approval. Hyam and Cohen both allege that each of them wanted this draft agreement to be drawn up. What then was their intention? Did they intend that the written instrument should be merely a memorial of an agreement already completed, or was it their intention that the draft should bring out clearly the points which still required consideration and must be settled before the agreement could be deemed completed? To determine the true view of the situation, we must bear in mind that important points had not been settled up to that stage. For instance it had not been determined whether the purchaser should have vacant possession. There were leases yet to run in respect of the premises not occupied by the Jewish school : There is nothing to show that Hyam was aware of the fact of these leases, their terms and conditions, though it has been asserted that he must have made enquiries into the matter and made up his mind to accept the property subject to the leases. It is well settled that the purchaser is not bound to take subject to leases and is entitled to actual possession, unless there is an agreement to the contrary. *Collier* v. *Jenkins* (22) and *Lincham* v. *Cotter* (23). Hyam would, therefore, be *primâ facie* entitled to vacant possession, and this would also be essential for the building operations he had in view. The question of vacant possession, then, was obviously one of the points which would require to be settled by the written agreement. There was also the question of completion of the transaction. According to the letter of Owen to Gregory, dated the 13th November, the time to execute and complete the conveyance was six weeks from the date of the contract; this would make the written agreement essential for the conclusion of the bargain. But it is now sought to be proved by oral evidence that in the course of the interviews on the 15th November, the date for completion was fixed at the 6th January 1913. The reason for this alleged variance is not satisfactorily made out, and the story is not convincing. There were evidently also other terms which might lead to difference between the parties though they were compendiously described under the somewhat misleading category of "usual terms and conditions of sale and purchase." What the conception of Cohen and his solicitor was about usual terms and conditions is amply made out by the draft agreement prepared later. These terms included provisions to the effect that the purchaser would take the property subject to existing tenancies, that the balance of purchase money would be paid and the sale completed on a date different from that contained in the letter of Owen, that interest on the balance of the purchase money would run at 9 per cent. per annum,

(21) Younge 346 ; 34 R. R. 284 (1831).

(22) Younge 295 ; 34 R. R. 268 (1831).

(23) 7 Ir. Eq. Rep. 176 (1844).

J. I. J. HYAM *v.* M. E. GUBBAY.

that the sale would be effected on the authority of a special power-of-attorney from the vendor, that the costs incidental to the completion would be paid by the purchaser, that the properties would be sold subject to unspecified outgoings and easements, that there would be a right of rescission in the vendor, that there would be a covenant running with the land not to use the site for the purposes of a mosque or a temple and not to carry on any noisome or obnoxious trade or business calculated to cause nuisance or annoyance to the Jewish Synagogue, and finally, that time would be deemed of the essence of the contract. It is obvious that many, if not all, of these conditions could in no sense be regarded as usual terms and conditions for the sale of lands. In the words of Knight Bruce, L. J., they were dependent on the state of the title, the conveniences, the fancies and the wishes of the agent of the vendor. The inference seems to me to be legitimate that the parties intended the written draft to be the consummation of their negotiations which were to be treated as concluded only upon the final execution of the written instrument. It is immaterial that the purchaser was prepared to modify the condition as to payment of interest before the negotiations were broken off or that he was prepared to waive one or other of the conditions named in the draft, during the trial of the suit. The vital point is that the fact that so many terms still remained undetermined is a sure index that the contract had not yet been concluded. This view fits in with the mode in which Cohen dealt with the earnest deposit; Cohen admits that he did not cash the cheque, but returned it to Gregory to keep it with him until he heard further from Gubbay; this is consistent only with the hypothesis that Cohen at that stage believed that there was no completed agreement and that it was still open to Gubbay to transfer the property to the Jewish school if he so desired. The inference that there was no concluded agreement is strengthened when we remember that the parties were really not of one mind with reference to material elements of the transaction. Cohen thought that the property would be transferred subject to existing leases; Hyam was under the impression that he would have vacant possession. Cohen thought that there should be a covenant binding the land for all time to come to the effect that no temple or mosque would be built on the site nor any business carried on there which might prove a nuisance to the Jewish Synagogue. Hyam was under the impression that as he would build on the site at once, a personal covenant from him was all that was required. There was ample room for misunderstanding, as is clear from the looseness of the language used by the parties, and if there was ambiguity in any of the conditions of sale in restriction of the rights of the purchaser, the condition would be construed most strongly against the vendor. [*Seaton* v. *Mapp* (24).] Thus, even in the day-book of the solicitor, in the entry of the 13th November, we find the proposed covenant described in one place as "that the purchaser would not use the premises as a temple or mosque" (language appropriate to a personal covenant by the purchaser) and in another place as "that the premises must not be used as a mosque or temple" (words appropriate to indicate a covenant running with the land). After anxious consideration of all the circumstances of the case, I do not see any escape from the conclusion that there was no concluded contract either on the 13th or the 15th November, and that as the parties intended the exe-

(24) 2 Collyer 568; 70 R. R. 324 (1846).

cution of the draft to be the final step in their negotiations, there was no concluded agreement capable of specific performance. In my opinion, this appeal should be allowed, the decree for specific performance discharged, and the suit dismissed with costs throughout.

Solicitor : *Mr. Jones* for the Appellant.

Solicitor : *Mr. Arnowitz* for the Respondent.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 4153 OF 1913.

CHITTY, J. RICHARDSON, J. 1915, 12, July.	NIRAS PURBE and anr., Plaintiffs, Appellants, *v.* MOST. TETRI PASIN and ors., Defendants, Respondents.

Transfer of Property Act (IV of 1882), sec. 41—Husband's property sold by wife—Bonâ fide purchaser for value, "without notice"—His rights—"Without notice"—Significance of the expression—Husband's right to redemption.

Where, during the husband's absence on pilgrimage, the wife sold a piece of land, which had before the husband's departure been mortgaged by her, the purchaser who paid off the mortgage having by proper enquiries satisfied himself that the wife was owner :

Held—*That the husband could not recover the land, nor was he entitled to be allowed to redeem the mortgage.*

This was an appeal from a decision of R. L. Ross, Esq., District Judge of Darbhanga, dated the 8th November 1913, reversing the decree of Babu Ramesh Chandra Sur, Officiating Munsif, Darbhanga, dated the 26th June 1913.

The Appellant Niras had sued in 1912 for the recovery of a piece of land sold by his wife in 1901. The Defendants pleaded that they had purchased for value and had paid off the mortgagee to whom the Plaintiff's wife had mortgaged the land in 1894, that the Plaintiff left for pilgrimage 40 years ago and he was supposed to be dead. The Munsif decreed the suit, but the District Judge, on appeal, reversed the decision of the Munsif and dismissed the suit, holding that the Defendants were *bonâ fide* purchasers for value without notice, actual or constructive, of any defect in their vendor's title and hence the Plaintiff was not entitled to recover the land. From this decree the Plaintiffs preferred the present appeal to the High Court.

Babu Umakali Mukerjee (with *Babu Chandra Sekhar Banerjee*) for the Appellants.—The wife had no right to sell the land, she is described in the sale deed as a widow, and the Appellants, at the very least, are entitled to the equity of redemption of the mortgage.

Babu Jitendra Nath Roy for the Respondents.—Sec. 41 of the Transfer of Property Act, protects a *bonâ fide* purchaser for value, provided he made proper enquiries about his vendor's title.

[CHITTY, J.—How does that help you, how was the proviso satisfied? The Judge is not right in saying that the purchaser was not bound to look beyond the mortgage bond to ascertain the vendor's title. He ought to have made proper enquiries.]

Though the District Judge has not stated anywhere in his judgment that the purchaser made proper enquiries, yet the expression "without notice" includes all that, because sec. 3 of the Transfer of Property Act defines that "a person is said to have notice, when he actually knows a fact, or when, but for wilful abstention from enquiry, etc., he would have known it." That is, constructive notice is inferred from abstention from enquiry, etc.; and when the Judge says that the pur-

chaser had no notice, he virtually declares that the purchaser was not guilty of abstention from enquiry, or, in other words, that he had made proper enquiries. The Judge certainly meant this because it is in evidence that the purchaser enquired and learnt at the Raj *sheresta* and from the Raj *patwari* that Most. Chulhya's (*i.e.*, the vendor's) name was registered there. Under the circumstances the sale is not voidable at law, and their contention in this Court, that they ought to be allowed to redeem, cannot stand. As regards the vendor having been described as a "widow," it is a mistranslation of the word "*Jouze*" in the original sale deed in Urdu.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff whose suit has been dismissed by the District Judge, reversing the decree of the Munsif. The Plaintiff was possessed of a piece of land in Darbhanga town. His case was that he left home on pilgrimage in 1901 and that his wife remained in possession of the land, but that on his return from pilgrimage in 1911, he found that his wife had conveyed the property to the Defendants Nos. 1 to 4 on 25th July 1901, and had died in June 1902. He claimed to recover the land from these Defendants on the ground that his wife had no power to sell to them. On the finding of fact, however, arrived at by the learned District Judge, it appears that the Plaintiff has really no case. He admits that he allowed his wife to mortgage the property for Rs. 115 in 1894, in favour of Doman Panjiar. The Plaintiff's case is that that mortgage was executed before his departure on pilgrimage, and that that was done by his consent. He therefore at that time expressly consented to his wife acting as the ostensible owner of the property. On whatever date he went on pilgrimage, it was certainly on 4th July 1901, when his wife Most. Chulhya sold the property to Defendants Nos. 1 to 4. The Plaintiff says that that did not operate as a sale to those Defendants, inasmuch as his wife had no right to convey; and his case as made before us, is that he should at least be allowed to redeem the mortgage which was passed to the hands of the Defendants by reason of their having paid it off some 5 years after their purchase. This contention, however, is of no avail, having regard to the finding of the Judge on the evidence which was given in the case. It was in evidence that the Defendant Chhathoo Pasi enquired at the Raj *sheresta* and found that Most. Chulhya's name was registered in the *sheresta* and that the Raj *patwari* also told him that her name was so entered. It cannot therefore be said that the requirements of the proviso to sec. 41 of the Transfer of Property Act have not been carried out in this case. The transferee made enquiries at the proper quarter to ascertain whether Most. Chulhya had power to make that transfer. The Judge no doubt had this evidence in his mind when he said that the Defendant was, in his opinion, a *bonâ fide* purchaser for value, without notice, actual or constructive, of any defect in his vendor's title. The Judge may not be quite correct in having said that the Defendant was not bound to look beyond the mortgage bond in order to ascertain whether Most. Chulhya was the real owner of the property or not. As a matter of fact we find that the Defendant did not stop there, but did make further enquiries. No doubt the Judge had this in his mind when he arrived at the finding. We must accept that finding as correct. The appeal must therefore be dismissed with costs.

Appeal dismissed.

THE

Calcutta Weekly Notes.

Vol. XX.] MONDAY, DECEMBER 13, 1915. [No. 4.

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Calcutta High Court.

(CIVIL APPELLATE.)

Gangadhar Karmakar and Brs. v. Sickharbasini Dasya and anr. *Second appeal—Competency of—Bengal Tenancy Act, s. 153—No decision of conflicting claims—Revision—Civil Procedure Code, s. 115—No application*.. xxiv

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ord Chief Justice on legal ties.

We have often said in these columns that is the English system of administration of stice that forms the strongest tie between the ople and Government in this country. No stitution of the British Government is more pular in India than the Law Courts. That common system of laws and a uniform mode f the administration of justice create strong mpathy between people who may differ widely their forms of Government and even in their oughts, ideas and interests, has been the xperience of the Lord Chief Justice of Engnd during his recent visit to the United States f America. His Lordship said at the recent uildhall Banquet "that out of 100,000,000 people constituting the population of the nited States, 90,000,000 were for the Allies, art and soul." The reason that his Lordship ssigned for it was this: "It would be strange it were otherwise. I sat in Court in the nited States. The principle of Common aw, the system of Jurisprudence, were those which I had been brought up."

awyer-Politicians.

At the same banquet Sir F. E. Smith who s recently been appointed Attorney-General ade a spirited defence against the attacks in e newspaper press on the lawyers who have en occupying the position of the most resnsible Ministers of the Crown. He said that "the Bar of England had rendered great services to these islands in the past, and I am confident that it will render great services in the future." At the Constitutional Club, the Attorney-General strongly repudiated the suggestion that the lawyer-politicians had in any respect been found wanting during the present crisis caused by the War. He emphasised the fact that not merely in England but in the British Colonies and the Continent of Europe lawyers had proved their aptitude for filling any position of responsibility no matter how grave and serious. He reminded his audience of the services during the war of Sir Robert Borden, Mr. Hughes (The Australian Premier), General Smuts, M. Millerand and M. Briand, all of whom are lawyers.

CRIMINAL CONSPIRACY.

WHAT CONSTITUTES THE OFFENCE.

In the present article we propose to explain the proper scope of sec. 120-A, I. P. C., which has incorporated the English law of criminal conspiracy in the Indian Penal Code by Act VIII of 1913.

Before the legislation of 1913, the substantive offence of conspiracy did not find any place in the Indian Penal Code. The Penal Code only recognised abetment by means of conspiracy. To appreciate the proper scope of sec. 120-A, I. P. C., it is necessary to point out that the substantive offence of conspiracy is not a species of *abetment*, nor is it identical with the offence of an *attempt* to commit a crime. Some confusion is apt to arise in this respect from the fact that while the offence of conspiracy was not defined in the Indian Penal Code before 1913, still it contained provisions for the punishment of abetment by conspiracy.

Another misapprehension that seems also not very uncommon is in supposing that to charge two or more persons with conspiracy it is necessary to refer to some "overt acts."

To remove these misapprehensions we need only refer to the provisions of the Indian Penal Code relating to abetment by conspiracy and then explain the scope of the new sec. 120-A.

It is not a fact as is sometimes loosely said that the Indian Penal Code did not before 1913 recognise the offence of criminal conspiracy. Sec. 107, cl. (*2*), and sec. 108, Expl. (*5*), show that it did contemplate the offence of conspiracy, but what the framers of the Code did was to introduce the safeguard in these sections that the offence of conspiracy would not be punishable in India unless it was accompanied by some overt act. The act need not in itself be an offence or even illegal. That this is so is shown by the expressions "engages in conspiracy for the doing of that thing," "if an act or omission takes place in pursuance," "in order to the doing of that thing" in sec. 107 of the Indian Penal Code.

The above also clearly indicates that the overt act must show some preparation for the commission of an offence to make it punishable under the abetment sections.

Sec. 34, I. P. C., which too is regarded as a conspiracy section also contemplates an overt act which must amount to an offence.

This, as stated by Mr. Mayne in his commentary on the Indian Penal Code, is the correct interpretation of the law, that is, unless a conspiracy was manifested by an overt act a prosecution for abetment by conspiracy did not lie under the old Code. (See Mayne's Criminal Law, Ed., 1914, p. 247.) The case of *Kali Munda* v. *King-Emperor*, I. L. R. 28 Cal. 797, shows that where abetment by conspiracy is alleged it is necessary to prove the conspiracy first. In that case the previous meetings held, the declarations made, the persuasions resorted to, for the commission of offences were given in evidence to establish the existence of conspiracy, and then sec. 10 of the Evidence Act was brought into requisition to prove the complicity of the different accused. It may therefore be safely stated on good authority that when acts are committed which would constitute offences under the Indian Penal Code, the proper course is to charge under the appropriate sections of the Indian Penal Code and if the offences are committed in pursuance of a conspiracy, to add a charge under sec. 109, I. P. C., for abetment by conspiracy, subject to certain qualifications stated below. This view will find support from the judgment of that eminent Judge, Sir Bhashyam Ayyangar in *King-Emperor* v. *Tirrumal Reddi*, I. L. R. 24 Mad. at pp. 546 and 547. But, as that learned Judge says, you cannot charge a person as an "abettor as well as a perpetrator," "cumulatively" although you may do so "in the alternative." (*Ibid.* at p. 547.)

The new sec. 120-A, I. P. C., provides that when two or more persons have agreed to commit an offence or an illegal act or an act not illegal but by illegal means, he is guilty of criminal conspiracy. We shall now show that it is the agreement which is made punishable by the section and not the act itself which may or may not be punishable under the Indian Penal Code.

The definition of conspiracy in sec. 120-A is bodily taken out of Lord Denman's judgment in *Jone's case* (1844) 4 B. & Ad. 345, at p. 439. See also Wright on Conspiracy, p. 63.

Before we come to explain the definition, it will be of some assistance if we briefly notice the history of the evolution of this definition of criminal conspiracy.

During the 17th Century it was frequently discussed both at the Bar and on the Bench whether the gist of the crime of conspiracy was in the *combination* or included the *execution* of the acts proposed. These discussions turned on the question how far the execution, or the overt act, was to be detailed in the indictment. But it was since *the Poulterer's case* decided in the Star Chamber in 1611 (9 Coke's Rep., p. 55) that the gist of the offence was held to be in the combination itself. The controversy at the Bar and conflict on the Bench, however, continued, till the offence was finally defined by Lord Denman. Then followed a period of explanatio and it is now finally settled that the gist of th crime of criminal combination (conspiracy) co sists in the *agreement* for such purpose and n in the execution. Of course the purposes mu be criminal or unlawful or the means adopte must be illegal. (See Wright on Conspirac pp. 66-67.)

The view that the offence consists in th agreement itself and not in the execution wa finally adopted by the House of Lords in th leading case *R.* v. *Mulcahy*, L. R. 3 H. L. 37 It is stated there that conspiracy consists n merely in the intention; so long as the desig rests in the intention it is not indictable; whe two or more persons agree to carry it into effe the very plot is an act in itself if it be for cr minal object or for the use of criminal mean

Sir Robert Wright, for some time a Judge the High Court in England and a recognis authority on the subject, says that conspira

is different from ordinary crimes or a joint crime inasmuch as such crimes may be proved by participation in the acts, whereas in the case of conspiracy participation in the design must be shown. And if others have to be connected with the conspiracy it must be done by establishing participation in furtherance of the plot, agreement or criminal design which must be the common object of all. See Wright, p. 71. Sir Robert Wright lays down in the following terms what should be the very first issue in a charge of criminal conspiracy. "Whether there was an agreement for the alleged purposes and whether the defendant was a party to it." The agreement or the plot is considered the "overt act" and no other overt act is necessary to establish a charge of conspiracy.

This view, has been accepted also by Sir Lawrence Jenkins in the case of *Barindra K. Ghose* v. *Emperor*, 14 C. W. N. 1142. There the learned Chief Justice quotes the dictum of Willis, J., in *R.* v. *Mulcahy* and explains the law in the same terms. Reference may be made to the portion of the definition of conspiracy as given by Willis, J., quoted at p. 1141, Vol. 14, C. W. N., where the learned Judge says that the agreement must be so established that it is "capable of being enforced if lawful," and "punishable if for a criminal object or for the use of criminal means." Thus it would appear that the agreement for criminal purpose must be proved between two or more persons by satisfactory and unequivocable evidence and then the complicity of other persons in the plot or in acts in pursuance thereof may be established.

We have said before that the substantive offence of conspiracy is not a species of abetment and we shall now further explain the distinction between an abettor and a conspirator. We have said before that a person joining a conspiracy and taking part in the commission of an offence or acting in pursuance thereof may be an abettor as contemplated in sec. 107, cl. 2 and sec. 108, Expl. 5, of the I. P. C., but it does not necessarily follow that every abettor of an offence may be presumed to be a conspirator. It is a very ordinary rule of logic that the converse of a proposition is not necessarily true. For instance, if I see a man assaulting another and join in the assault we may be tried as joint offenders but not necessarily as conspirators. It is obvious therefore that a joint offender cannot be presumed to be a co-conspirator. On the other hand if I agreed with another man to go and assault some other person our agreement would be a conspiracy and it would be perfectly immaterial for the purposes of a charge of conspiracy for the commission of an offence whether either or any of us actually committed the assault or not. It is the previous criminal concert or agreement between two or more persons that constitutes the offence of conspiracy and not the execution or the commission of the offence.

Thus it follows that in the absence of any proof of preconcert, agreement and common criminal design, mere "overt acts" would not be enough to substantiate a charge of criminal conspiracy. For the acts of individuals may be joint offences or acts of abetment in the commission of an offence or may be attempts for its commission without any preconcert.

It may generally be stated that if a person joins another or others in the formation of a plot for the commission of an offence and does take part in its commission he is an abettor. But one who takes no part in the execution but participates in the formation of the plot, is only a co-conspirator. This is quite consistent with the scheme of the Indian Penal Code. (See Encyclo : Laws of England, p. 24, heading "Abettor."). This view is also supported by the judgment of Beachcroft, J., in Baranagore conspiracy case *Khagendra Nath Chaudhuri* v. *King-Emperor*, 19 C. W. N. 706.

The law of criminal conspiracy has been described by Sir Robert Wright as an extension of the law of attempt. But by this he surely means that it goes a step beyond the law of *attempt*, not that the two are identical. *Conspiracy is distinguished from attempt* in this way that in an attempt you must prove something more than mere agreement; some movement or progress towards the commission of the offence is essential but in the case of criminal conspiracy, proof of the agreement or the formation of the plot is enough. An attempt may be said to be an "overt act" which is more than an intention or a preparation but falls short of a completed offence. See sec. 511, I. P. C. It is doubtful whether all attempts for the commission of an offence would be punishable under the Indian Penal Code. (See Mayne's Penal Code, 3rd Edition Ch. Attempts Art. 701, p. 926.)

The new secs. 120-A and 120-B, of the Indian Penal Code, have made a departure from the scheme of the old Code in so far as they have embodied in them the principle of English Law which makes plots for the commission of an offence punishable by itself and independently of the fact whether the plot is in progress (attempt)

or the plot has been put into execution (abetment or completed offence).

An attempt to be punishable must result in some overt act towards the commission of an offence. To make one punishable for abetment by conspiracy, it must be shown that besides the plot there is some overt act which may not amount to an offence but shows *preparation* for the commission of some offence or in other words that the plot for committing some crime must be shown to be in progress. (Mayne, *ibid.*, Art. 249.) But *preparations* for a crime are not otherwise punishable under the Indian Penal Code. The new sec. 120-A makes the formation of the plot punishable apart from any overt act as contemplated in secs. 54, 107, 108, 109 and 511 of the Indian Penal Code. Thus the substantive offence of conspiracy is quite distinct from that of *abetment* or *attempt*.

That our analysis of the law of criminal conspiracy is borne out by the terms of the new sec. 120-A, I. P. C., will appear by a reference to it.

Turning to the proviso which follows sec. 120-A, paras. (1) and (2), we find that, as in English Law, in the case of an "agreement to commit an offence," it is not necessary to do any act besides the "agreement" to constitute the offence of conspiracy. Or in other words, as in English law, the essence of the offence of conspiracy under sec. 120-A, I. P. C., consists in the "agreement" and not in its "execution."

This the English Judges have explained by saying that in a conspiracy for the commission of an offence, the plot itself is the "overt act" and no other "overt act" is necessary to support the charge.

But both the English Law and the Indian Act VIII. of 1913, require that when there is a combination or agreement for the commission of a civil wrong or for the employment of illegal means, some overt "act" "in pursuance of the agreement" must be done to constitute criminal conspiracy as defined in sec. 120-A, I. P. C.

Thus it is evident that it is only in the latter case that overt "act" has to be taken into consideration, which moreover need not be an offence. It follows therefore logically and legally that the criminality of "criminal conspiracy" is distinct from that of the overt act and consists in the "agreement" and not in its "execution." For in some cases, as where the object is to commit a "civil wrong" or to employ illegal means which may not amount to an offence, a man may be prosecuted for "criminal conspiracy" although no criminality attaches to the "overt act."

CURRENT INDIAN CASES.

(Civil.)

Hindu Law.

Gajanan *v.* Kashinath, I. L. R. 39 Bom 410.

The adoption of a half-brother is not invalid The opinions of Nanda Pandit when they ar not supported by any text of the Smriti-writer are generally speaking recommendatory and no mandatory.

Civil Procedure Code, sec. 97.

Bharma *v.* Bhamagavda, I. L. R. 39 Bom 421.

A decision that a matter is not *res judicat* and that therefore the trial can proceed is not preliminary decree from which an appeal wil lie.

The Indian Stamp Act.

In re Gangaram Narayandas Teli, I. L. R 39 Bom. 434.

In the case of a lease containing a stipulation regarding the payment by the lessee to the lessor of Government assessment, etc., for its eventual payment by the lessor to the Government stamp duty should be calculated on the amount of rent only and not on the total amoun of rent and Government assessment, etc.

Guardians and Wards Act, sec. 25.

Davabhai *v.* Bai Parvati, I. L. R. 39 Bom 438.

A guardian as defined by the Act means a person having the care of the person of a minor or of his property or of both his person and property and it is open to an aggrieved party to make an application to the Court under sec 25 where the ward leaves or is removed from the custody of the guardian of his person. It is not essential that there should be a certificated guardian before an application under sec. 25 could be entertained by the Court.

Transfer of Property Act, sec. 54.

Timangowda *v.* Benepgowda, I. L. R. 39 Bom. 472.

The Plaintiff purchased a house under a registered deed of sale. The Defendant remained in possession and on the Plaintiff suing

for recovery of possession the defence was made that the Defendant was entitled to retain possession as the Plaintiff had agreed to reconvey the house to the Defendant on payment of a certain sum.

Held, that it was not a good defence and the case was governed by sec. 54 of the Transfer of Property Act.

Railways Act.

RAMCHANDRA NATHU *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY, I. L. R. 39 Bom. 485.

The commencement of the liability of the company for goods delivered to be carried under sec. 72 of the Act is in no way dependent upon the fact of a receipt having been granted and must be determind on the evidence in the case.

Transfer of Property Act, sec. 53.

VASUDEO *v.* JANARDHAN, I. L. R. 39 Bom. 507.

A person who steps in by operation of law and not by any act of the owner is not a subsequent transferee within the meaning of sec. 53.

(CRIMINAL.)

Approver—Forfeiture of pardon.

EMPEROR *v.* GANGUA, I. L. R. 37 All. 331.

An approver in a dacoity case after he gave his evidence in the Sessions Court was directed by the Judge, who acquitted the accused, to be prosecuted on the charge of dacoity. The Sessions Judge found that the approver did not speak the truth and therefore forfeited the conditional pardon granted to him.

In the course of his trial on a charge of dacoity the approver pleaded the pardon in the Sessions Court although he had taken no such plea before the Committing Magistrate.

Held, that in the original case the Sessions Judge while competent to pronounce on the truthfulness or otherwise of the approver's testimony had no authority to direct his prosecution on any specific charge.

That while on his trial the approver was entitled to plead his pardon in the Sessions Court.

Criminal Procedure Code, sec. 476.

EMPEROR *v.* TILAK PANDEY, I. L. R. 37 All. 344.

There is nothing in sec. 476 which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter.

Indian Penal Code, sec. 332—Assaulting a public servant in the discharge of his duties.

EMPEROR *v.* MUKHTAR AHMAD, I. L. R. 37 All. 353.

An Excise Officer searched the house of the accused without a warrant and in the presence of only one search witness. He also directed a constable to scale the outer wall and effect a burglarious entry into the house. The Inspector and his constables were assaulted by the accused.

Held, the accused could only be convicted under sec. 323 and not under sec. 332, I. P. C.

Criminal Procedure Code, secs. 209-212.

DHARAM SING *v.* JOTI PRASAD, I. L. R. 37 All. 355.

When in an enquiry in a case triable by the Court of Sessions the Magistrate has heard the evidence for the prosecution with entire disbelief and he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit and *a fortiori* when after examining certain witnesses on behalf of the accused he has come to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution witnesses he is well within his discretion in discharging the accused.

Reviews.

ESTOPPEL AND THE SUBSTANTIVE LAW. *By Arthur Caspersz, Bar.-at-Law, Advocate of the High Court, Calcutta. Fourth Edition. Butterworth & Co. (India), Limited. Price Rs. 18.*

The title of Mr. Caspersz's well-known work on Estoppel has, we notice, been somewhat altered. We believe that the author's object in doing so is to show what important part the so-called doctrine of estoppel plays in the sphere of the substantive law. There may be a prevailing notion in India that the doctrine of estoppel is a rule of evidence because the doctrine has been embodied in sec. 115 of the Indian Evidence Act. An inspection of the section will at once convince one that it is as much a rule of substantive law as it is one of evidence. The doctrine of "good faith" or that of "keeping faith," which is often ambiguously expressed by the expression "estoppel" forms the very backbone of the validity or otherwise of all human transactions that fall within the scope of the substantive law. It is no less a reasonable rule

of the adjective law, be it that of procedure, pleading or evidence, founded on the same doctrine of "good faith," that no person who has by his representation, active or passive, caused another man to believe in its truth and act upon that belief, shall be allowed in any judicial proceeding between them to deny the truth of it or resile from its consequences. It is perhaps unfortunate that the expression "Estoppel" ever found currency in the English legal nomenclature. But the science of law is not quite unique in this rsepect. We come across euphonious and perhaps no less mysterious expressions of the kind in the more precise and positive sciences as well. For instance when a chemical action is not fully understood, it is sought to be explained by the use of the euphonious expression "catalytic." It does not throw any additional light on it but is used as a make-believe expression designed to take the place of an explanation. The same may be said to be true of the expression "Estoppel." As patient research has eventually explained many mysterious phenomena of nature by reference to simple laws and made many bombastic nomenclature obsolete in the domain of science, the same process seems to be discernible in the region of law as well. Whatever ambiguity or mystery used to hang round the so-called doctrine of "Estoppel" at one time has almost all now been dispelled by the researches of American and English jurists and in no less degree by the strong common sense view of the doctrine taken by the English Judges, that after all the so-called doctrine of "Estoppel" is a question of "good faith" and as such is ordinarily more a question of fact than one of law. This finds expression in a recent decision of the Judicial Committee of the Privy Council. *In Rani Dharma Kanwar* v. *Balwant Sing*, 16 C. W. N. 675; their Lordships say at p. 682 that a very strong case of estoppel might well be decided as one of fact without recourse to the doctrine.

We appreciate therefore this attempt on the part of Mr. Caspersz to explain the so-called doctrine of estoppel by the classification of his subject under the different heads of the substantive and adjective law to which the doctrine is applicable and explain it under each head by copious extracts from the decisions of English and Indian Law Courts. Mr. Caspersz had to a great extent rewritten his third Edition and has embodied in the Fourth nearly 700 new cases noting the points of decision. The get-up and the printing of the work are excellent.

Indian Decisions (New Series). High Court Reports, Bengal, Vol. I. *Law Printing House, Madras. 1915.*

The Law Printing House have, very deservedly, obtained permission from the Government to reprint the High Court Reports of Bengal, Madras, Bombay and the North-Western Provinces from 1862 to 1875, and the present volume is the first of the series and contains a verbatim reprint of the first and second volumes of the Bengal Law Reports (1868-1869)). The present volume fully maintains the high standard of the other reprints of Law Reports published by this office in point of get-up and excellence of its arrangements. The original reports are published verbatim with headnotes, statements of facts, arguments of counsel and judgments and references are given showing how each case has dealt with previous cases and has in its turn been affected by subsequent judicial decisions.

All-India Civil Court Manual. Imperial Acts, Vol. I. Third Edition. *Law Printing House, Madras. 1915.*

That a third edition of this compilation has been called for within a comparatively short time of its first appearance in the field is proof positive of the appreciation in which it is held by legal practitioners. Besides the Acts contained in the previous edition this volume incorporates such Acts as were passed between the years 1913 and 1915, amongst which the Administrator-Generals Act (III of 1913), the Companies Act (VII of 1913 as amended by Act XI of 1914) and the Copyright Act (III of 1914) may be specially mentioned. We notice that the Government of India Act (5 and 6 George V, Ch. 61) consolidating all enactments relating to the Government of India, the Indian Councils and the Indian High Courts has also found a place in the present volume. The notes of case-law given at the foot of each page have also been brought up-to-date. Heavy as the compilation is, its flexible covers make it easy of handling.

All-India Civil Court Manual. Local Acts—United Provinces of Agra and Oudh. Second Edition. *Law Printing House, Madras. 1915.*

We notice that this publication too is going through a second edition which appears to be fuller and more exhaustive than the first and contains several Acts which were

left out in the previous edition. The texts too of many of the Acts contained in this volume appear to have been subjected to careful revision and all recent legislative changes and amendments have been incorporated in the Acts themselves and pointed out in the footnotes as well. The get-up of the volume is excellent.

ALL-INDIA CIVIL COURT MANUAL. Local Acts—Central Provinces. *Law Printing House, Madras. 1915.*

The volume under notice is a new addition to the above series of useful compilations containing the local Acts applicable in the Central Provinces. It contains 15 local enactments with all legislative changes up-to-date noted therein. It is evidently the desire of the publishers to leave no Province of India without a complete set of its laws in a handy form.

THE GOVERNMENT OF INDIA ACT, 1915. *By Panchanandas Mukherji, M. A. Published by Messrs. Thacker, Spink & Co. 1915. Price Re. 1.*

This little volume is a supplement to the Indian Constitutional Documents (1773-1913) which we had occasion to review previously. The present Government of India Act, it need hardly be stated, consolidates all the parliamentary statutes relating to India and, in a manner, brings up to date the record of constitutional landmarks along which the Indian constitution has developed since the acquisition by the East Indian Company of the Dewany of Bengal in 1765. The printing as well as the get-up of the book is excellent.

GHOSE'S LAWYERS' DIARY, 1916. *Compiled by J. N. Ghosh (Krishnagar). Published by R. Cambray & Co., Law-Booksellers and Publishers, Calcutta. Price Re. 1.*

This is a handy and well got up diary, distinctively styled "Lawyers' diary," because besides containing the directories, tables of rates, weights and measures and postal, railway and other informations usually found in similar compilations, it gives a fairly large amount of purely legal information such as Court-fees, stamps, process fees, periods of limitations for suits and applications, tables of statutes, etc., with, to cap all, a list of barristers, attorneys and vakils of the High Court, which last might however have been brought more up to date without much additional trouble. In the calendar portion we have corresponding Mahomedan, Fuslee, Samvat and Bengali dates with the *tithis* also thrown in. There are pages set apart for memos of expenses and other matters; and, all things considered, Ghosh's Lawyers' Diary for 1916 appears, for its price, to be as useful a compilation of its kind as any we have known.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD PARMOOR.
LORD WRENBURY.
SIR JOHN EDGE.
MR. AMEER ALI.*
1915,
27, October.

RAJ KUMAR BABU BISHEN NARAYAN SINGH, Plaintiff, Appellant,
v.
MAHARANI JANKI KUNWAR and ors., Defendants, Respondents.

Claim to recover Bettia Raj—Special leave to appeal granted.

This was an application for special leave to appeal from a judgment of the Calcutta High Court, dated 5th September 1911, affirming a judgment of the Subordinate Judge of Chapra. The Petitioner instituted the present suit to recover the Bettia Raj on the allegation that he was entitled to succeed thereto by right of survivorship, and that Maharani Janki Kunwar had no right or title to the same. The Rani's title was also challenged by one Ram Nandan Singh, whose claim was finally rejected by the Judicial Committee of the Privy Council in a judgment reported in L. R. 29 I. A., p. 187. In the present case the Plaintiff produced new evidence, chiefly documentary, and contended in the Courts below that if the new evidence had been before the Courts in the previous litigation, judgment would have gone against the Maharani.

After considering the new evidence the High Court, as well as the Subordinate Judge, came to the conclusion that the decision in the previous litigation was right, and that the Plaintiff had failed to establish his title. By an order, dated the 28th August 1912, the High Court refused leave to appeal to His Majesty

* Viscount Haldane retired when during the argument of the Counsel for the Petitioner, it appeared that Viscount (then Mr.) Haldane was Counsel for the Appellant in the previous litigation.—*See* L. R. 29 I. A. 187.

in Council on the ground that in their opinion the appeal did not involve any substantial question of law, and that it was not a fit case for appeal to His Majesty in Council. Hence this petition.

Sir Erle Richards, K. C., and *Mr. Bhugwandin Dubé*, for the Petitioner, submitted that the Petitioner was entitled to special leave. The judgment in Ram Nandan Singh's case was not binding on the Petitioner as he was not a party to it. The Petitioner had produced new and important evidence which went to show that the Bettia Raj was not granted to Raja Jugal Kishore Singh as a matter of the grace and favour of the Government in exercise of its Sovereign authority, and that the Petitioner was entitled to succeed to the Raj by right of survivorship.

Their Lordships granted the petition on the usual terms.

Messrs. T. L. Wilson & Co. for the Petitioner.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before HOLMWOOD and MULLICK, JJ. APPEAL FROM APPELLATE DECREE No. 1706 OF 1913. GANGADHAR KARMAKAR and on his death his heirs and legal representatives KALIPADA KARMAKAR AND ORS., Defendants Appellants *v.* SICKHARBASINI DASYA (Plaintiff) and HRIDAY KANTA KARMAKAR (*Pro formâ* Defendant), Respondents. 23rd November 1915.

Second appeal—Competency of—Bengal Tenancy Act (VIII of 1885), sec. 153—No decision of conflicting claims—Revision—Civil Procedure Code (Act V of 1908), sec. 115—No application.

This second appeal arose out of a rent suit valued less than Rs. 50. The Plaintiff, a lady, alleging that she purchased the land from the original proprietor, sued her father as a tenant for rent, for the last two years of her vendor's incumbency and for the first two years of her possession. The father set up the title in himself and said that he purchased the holding *benami* in the name of his daughter and leased it out to his son-in-law nominally for his daughter. The first Court declined to have anything to do with these conflicting claims and decided that, because the Plaintiff had not attempted to collect or collected any rent from her father, the relationship of landlord and tenant did not exist. The Appellate Court held on a preliminary objection, that the question of the conflicting title to or interest in the land had been decided by the first Court and that it was competent to him to deal with the appeal and accordingly he dealt with it and found on the facts that the lady was speaking the truth and was supported by the necessary documents and that the story told by the father was a mere pretence to get rid of his liability.

Held, that the appeal to the lower Appellate Court was incompetent as there was no actual decision of the conflicting claims or interest in the land by the Primary Court.

Shilabati Debi v. *Rodrigues* (I. L. R. 35 Cal. 547) followed.

That if no appeal lay to the first Appellate Court, no appeal lay to the High Court from the decree of the first Appellate Court.

Bhagabati Bewa v. *Nanda Kumar Chakravarty* (12 C. W. N. 835) followed.

That the High Court could deal with the case under sec. 115 of the Code of Civil Procedure, though no application was made for that purpose.

Babu Baranashibasi Mukerjee for the Appellants.

Babus Sarat Chandra Roy Chowdhury and *Sasadhar Roy* (Jr.) for the Respondent.

A. T. M. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

VISCOUNT HALDANE.
LORD WRENBURY.
SIR JOHN EDGE.
MR. AMEER ALI.
1915,
Heard, 22, October.
Judgment, 3, November.

A. K. A. S. JAMAL, Appellant,
v.
MOOLLA DAWOOD, SONS, AND COMPANY, Respondents.

Indian Contract Act (IX of 1872), secs. 73, 107 —Contract to purchase shares—Failure of buyer to take on date of delivery—Subsequent sale by seller at higher than market price on date of delivery—Buyer's liability—Measure of damages.

The Defendants were purchasers of certain shares from the Plaintiff under a contract note which inter alia *provided that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction—any loss arising therefrom to be recoverable from the buyer. On 30th December 1911, the date of delivery, the shares having fallen largely in value, the Defendants failed to take delivery. The seller sold the shares on various dates from 28th February 1912 onwards, the sales fetching in most instances higher prices than the market rate on 30th December 1912. The Plaintiff sued the Defendants for the difference between the contract rate and the market rate on 30th December 1911; but the Appeal Court in India held that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach.*

Held—*That, upon a true construction of the contract note, property in the shares never passed to the purchaser and sec. 107 of the Contract Act which deals with cases in which a seller has lien on goods or has stopped them in transitu had no application to the case.*

That the option to resell was only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale.

That the loss to the Plaintiff arising from Defendants' breach of the contract was the loss at the date of the breach, viz., the 30th December 1911. If at that date the Plaintiff could do something or did something which mitigated the damage the Defendants would be entitled to the benefit of it, STANIFORTH *v.* LYALL (1), *but the fact that by reason of the loss of the contract which the Defendants failed to perform, the Plaintiff obtained the benefit of another contract which was of value to him, did not entitle the Defendants to the benefit of the later contract.*

YATES *v.* WHYTE (2), BRADBURN *v.* GREAT WESTERN RAILWAY CO. (3), JEBSEN *v.* EAST AND WEST INDIA DOCK CO. (4), RODOCANACHI *v.* MILBURN (5) *and* WILLIAMS *v.* AGIUS (6) *referred to.*

This was an appeal from a judgment of the Chief Court of Lower Burma (Hartnoll, Officiating C. J. and Young, J.), dated the 24th July 1913, which affirmed a judgment of that Court (Ormond, J.).

The Plaintiff-Appellant sold certain shares to the Respondents and the date for delivery was the 30th December 1911, but the Respondents failed to pay for them and take delivery on the date fixed. The Appellant thereupon intimated that he would hold the Respondents responsible for breach of contract. Subsequently the Appellant sold the shares in some cases with profit. The Appellant brought the present suit to recover damages.

The Courts below held that the Respondents were entitled to the benefit of the increased price which the shares in fact

(1) 7 Bing. 169 (1830).
(2) 4 Bing. N. C 272 (1838).
(3) L. R. 10 Ex. 1 (1874).
(4) L. R. 10 C. P. 300 (1875).
(5) 18 Q. B. D. 67 (1886).
(6) [1914] A. C 618.

realized by the sale. The trial Judge in his judgment observed as follows :—

"Can then the Defendant-firm claim to have the benefit of the higher prices realized by the Plaintiff? I think they can. If a seller, having the right of resale, elects to exercise such right, he must give notice of his intention to resell; and having done so he has made his election between the two measures of damages that were open to him. After giving such notice, it is his duty to resell either at the time (if any) appointed by the contract or within a reasonable time after the date of the breach. If he delays, he takes upon himself all risk arising from further depreciation. And if he sells at a higher rate, such sale will be taken to be a resale in pursuance of his notice: for otherwise he would be allowed to benefit by his own wrong."

On appeal Hartnoll, Officiating C. J., (Young, J., concurring) delivered the following judgment :—

"There is no doubt as to what Appellant's true measure of damages is. It is the difference between the contract prices and the market price when the contracts ought to have been completed,—that is, in this case the date of the breach the 30th December 1911 for the Appellant could then have taken the shares into the market and obtained the current price for them. This was the principle followed in the case of *Pott* v. *Flather* (7). But it was argued that as in the beginning Appellant chose to proceed under sec. 107 of the Indian Contract Act he should be kept to such choice. It is clear that though at first he expressed the intention of pursuing the course set out in sec. 107 he did not keep to his intention for, when he brought his suit he had only sold 100 shares and this was on the 28th February and he sued for his whole measure of damages. Appellant's counsel urged that, though Appellant at first expressed the intention of following the course laid down by sec. 107, he was not bound to carry out such intention and could change his mind if he liked. This view appears to be correct. The words of sec. 107 are permissive and not compulsory. In the case of *Buldeo Doss* v. *Howe* (8) the view was taken that sec. 107 does not deprive an unpaid vendor of goods of any other remedy he may have. I am therefore unable to agree with the views expressed by the learned Judge on the Original Side as to Appellant being bound to proceed under sec. 107.

"But I think that there is abundant authority for holding that the Respondents are entitled to the benefit of the higher prices realized by Appellant in mitigation of the sum payable by them as damages. The subject is dealt with at pp. 771 and 772 of Leake on Contracts, 6th Ed., and p. 207 of Mayne on Damages, 8th Ed.

"I would especially refer to the following cases :

"In *Oldershaw* v. *Holt* (9) where the Plaintiff claimed as damages certain monies from the Defendant owing to his failing to carry out certain terms of a building lease and where Plaintiff entered into a new agreement with another tenant the jury were directed to have regard to the new and ultimately more advantageous agreement entered into in calculating the amount of damages due. In *Smith* v. *M'Guire* (10), which was a suit to recover damages for failure to carry out the terms of a charter party, that is, to load a ship with a cargo of oats Martin B. said : "It would be doubtful whether a party who breaks a contract has a right to say to a

(7) 16 L J., Q. B. 366 (1847).

(8) I. L. R. 6 Cal. 64 (1880).
(9) 12 A. & E. 590 (1840).
(10) 27 L. J Ex. 465 ; 3 H. & N. 554 (1858).

person with whom he breaks it 'I will not pay you the damages arising from my breach of contract, because you ought to have done something else for the purpose of relieving me from it.' I am not satisfied that the person who breaks a contract has a right to insist on that at all; *but if the ship had earned anything the Defendant would be entitled to a deduction in respect to that.*" Again in *Brace* v. *Calder* (11) where the Plaintiff was employed by the Defendants, a partnership consisting of 4 members, as manager of a branch of their business and the agreement was that he was to be employed for a certain period, but before that period had expired two of the partners retired and the business was transferred to and carried on by the other two, in an action for wrongful dismissal it was held that the Plaintiff was only entitled to nominal damages as the continuing partners were willing to employ the Plaintiff on the same terms as before for the remainder of the period and so the Plaintiff would have suffered no damage. In that in the present case the Appellant reduced his loss by selling the shares at a higher price than obtained at the date of the breach, I think it only equitable to give the Respondents the benefit of the higher prices realized."

Hence this appeal.

Sir Erle Richards, K. C., and *Mr. F. J. Coltman* for the Appellant submitted that the Courts below were wrong in holding that the Respondents were entitled in mitigation of damages to the benefit of higher prices actually obtained by the Appellant by sale of the shares after the institution of the suit. The Appellant was entitled to recover the whole of the difference between the contract price and the market rate prevailing at the date of the breach. The clause in the contract did not take away any right under the law. It merely gave additional security. Sec. 107 of the Indian Contract Act had no application to the case, and in any case the remedy provided by it was optional. The case was covered by sec. 73 of the Indian Contract Act. The loss to be ascertained was the loss at the date of the breach and the market value on that date was the decisive element. Reference was made to the following :— *Williams* v. *Agius* (6) and *Pott* v. *Flather* (7).

Mr. Frand Dodd for the Respondents submitted that the Appellant having elected to exercise the right of resale was accountable to the Respondents for the proceeds thereof. The Respondents were entitled to the benefit of any matter which went in mitigation of damages. The sales of the shares held by the Appellant were in pursuance of the notice given by him. The principle of sec. 107 of the Indian Contract Act was applicable.

Their LORDSHIPS' JUDGMENT was delivered by

LORD WRENBURY.—Under six contracts made at various dates between April and August 1911 the Plaintiff (the Appellant) was seller to the Defendants of certain 23,500 shares at prices amounting in the aggregate to Rs. 1,84,125-10. The date for delivery was the 30th December 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran : "by auction at the Exchange at the next meeting," etc.

By the 30th December the shares had

(11) [1895] 2 Q. B 253.

(6) [1914] A. C. 510 at p. 560.

(7) 16 L. J. C. B. 366 (1847).

fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding: "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo, responsible for all losses sustained thereby (*sic*)." The purchasers did not pay the sum demanded. They set up a contention that the seller was indebted to them on another transaction, and they sent cheques for the differential sum of Rs. 75,925-10, and called for a transfer of the shares. On the 2nd January 1912 the seller repudiated the claim to a set-off, and repeated: "We have now to give you notice that our client intends to resell these shares and to institute a suit against you for the recovery of any loss which may result from that course." The purchasers stopped payment of the cheques, and nothing turns upon the fact that they were given.

Negotiations ensued between the parties which extended to 26th February 1912. On that day the seller, by his agents, wrote to the purchasers a letter as follows:—

"71, Phayre Street, Rangoon,
"26th February 1912.

"Messrs. Moolla Dawood and Sons.

"Dear Sirs,

"We are instructed by Mr. A. K. A. S. Jamal that he has not hitherto taken any steps to enforce his claim against you for failing to pay for and take delivery of 23,500 shares in the British Burma Petroleum Company, Limited, at your request, in order that his claim might, if possible, be settled. It now appears that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs. 1,09,219-6 is paid to him by way of compensation before the end of this week.

"The amount claimed is arrived at by deducting Rs. 74,906-4, the value of 23,500 shares at 4*s.* 3*d.*, from Rs. 1,84,125-10, the agreed price of the shares.

"Yours faithfully,
"GILES AND COLTMAN."

The 4*s.* 3*d.* a share there mentioned was the market price of the shares on the 30th December.

On the 22nd March the seller commenced a suit to recover Rs. 1,09,218-12 as damages for breach measured by the difference between the contract price of the shares and their market price (4*s.* 3d. a share) on the date of the breach, the 30th December 1911. This is (with a trifling variance) the same sum and arrived at in the same way as the Rs. 1,09,219-6 mentioned in the letter.

Immediately after the letter of the 26th February 1912, *viz.*, on the 28th February, the seller commenced to make sale of the shares. He sold them all at various dates from the 28th February onwards. In one case the sale was at less than 4*s.* 3*d.* (*viz.*, at 4*s.*). In one case it was at 4*s.* 3*d.* In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realised, by giving him credit in reduction of the damages for the increased prices in fact realised over the market price at the 30th December, the date of the breach. The Appellant contends that this is wrong.

Their Lordships will first deal with the contractual term as to resale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was in their Lordships' opinion only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the pur-

chaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price. Their Lordships are unable to agree with the original Judge that the Plaintiff's letters of the 30th December and 2nd January amounted to an election to take a measure of damages to be arrived at by a resale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to resale.

The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a Plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the Plaintiff could do something or did something which mitigated the damage, the Defendant is entitled to the benefit of it. *Staniforth* v. *Lyall* (1), is an illustration of this. But the fact that by reason of the loss of the contract which the Defendant has failed to perform the Plaintiff obtains the benefit of another contract which is of value to him, does not entitle the Defendant to the benefit of the latter contract. *Yates* v. *Whyte* (2), *Bradburn* v. *Great Western Railway Co.* (3) and *Jebsen* v. *East and West India Dock Co.* (4).

The decision in *Rodocanachi* v. *Milburn* (5), that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams* v. *Agius* (6.) The breach in *Rodocanachi* v. *Milburn* (5) was breach by the seller to deliver, but in their Lordships' opinion the proposition is equally true where the breach is committed by the buyer.

The Respondents further contend that secs. 73 and 107 of the Indian Contract Act, or one of them, is in their favour. As regards sec. 107 their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them in transitu. The section follows upon sections dealing with those subject matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares.

(1) 7 Bing. 169 (1830).
(2) 4 Bing. N. C 272 (1838)
(3) L. R. 10 Ex. 1 (1874).
(4) L. R. 10 C. P. 300 (1875).
(5) 18 Q. B. D. 67 (1886).
(6) [1914] A. C. 510.

A. K. A. S. JAMAL *v.* MOOLLA DAWOOD, SONS AND COMPANY.

As regards sec. 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment.

Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares, and became entitled to damages such as the law allows. The first of these two properties, *viz.*, the shares, he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the original Court and in the Appeal Court discharged, and judgment entered for the Plaintiff according to his plaint, and that the Respondent ought to pay the costs in the Courts below and of this appeal.

Solicitors: *Messrs. Arnold & Sons* for the Appellants.

Solicitors: *Messrs. Bramall and White* for the Respondents.

B. D. *Appeal allowed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 1039 OF 1910.

CHAUDHURI, J.		KUNJA LAL BANERJEE
1915,		*v.*
15, February.		NARSAMBA DEBI.

Rule of* Damdupat, *if applicable to mortgage decree—Interest in excess of principal if may be allowed—Sec 4, Transfer of Property Act (IV of 1882)—Sec. 87, Contract Act (IX of 1872).

In the taking of accounts of a mortgage decree in a Presidency town, all interests exceeding the amount of the principal sum secured by the mortgage should be disallowed according to the rule of Damdupat.

MADHWA SIDHANTA ONAHINI NIDHI *v.* VENKATARAMANJULU NAIDU (1) *dissented from.*

JEEWANBAI *v.* MANORDAS LACHMONDAS (4) *followed.*

The material facts will appear from the judgment.

Messrs. B. C. Mitter, N. Sircar and *C. C. Ghosh* appeared for the Plaintiff.

The JUDGMENT OF THE COURT was as follows:—

CHAUDHURI, J.—This matter arises upon a contention raised on behalf of the Plaintiff that the rule of *Damdupat* does not apply to mortgages under the Transfer of Property Act. There was a reference for accounts upon a mortgage decree in this suit in the usual course. Accounts have been taken and the official Referee has made his report disallowing interest exceeding the amount of principal applying the rule of *Damdupat*. It was contended before me on the strength of *Madhwa Sidhanta*

(1) I. L. R. 26 Mad. 662 (1903).
(4) I. L. R. 35 Bom. 199 at p. 203 (1910).

KUNJA LAL BANERJEE *v.* NARSAMBA DEBI.

Onahini Nidhi v. *Venkataramanjulu Naidu* (1), that the rule of *Damdupat* does not apply. The question has not so far come up for decision in this Court. *In the matter of Harikal Mullik* (2) the point was raised but not decided. It was held in that case that an order admitting a creditor's claim was tantamount to a decree, and as such put an end to the contractual relationship between the parties. The very same principle has been acted upon in the case of *Nanda Lal Roy* v. *Dhirendra Nath Chuckerbutty* (3). In the case of *Jeevanbai* v. *Manordas Lachmondas* (4), the learned Judge held that the rule of *Damdupat* was applicable. I find, however, in that case the case in *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (1) was not cited. The current of decisions in the Bombay Court has been that the rule of *Damdupat* does apply. See the case of *Sundarbai* v. *Jayawant Bhikaji* (5). In this Court the uniform rule so far as I know has been to disallow interest larger than the amount of principal in making up a mortgage account. As a Court of first instance I am not prepared to follow, under the circumstances, the case in *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (1). It seems to me that in that case the learned Judges have overlooked the provision of sec. 4 of the Transfer of Property Act, taken with sec. 37 of the Contract Act. It is conceded in the Madras case that in the Contract Act provision has been made for the application of the rule of *Damdupat*. Sec. 4 of the Transfer of Property Act provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Contract Act. I therefore confirm the report made by the Referee in this instance and disallow the contention raised.

(1) I. L. R. 26 Mad. 662 (1903).
(2) 10 C. W. N. 884 : s. c. I. L. R. 33 Cal. 1269 at p. 1276 (1906).
(3) I. L. R. 40 Cal. 710 (1910).
(4) I. L. R. 35 Bom. 199 at . 203 (1910).
(5) I. L. R 24 Bom. 114 (1899).

Solicitors : *Messrs. B. N. Basu & Co.* for the Plaintiff.

Solicitor : *Babu P. N. Sen* for the Defendant.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER

No. 74 OF 1915

AND

RULE No. 170 OF 1915.

HOLMWOOD, J.
WALMSLEY J.
1915,
13, May.

THAKUR MADAN MOHUN NATH SAHI DEO, Appellant,
v.
MAHARAJA PRATAP UDAI NATH SAHI DEO, Respondent.

Chota Nagpur Tenancy Act (VI B. C. of 1908), secs. 184, 191 (2), 208 (2), 210—Rent decree—Execution by arrest of judgment-debtor in the first instance, if legal—Effect.

A landlord who has obtained a decree for rent of a tenure under the Chota Nagpur Tenancy Act may proceed at once to execute it against the person of the tenant and he is not bound to put up the tenure to sale in the first instance. The warrant of arrest so taken out will only stay proceedings for sale of the tenure.

Sec. 191 (2) of the Chota Nagpur Tenancy Act which refers to a person arrested in execution of a decree for money has no application to such a case.

This was an appeal preferred on the 22nd February 1915, against the order of Babu B. N. Sahai, Deputy Collector, Ranchi, dated 10th February 1915.

THAKUR MADAN MOHUN NATH SAHI DEO *v.* MAHARAJA PRATAP UDAI NATH SAHI DEO.

The facts of the case will appear from the judgment.

Babu Bepin Chandra Mullick for the Appellant.

Mr. Caspersz and *Babu Jogesh Chandra Dey* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against the order of a Revenue Officer empowered to hear rent suits under the Chota Nagpur Tenancy Act, who in execution of the decree of another Deputy Collector for Rs. 11,103 and odd passed an order in execution that warrant of arrest against the judgment-debtor returnable by the 25th February should be issued inspite of the judgment-debtor's objections. Those objections as far as we have been able to understand them have been repeated here, and the first is that the decree for rent of Kairo, Perganah Khukra, is not a decree for the rent of the entire tenure. The learned Deputy Collector unnecessarily discusses this point, and incidentally misreads the decision of this Court in *Chandra Nath Tewari* v. *Pratap Udai Nath Sahi* (1). But with that we have nothing to do, inasmuch as the executing Court is not entitled to go beyond the decree, and the decree shows that the rent was for the entire village which is certainly an entire unit for agricultural purposes. There is therefore no reason why the decree should not be executed under the Chota Nagpur Tenancy Act.

Then sec. 184 is sought to be ignored by the Appellant and he carries this on to sec. 210, then comes back to sec. 208 and so seeks to read the Act backwards. The procedure under the Act seems to be perfectly simple. The first section which deals with it is sec. 184, which lays down that the process of execution may be issued against either the person or property of the judgment-debtor and shall not be issued simultaneously against both the person and property. The sec. 191, (2), which is relied upon by the Appellant has nothing whatever to do with the present question before us. That refers to a person who is arrested on a decree for money. Then on reference to sec. 139 which the Appellant also relies upon a suit referred to in cl. (7) would clearly seem to be a suit which is not for rent on account of agricultural land but suits for recovery of money from defaulting agents and others. Then sec. 208, (2), provides that when a warrant of execution has been issued under this Chapter against the person or moveable property of the judgment-debtor that is, a warrant under sec. 184, no application shall be received under sub-sec. (1) of sec. 208 while such warrant remains in force. Nothing can be clearer than this, that a warrant of arrest may precede everything else and that it stays proceedings for sale of the tenure. The provision of sec. 210 giving the Deputy Commissioner protective jurisdiction in favour of agriculturists whose tenures and holdings have been sold in pursuance of sec. 208 has nothing whatever to do with the question before us; and we find that all the arguments adduced before us have been unnecessary and mostly irrelevant, and that from the time that has elapsed since those decrees were first made it would appear that the judgment-debtor is purposely endeavouring to throw every possible technical legal objection in the way of getting out of paying rent which has been declared to be honestly due from him. This is a state of things which we cannot encourage.

The appeal is dismissed with costs. We assess the hearing fee at four gold

(1) 18 C. W. N. 170 (1913).

THAKUR MADAN MOHUN NATH SAHI DEO *v.* MAHARAJA PRATAP UDAI NATH SAHI DEO.

mohurs as the value of the decree is upwards of Rs. 5,000.

There is a Rule connected with this appeal, namely Rule No. 170 which was issued to show cause why the warrant of arrest should not be set aside as being made without jurisdiction under the Chota Nagpur Tenancy Act. We cannot find that any question of jurisdiction arises under that Act and this Rule must be discharged with costs two gold mohurs.

The record will be sent down without delay.

Appeal dismissed,

Rule discharged.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3561 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1914, Heard, 26, 27, May & 15 and 16, June. 1915, Judgment, 21, July.

ATIMANNESSA BIBI, Plaintiff, Appellant,
v.
ABDUL SOBAN and ors., Defendants, Respondents.

Wakf—Descendant of founder if becomes Mutwalli by right of inheritance on death of Mutwalli without appointing successor—Preferential right of descendant to Mutwallishiip—Appointment of Mutwalli if must be made by Quadi—*Judicial Officer in British India corresponding to Quadi—Jurisdiction of Subordinate Judge to exercise functions of a* Quadi—*Jurisdiction of District Judge.*

The mutwalli *of a* wakf *died without appointing a successor. Two persons took possession of the* wakf *properties and after administering them for some time executed a deed of relinquishment in favour of the Plaintiff the sole surviving descendant of the founder of the trust. A suit under sec. 539, C. P. C., was then instituted by persons claiming to be interested in the due administration of the trust. In this suit the Defendants did not deny that the trust was a public one and the Plaintiff who alleged that the* wakf *was private applied but was not allowed to be made a party. After trial of the suit the District Judge appointed the Defendant mutwalli. The Plaintiff thereupon instituted a suit in the Court of the Subordinate Judge for declaration of her title as* mutwalli *of the* wakf *which according to her case was a private* wakf. *The Subordinate Judge decreed the suit holding that the* wakf *was a public one but that the Plaintiff as the sole surviving descendant of the founder had established a claim to the office of* mutwalli *superior to that of any stranger. The finding as to the public nature of the* wakf *was affirmed in appeal by the District Judge who however dismissed the suit on the ground that so long as the decree in the suit under sec. 539, C. P. C., was in force no relief could be granted to the Plaintiff.*

Held—*That in the suit as framed the Plaintiff could not be appointed* mutwalli *and the suit was rightly dismissed.*

That the Plaintiff did not as the sole surviving descendant of the founder become by operation of law the mutwalli *by right of inheritance on the death of the last* mutwalli, *for a descendant of the* mutwalli *though he has a preferential claim to the office of* mutwalli *does not become* mutwalli *by right of inheritance but has to be appointed such by the* quadi *who may supersede him if he is not qualified.*

That it is clear from an examination of the texts that under the Mahomedan law that quadi *alone was competent to exercise authority in respect of* wakf, *who was so expressly authorised in his Letters Patent. There was some difference of opinion upon the question whether such express authority was needed when a person was explicitly appointed the chief* quadi, *but the balance of opinion of Jurists favoured the*

ATIMANNESSA BIBI *v.* ABDUL SOBAN.

view that power should be expressly conferred on the chief quadi *to validate the administration of* wakfs *by him. There is also authority to show that the supreme authority in the State by whom the* quadi *is appointed need not be a Mahomedan and there is also authority to show that this office of* quadi *may be held by a non-Moslem for the decision of disputes between non-Moslems under Mahomedan protection.*

That as this was a matter regarding religious usages and institutions within the meaning of sec. 15 of Reg. IV of 1793, the rights of the parties must be determined with regard to the provisions of the Mahomedan law on the subject and it followed accordingly that a Subordinate Judge who has not been expressly authorised by the Government to exercise functions in connection with the administration of wakfs *is not competent to act in that behalf. In respect of* wakfs *which may be described as trusts for public purposes of a religious nature within the meaning of sub-sec.* (1) *of sec. 92, C. P. C., the District Judge may be assumed to have been authorised to discharge the functions of a* quadi.

Per MOOKERJEE, J.—*With regard to private* wakfs *it is desirable that to cover such cases the Local Government should authorise either District Judges or Subordinate Judges or even Judicial Officer of a lower grade, if it be thought desriable, to exercise the function of a* quadi.

Per CURIAM.—*That in the present case, it being found that the* wakf *is a public one, the District Judge had jurisdiction under sec. 539, C. P. C., to appoint the Defendant as* mutwalli *and the Subordinate Judge had no authority to recall that order and to appoint the Plaintiff as* mutwalli.

That the remedy of the Plaintiff was to proceed under sec. 92, C. P. C., and to get herself appointed mutwalli *on the ground that she had the preferential right to the office as the sole surviving descendant of the founder at the time of the death of the last* mutwalli *and it would be open to the Plaintiff to accept the decision in this suit that the* wakf *is public and to proceed on that basis under sec. 92.*

This was an appeal preferred on the 19th December 1911 against the decree of T. W. Richardson, Esq., District Judge of Zilla 24-Parganas, dated the 18th September 1911, reversing the decree of Babu Pramatha Nath Chatterjee, Subordinate Judge, 1st Court at Alipore, dated the 9th March 1911.

The material facts will appear from the judgment.

Babus Umakali Mookerjee, Tarakisor Choudhury, Moulvi Muhammad Mustafa Khan and *Babu Satis Ch. Mookerjee* for the Appellant.

Mr. Arthur Caspersz and *Maulvi Wahid Hossain* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—The subject matter of the litigation which has culminated in this appeal consists of immoveable property dedicated as *wakf* in or about the year 1836 by a Mahomedan named Azimuddin Mistri. A mosque was erected by the founder on a portion of the land and income for its maintenance is derived from the remainder which is in the occupation of tenants. Azimuddin constituted himself the first *mutwalli* and acted as such so long as he was alive. He appointed his grandson Imamuddin as the next *mutwalli;* the latter executed a *tawliatnama* on the 13th March 1854 whereby he appointed one Sekandar as his successor in the office of *mutwalli* with authority to appoint a successor. On the 1st Decem-

ber 1892, Sekandar, in exercise of the power vested in him, appointed his daughter Sobran Bibi as *mutwalli;* she performed the duties of the office for over seven years and died in the year 1900, without appointing anyone as *mutwalli.* Two brothers of Sobran, Yakub, Yasin by name, however, took possession of the *wakf* properties and administered them for a term of seven years. On the 22nd February 1907, Yakub and Yasin executed a deed or relinquishment in favour of the Plaintiff Atimannessa Bibi, daughter of Imamuddin, the grandson of Azimuddin. In this deed they admitted that as the sole surviving descendant of the founder she had a preferential claim to the office of *mutwalli.* Immediately after this, there was a scramble for the possession of the *wakf* properties and on the 22nd July 1907, a suit was instituted, with the consent of the Advocate-General, under sec. 539 of the Civil Procedure Code of 1882, in the Court of the District Judge, by persons who claimed to be interested in the due administration of this religious trust. The assistance of the Court was sought, as it could only have been sought, on the allegation that the trust had been created for public purposes. The three sons of Sekandar were originally joined as Defendants. The present Plaintiff subsequently applied to be made a Defendant, but as she alleged that the *wakf* constituted a private trust not affected by sec. 539, her application was refused on the authority of the decision in *Budh Singh* v. *Niradbaran* (1). As the original Defendants did not deny that the trust was a public one within the meaning of sec. 539, the suit as against them was tried in due course, and one Abdus Sobhan who had married the daughter of Kariman a son of Sekandar was appointed *mutwalli* on the 28th May 1908. The District Judge, however, expressed the opinion that he had a very strong suspicion that the suit was purely collusive and had been brought to defeat Atimannessa. On the 16th March 1910 she commenced this suit for declaration of her title as *mutwalli* of this trust, which she alleged, was a private *wakf*, and also for an injunction to restrain the Defendants (in which category she included Abdus Sobhan) from interfering with her possession of the endowed properties. The Subordinate Judge, held, that the *wakf* constituted a public trust, contrary to the allegations of the Plaintiff, but that as the sole surviving descendant of the founder she had established a claim to the office of *mutwalli* superior to that of any stranger; in this view, he decreed the suit. On appeal, the District Judge affirmed the view of the trial Court as to the public nature of the *wakf*, but dismissed the suit on the ground that so long as the decree in the suit under sec. 539 remained in force, no relief could be awarded to the Plaintiff. The Plaintiff has now appealed to this Court. On an analysis of the elaborate arguments addressed to the Court on both sides, the following two points emerge for consideration, namely, *first* did the Plaintiff as the sole surviving descendant of the founder become *mutwalli* by operation of law when the last *mutwalli* died without appointing a successor; and *secondly*, can the Plaintiff be appointed *mutwalli* in this suit, instituted in the Court of the Subordinate Judge and relief granted to her on the basis of such appointment?

As regards the first ground it is plain that the Plaintiff did not by operation of law, become the *mutwalli* by right of inheritance on the death of the last *mutwalli*. The Rule on the subject is thus stated by Neile Baillie in his Treatise on Mahomedan

(1) 2 C. L. J. 481 (1905).

Law (Vol. 1, p. 593) : " When the Superintendent has died and the appropriator is still alive, the appointment of another belongs to him and not to the Judge; and if the appropriator be dead his executor is preferred to the Judge. But if he has died without naming an executor the appointment of an administrator is with the Judge. In the Asul it is stated that the Judge cannot appoint a stranger to the office of administrator, so long as there are any of the house of the appropriator fit for the office, and if he should not find a fit person among them, and should nominate a stranger, but should subsequently find one who is qualified, he ought to transfer the appointment to him. When the appropriator has made it a condition that the Superintendent shall be of his children and children's children, and the Judge appoints another than one of these without any malversation, is the person so appointed the Superintendent? Boorhanood Deen has said 'No'." It is obvious from this statement of the law that though a descendant of the founder has a preferential claim to the office of *mutwalli*, he does not become *mutwalli* by right of inheritance, but has to be appointed such by the *quadi* who may supersede him if he is not qualified. This view is confirmed by two texts from works of recognised authority on Mahomedan law, translated in the judgment of this Court in the case of *Khajeh Salimullah* v. *Abul Khair M. Mustafa* (2). One of these texts is from the Isaf of Al-Tarabulusi (Cairo Ed. P. 42) and the other is from the Fatawa Alamgiri (Cal. Ed., Vol. II, p. 507) (see other texts translated by Amir Ali in his Mahomedan Law, Vol. I, 4th Ed., pp. 451, 759, 760, 763 and 765. See also Anglo-Mahomedan Law by Sir Ronald Wilson, para. 328 and Tayabji on Mahomedan Law, p. 414). Indeed it may be taken as a settled doctrine of Mahomedan law that no right of inheritance attaches to a religious endowment. As Parsons, J., observed, with the concurrence of Sargent, C. J., in *Syed Abdulla* v. *Sayad Zain* (3), it is by appointment that one officer succeeds to another—appointment, either by the original appropriator or by his successor or executor or by the Superintendent for the time being, or failing all these, by the Ruling Power. This is laid down distinctly by Macnaughten in his Mahomedan Law (Chap. X on Endowments paras. 5 and 6; Precedents of Endowments Cases IX and X). Consequently, the position cannot be sustained that the Plaintiff became by operation of law the *mutwalli* of his *wakf* as the sole surviving descendant of the founder when the last *mutwalli* died without having appointed his successor. This conclusion is in accord with the decision in *Moohammad Sadiq* v. *Moohammad Ali* (4) and *Shahoo Banoo* v. *Aga Mahomed* (5). The first contention of the Appellant must accordingly be overruled.

As regards the second ground, the question arises whether in the present suit, instituted in the Court of the Subordinate Judge, the Plaintiff can be appointed *mutwalli* of the *wakf*. As is obvious from the texts already mentioned, where, as here, the appropriator is dead and has not left an executor the power of appointment rests with the *quadi*. The problem thus requires solution, who is the Judicial Officer in the British Indian system of law who corresponds to the *quadi* under the Mahomedan law and can exercise his functions in relation to *wakfs*. The question has never been fully investigated, but it was

(2) I. L. R. 37 Cal 268 : s. c 14 C W. N. 497 (1910).

(3) I. L. R. 13 Bom. 555 (1888).

(4) 1 Mac. Sel. Rep. 24 (1798).

(5) L. R. 34 I. A. 46 : s. c. I. L. R. 34 Cal. 118 (1906).

assumed in the cases of *Shyama Churn* v. *Abdul Kabeer* (6), *In the matter of Woozat-unnessa Bibi* (7) and *In re Halima Khatun* (8) that the Civil Court of superior jurisdiction, in the locality where the *wakf* properties are situated, is vested, generally speaking, with the powers exercised by the *quadi* under the Mahomedan regime. On the other hand, in *Nimai Chand* v. *Golam Hossain* (9) it was observed that if a District Judge or a Judge of this Court in its original jurisdiction could exercise the functions of a *quadi*, there was no apparent reason why a Subordinate Judge who has jurisdiction over the *wakf* property should not be deemed equally competent to discharge those functions. As the question is of paramount importance, I have investigated the position of a *quadi* under the Mahomedan law, a problem which, so far as I am aware, has been treated historically only in the valuable lectures on the History of Moslem Legal Institutions delivered by Dr. Abdullah-al-Mamun Suhrawardy as Tagore Professor of Law in the University of Calcutta. No assistance in the solution of this question has been derived from an examination of the Legislative enactments and Judicial decisions relating to the powers and duties of a *quadi* appointed under the Anglo-Indian System of Law. Amongst these may be mentioned Bombay Regulation XXVI of 1827 repealed by Act XI of 1864 (Act XII of 1880); Harrington's Analysis of the Bengal Regulations Vol. I, 2nd Ed., pp. 67, 219, 223, Colebrooke's Supplement of Digest of Regulation, pp. 1, 14, 19; Morley's Digest, Introduction pp. 30, 31, 34 and tit. Kazi; *Mahomed* v. *Syed Ahamed* (10), *Jamal* v. *Jamal* (11), *Daudsha* v. *Ismalsha* (12), *Baba* v. *Nasaruddin* (13), *Advocate-General, Bombay* v. *Abdul Kadir* (14). It is necessary therefore to examine the original texts on the subject. The following texts illustrate the position of the *quadi* under the Mahomedan law.

(Translation of Text I.)

If the executor or the *mutwalli* is appointed by the Judge (*hakim*) the safest course is that he (the Judge) should write in the Judicial records and registers that he (the executor) is the executor appointed by a Judge possessing the authority of appointing the executor and the *mutwalli*. For if he (the Judge) limits himself to his statement "and he is the executor appointed by the Judge," he (the executor) may sometimes happen to be (appointed) by a Judge not possessing the authority of appointing the executor and the *mutwalli*. For the *quadi* does not possess the power of appointing the executor and the *mutwalli*, except when mention of the administration of *wakf* properties and orphans is expressly made in the Royal Letters Patent (Manshur) of his (*quadi's*) appointment. Thus it becomes like the rule regarding the Deputy *quadi* (*naib quadi*), for it is indispensable therein to mention that *quadi* so and so is permitted to have a Deputy to guard against this notion, supposition doubt (Jami-al-Fusulayn by Shaykh Mahmud C. Ismail, better known as Ibu Quadi Samawah, Cairo Ed., Vol. II, p. 15).

(Translation of Text II.)

Here there is a point to which attention should be called (*tanbih*) and which is in-

(6) 3 C. W. N. 158 (1898).
(7) I. L. R. 36 Cal. 21 (1908).
(8) I. L. R. 37 Cal. 870 (1910)
(9) I. L. R. 37 Cal. 179 (187): s. c. 14 C. W. N. 535 (1909).
(10) 1 Bom. H. C. R. App. 18 (1861).
(11) I. L. R. 1 Bom. 633 (1877).
(12) I. L. R. 3 Bom. 73 (1878).
(13) I. L. R. 18 Bom. 108 (1893)
(14) I. L. R. 18 Bom. 401 (1894)

dispensable and it is—What is meant by the *quadi* who possesses the power of appointing the executor and the *mutwalli* and has the supervision of *wakf*? I say it is the chief *qadi* (*quadi* of *quadis*) and not every *quadi*, because of what is stated in the 27th Chapter of Jami-al-Fusulayn (Text I is quoted here). There is no doubt that the Sultan's saying "I appointed the chief *quadi*" is like expressly mentioning these things in the Letters Patent, as is expressly stated in the Khulasah in connection with the question of the *quadi's* power of appointing his substitute or successor. According to this, in their (jurists') statement regarding obtaining a loan with the sanction of the *quadi;* by *quadi* the chief *quadi* is meant, and in every place where the *quadi* is mentioned regarding *wakf* affairs. This is contrary to their (jurists') statement "When the order, or judgment of a *quadi* is brought before him, is referred to him, he executes it," for this is general, (*i.e.*, here the word *quadi* is used in a general sense) (Bahr-al-Raiq, Cairo Ed., Vol. V, p. 252).

(Translation of Text III.)

(He was questioned) regarding a registered *wakf* set aside by a Deputy *quadi* who relied on the absence of its bindingness according to the Great Imam, "Has the Deputy the power of setting it aside for the reasons mentioned or is the power of setting it aside peculiar to the original *quadi*"? (He answered) :—It is stated in the Bhar-al-Raiq (Text II is quoted here as far as "*wakf* affairs").

Thus it (*i.e.*, Bahr-al-Raiq) is explicit regarding that the Deputy *quadi* has not the power of setting aside the *wakf* and that is peculiar to the original (*quadi*) in whose letter of appointment the Sultan has mentioned the appointment of *mutwallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be placed upon this although our master Shaykh Muhammad b. Siraj-al-Din-al Hanuti has examined, criticised, discussed it; because of the difference of opinion* with regard to the application in an unrestricted sense of the like of it to the deputies in this age.†

And there is no special text with regard to this question so far as our research goes and similarly so far as the research of our above mentioned master and that of Shaykh Zayn, author of the Bahr-al-Raiq goes. And verily he (the author of the Bahr-al-Raiq) deduced it juristically and God knows best (Fatawa Khayriyah, Vol. I, p. 118, second Edition, Government Press Gulaq, Cairo).

(Translation of Text IV.)

"Here there is a point, etc." Al-Ramti† says—I say, in the collection of *fatwas* of our master Muhammad b. Siraj-al-Din-al-Hanuti there is a question with regard to their (jurists') statement that the *istibdal* (exchange) can be effected by the *quadi* when there is no stipulation of the *wakf* (to that effect). Is the chief *quadi* meant thereby or it is not peculiar to him, and is it a condition that it should be written in his Letters Patent?

The answer :—We have not seen any one restricting it to the condition that it should be in his Letters Patent as they (jurists) have restricted it with regard to the power of giving minor girls in marriage and with regard to (the *quadi's* power of appointing) his substitute, successor. Therefore it should be acted upon in an unrestricted general sense. And amongst those which indicate that (the power of effecting) *istibdal* does not peculiarly belong to the chief *quadi* but rather it (*istibdal*)

* The Author of the Radd-al-Muhtar quoting this passage reads the word translated "difference of opinion" as *Ikhtilal*—confusion, disorder, tumult. See below Text IV and V.

† Author of Fatawa Khayriyah.

can be as much effected by his Deputy as by himself, is the fact that it is not lawful for him to appoint his Deputy as his substitute, successor unless the power of doing so is delegated to him by the Sultan. And when the power of doing so is delegated to him (*quadi*) then the authority of his Deputy is based on the permission of the Sultan, and he (the Deputy) stands in the stead of the person appointing him his Deputy, *viz.*, the chief *quadi*, as they (jurists) have expressly laid it down regarding the question of appointing a successor. Therefore what is understood by their (jurists) statement is that when in the Letters Patent of the *quadi*, the power of giving minor boys and girls is stipulated he (*quadi*) has that power and then the person appointed by him. So they (jurists) have made the permission of the Sultan to the *quadi* as to giving in marriage sufficient with regard to his (*quadi's*) conducting it as well as (with regard to) the person appointed by him (*quadi*) because of his standing in his (*quadi's*) stead. And when the conducting of marriage is lawful for the Deputy with their (jurists') express declaration that it should be stipulated for the *quadi* in his Letters Patent, then how without it? The text of Ibu-al-Hammam regarding the order of succession of matrimonial guardians is as follows :—"Then the Sultan, then the *quadi* if the (power of) giving in marriage of minor girls and boys is stipulated in his Patent of office, then the person appointed by the *quadi*." Thus he (Ibn-al-Hammam) has made the stipulation, I mean, his statement, "if . . . stipulated in his Patent of office," refer to the *quadi* only and not to him and to the persons appointed by him, because he (Ibn-al-Hammam) has not put it (the stipulation) after both of them (*i.e.*, after the word *quadi* and "the person appointed by him"). Yes it is true that in the writings of some of them (jurists) is to be found that he (Ibn-al-Hammam) has put the stipulation after the word *quadi* as well as "the person appointed by him." Thus the text is capable of being made to refer to the *quadi* as he is the original (incumbent) or to both of them. Finis. But he (Al-Ramti) has stated in the Khayriyah (Collection of his *fatwas*, see Text III) towards the commencement of the chapter of *wakf*, the text of the Bahr-al-Raiq mentioned here. Then he says, "Thus it (*i.e.*, Bahr-al-Raiq) is explicit regarding that the Deputy *quadi* had not the power of setting aside the *wakf* and that that is peculiar to the original (*quadi*) in whose letter of appointment the Sultan has mentioned the appointment of *mutwallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be placed upon this, although our master Shaykh Muhammad b. Siraj-al-Din-al-Hanuti has examined, criticised, discussed it because of the confusion* with regard to the application in an unrestricted sense of the like of it to the deputies in this age. And there is no special text with regard to this question so far as our research goes, and similarly so far as the research of our above-mentioned master and that of Shaykh Zayn author of the Bahr-al-Raiq goes. And verily he (the author of the Bahr-al-Raiq) deduced it juristically and God Knows best (Manhat-al-Khaliq, marginal gloss on the Bahr-al-Raiq by Ibn Abidin the author of the Radd-al-Muhtar, Vol. V, Cairo Ed.).

(Translation of Text V.)

"Then the power of appointment is for the *quadi*."

"For the *quadi*" :—In the Bahr-al-Raiq, he has restricted it to the chief

* The word translated confusion here is a (*Ikhtilal*) in the original, while in Text III the word used is Ikhtilaf difference of opinion.

quadi, relying on the passage from the Jami-al-Fasulayn quoted by us one leaf back. Then he (the author of the Bahr-al-Raiq) states, "According to this their (jurists') statement regarding obtaining a loan with the sanction of the *quadi*, by *quadi*, the chief *quadi* is meant and in every place where the *quadi* is mentioned regarding *wakf* affairs. This is contrary to their (jurists') statement, "when the order or judgment of a *quadi* is brought before him, is referred to him, he executes it." For this is general. It is stated in the Khayriyah "Thus it (*i.e.*, Bahr-al-Raiq) is explicit regarding that the Deputy *quadi* has not the power of setting aside the *wakf* and that that is peculiar to the original (*quadi*) in whose letter of appointment the Sultan has mentioned the appointment of *mutwallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be placed upon this, although our master Shaykh Muhammad b. Siraj-al-Din-al-Hanuti has examined, exercised, discussed it because of the confusion (Ikhtilal) with regard to the application in an unrestricted sense of the like of it to the deupties in this age. And there is no special text with regard to this question so far as our research goes and similarly so far as the research of our above-mentioned master and that of Shaykh Zayn, author of the Bahr-al-Raiq, goes. And verily he (the author of the Bahr-al-Raiq) deduced it juristically. And he (the author of the Fatawa Khayriyah, Khayr-al-Din-al-Ramti) has quoted, in his marginal gloss on the Bahr-al-Raiq, the text of his master al-Hanuti in extenso and has confirmed it (See Text IV). And of it (the text) is—And amongst what indicates that (the power of effecting) *istibdal* of *wakf* is not peculiar to the chief *quadi* but rather is lawful to his Deputy as well, is the fact that his Deputy is his *locum tenens*. Therefore what is understood by their (jurists') statement is that when (the power of) giving minor girls and boys is stipulated in his Letters Patent that (power) belongs to the person appointed by him. The text of Ibu-al-Hammam as to the order of succession of matrimonial guardians is. "Then the Sultan, then the *quadi* if that is stipulated in his Patent of office, then the person appointed by the *quadi*. End of the quotation in substance. (Note) but he (the author of the Arfa-al-Wasail) has stated that the governance of the *wakf* is for the *quadi* even though the Sultan has not stipulated it in his investiture and has not ascribed, assigned it to any one. And this is contrary to what is reported, quoted in the Jami-al-Fasulyan (Radd-al-Muhtar, Vol. III, p. 635 Ed., Constantinople).

(Translation of Text VI.)

"If the *quadi* associates with the *mutwalli* a reliable person." It is stated in the Bahr-al-Raiq (Text II is quoted here) Al-Tahawis commentary on the Durr-al-Mukhtar, Vol. II, p. 567 (Government Press, Bulaq Cairo).

(Translation of Text VII.)

He was questioned :—Is the *quadi's* appointment of another person as *mutwalli* valid even if he is not the chief *quadi* or does it depend upon his being that, and what is meant by the chief *quadi*?

He answered :—When the *mutwalli* dismisses himself, resigns his office before, in the presence of, the chief *quadi* and he (the chief *quadi*) appoints another as *mutwalli* it is valid. Similarly when the (news of) dismissal, resignation, reaches the *quadi*, he becomes dismissed, otherwise not. By the chief *quadi* is meant the person who is expressly authorised by his Letters Patent to have the administrations of *wakf* properties and orphans, or to whom the Sultan says, "I have made the

chief *quadi*. It is stated in the Bahr-al-Raiq (Text II is quoted here) Fatawa Mahdiya, Vol. II, p. 575, Cairo Ed.)

(Translation of Text VIII.)

When the Sultan says to a man "I made thee a *quadi*," he has not the power of appointing a substitute, successor except when he (Sultan) permits him to do that expressly or by implication by saying "I made thee chief *quadi*," because it is the chief *quadi* who acts as he pleases respecting *quadi* as regards investiture or dismissal. Thus it is laid down in the Dhakrirah. (Fatawa Alamgiri, Vol. III, p. 388, Cal. Ed.)

(Translation of Text IX.)

And the *quadi* cannot appoint as successor, substitute a Deputy except when (the authority to do so) is delegated to him expressly like, "Appoint whomsoever thou likest"; or implicitly, like, "I made thee chief *quadi*." And here the implication is stronger, for in the explicit stated above, he possesses the power of appointing a successor, not that of dismissal. And in the implicit he possesses both, like his (Sultan's) saying, "Appoint whomsoever thou likest, supersede (substitute) whomsoever thou likest," for it is the chief *quadi* who acts as he pleases respecting them (*quadis*) as regards investiture or dismissal (Durr-al-Mukhtar, p. 529, Ed. Cal.)

(Translation of Text X.)

The appointment of a *quadi* is not valid unless the person appointed combines in himself the condition of evidence (Qualifications of witness) according to the Hidayah, *viz.*, Islam, Taklif, Freedom, etc. (Fatawa Alamgiri, Vol. III, p. 378, Cal. Ed.) Cf. Hamilton's Hedayah (Grady Ed.) Bk. XX, p. 334.

(Translation of Text XI.)

It is stated in Multaqa "And Islam is not a condition in him, *i.e.*, in the Sultan who invests (a person with the office of *quadi*). Thus it is laid down in the Jatarkhaniyah" (Fatawa Alamgiri, Vol. III, p. 379, Cal. Ed.)

(Translation of Text XII.)

It is valid to accept the investiture of office of *quadi* from a just Sultan and from a tyrant even though an infidel (it is stated by Miskin and others) except when he prevents him from doing justice, what is right; then it is unlawful (Durr-al-Mukhtar, p. 524, Ed. Cal.)

(Translation of Text XIII.)

And qualified for it (office of *quadi*) is one who is qualified for being a witness. This is contrary to the statement of al-Zaylai in the (Chapter on) Arbitration to the effect that the investiture of an infidel with the office of *quadi* in order to decide between non-Moslems under Moslem protection (Ahl-al-Dhimmah) is valid." (Durr-al-Mukhtar, p. 521, Ed. Cal.)

It is clear from an examination of these texts that, under the Mahomedan law, that *quadi* alone was competent to exercise authority in respect of *wakfs* who was so expressly authorised in his Letters Patent. There was some difference of opinion upon the question, whether such express authority was needed when a person was explicitly appointed the chief *quadi;* but even here the balance of opinion of jurists favours the view that power should be expressly conferred on the chief *quadi* to validate the administration of *wakfs* by him. There is also authority to show that the supreme authority in the State, by whom the *quadi* is appointed, need not be a Mahomedan, and although there is some divergence of opinion, there is also authority to show that the office of *quadi* may be held by a non-Moslem for the decision of disputes between non-Moslems under Moslem protection. As this is a matter regarding religious usages and institutions within the meaning of sec. 15 of Reg. IV

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of 1793 the rights of the parties must be determined with regard to the provisions of the Mahomedan law on the subject [*per* Peacock, C. J., in *Kadrutulla* v. *Mohani Mohan* (15)]. It follows accordingly that a Subordinate Judge, who has not been expressly authorised by the Government to exercise functions in connection with the administration of *wakfs*, is not competent to act in that behalf. Whether a District Judge has implied authority to exercise the functions performed by a *quadi* under the Mahomedan law is doubtful. In respect of *wakfs* which may be described as trusts created for public purposes of a religious nature within the meaning of sub-sec. (*1*) of sec. 92 of the Civil Procedure Code, 1908, the District Judge may be assumed to have been authorised to discharge the functions of a *quadi*. The real difficulty arises in the case of private *wakfs;* it is desirable that to cover such cases the Local Government should authorise either District Judges or Subordinate Judges or even Judicial Officers of a lower grade, if it be thought desirable, to exercise the function of a *quadi*. When authority has been so conferred, a question may arise whether the assistance of the Court is to be invoked by a suit or by an application [see *Mahamal Haji* v. *Ahmadbhai* (16)]. The case before us, however, is reasonably free from difficulty. The Courts below have concurrently found that the *wakf* was public and has thus negatived the fundamental allegation of the Plaintiff. The District Judge had jurisdiction under sec. 539 of the Civil Procedure Code of 1882 to appoint the Defendant as *mutwalli*. The Subordinate Judge has no authority to recall that order and to appoint the Plaintiff as *mutwalli*. [*Saiyid Ali* v. *Ali Jan* (17).]

(15) 4 B. L. R. (F. B.) 134 (169) (1869).
(16) I. L. R. 25 Bom. 327 (1900).
(17) I. L. R. 35 All. 98: s. c. 11 All. L. J. (1912).

It might have been otherwise if the suit had been instituted by a person already appointed *mutwalli*, for example by a testamentary instrument, *Muhammad Abdul Majid* v. *Ahamad Saeed* (18). The remedy of the Plaintiff obviously is to proceed under sec. 92 of the Code of 1908 and to get herself appointed *mutwalli* on the ground that she had the preferential right to the office as the sole surviving descendant of the founder at the time of the death of the last *mutwalli*. In fact, she would have been so appointed in the suit mentioned, if she had not asserted at the time that the *wakf* was private. It would be open to her now, however, to accept the decision in this suit that the *wakf* is public and to proceed on that basis under sec. 92.

The inference follows that in the present suit as framed, the Plaintiff cannot be appointed *mutwalli* and the suit has consequently been rightly dismissed. The appeal is accordingly dismissed with costs.

BEACHCROFT, J.—I agree that this appeal must be dismissed for the reasons given by my learned brother. I express no opinion as to the position of the District Judge with reference to private *wakfs*.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 55 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 9 and 10, July.
Judgment, 10, August.

ACHYUTANANDA DAS, Defendant, Appellant,
v.
JAGANNATH DAS, Plaintiff, Respondent.

Mourashi Muth, succession to—Onus of proof—Indian Succession Act (X of 1865), sec. 187—Will not probated if can be used in evidence and for

(18) 11 All. L. J. 667 (1913).

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what purpose—Indian Evidence Act (I of 1872) sec. 32, (5)—Relationship between Mohunt and Chela if relationship by adoption—Existence of relationship, statement relating to.

One R was the Mohunt of a muth *known as the Khumbakul Muth. He was succeeded by his* chela *S. After the death of S the Plaintiff claimed to be his lawful successor as his* gurubhai. *The Defendant resisted the claim on the allegation that he had been adopted by S as a* chela. *The* muth *in question was admittedly a* maurasi muth, *and the Court found that in a* maurasi muth *the* chela *succeeds and in default of a* chela *the* gurubhai *succeeds and when there are more* chelas *than one the eldest generally succeeds but a junior* chela *may succeed if he be found more capable and if he be selected by the last Mohunt as his successor.*

Held—*That it was for the Plaintiff to prove that he was the* chela *of R and that the Defendant was not the* chela *of S, as he must succeed on the strength of his own title and not on the infirmity, if any, in the title of the Defendant.*

In the course of the evidence in the case two Wills alleged to have been executed by R and S respectively neither of which was proved in the Probate Court were produced, the former of which only was found to be genuine.

Held—*That notwithstanding sec. 187 of the Indian Succession Act which is incorporated in the Hindu Wills Act, a Will not proved in the Probate Court may be used in evidence for a purpose other than the establishment of a right as executor or legatee and in the present case the recital in the Will of R, which was found to be genuine, that he had no one else as his* chela *except S was admissible in evidence under sec. 32, cl. (5), of the Evidence Act inasmuch as the relationship between a Mohunt and his* chela *is a relationship by adoption and a statement that A has one* chela *B and has no other* chela *is a statement relating to the existence of a relationship.*

This was an appeal from a decision of Babu Narendra Krishna Dutt, Subordinate Judge, Cuttuck, dated 15th February 1912.

The material facts will appear from the judgment.

Babus Provash Chandra Mitra and *Satish Chandra Bose* for the Appellant.

Babus Sarat Chandra Roy Choudhuri and *Charu Chandra Bhattacharjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The question in controversy in this appeal relates to the right of succession to the office of Mohunt of a Hindu religious institution, known as the Khumbakul Muth, situated in the interior of the District Cuttack at a distance of about forty miles from the head quarters. In 1906, and for some years before, Raghabananda Das was the Mohunt. He died on the 13th November 1906 and left, it is said, a Will executed and registered on the day of his death. His *chela* Sriram Das succeeded to the office of Mohunt and continued as such only for a brief period, as he died on the 28th September 1907. He left, it is alleged, a Will executed on the day of his death. Immediately after his death, Jagannath Das laid claim to the office of Mohunt on the allegation that he was his *gurubhai* or co-disciple. The claim was resisted on behalf of an infant Achyutananda Das who, it was said by his supporters, had been taken as *chela* by Sriram Das and was consequently entitled to succeed him as Mohunt. This led to proceedings under the Land Registration Act, before the Revenue Authorities, one of these was decided against Jagannath

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Das on the 25th March 1909, while another had terminated in his favour on the 20th February 1909. The result was that on the 11th October 1909 Jagannath Das commenced this action for declaration that as the *gurubhai* of Sriram Das, he had lawfully succeeded to the office of Mohunt, and that Achyutananda Das, the pretended *chela*, had no claim thereto and was in fact an impostor set up by persons anxious to seize the properties of the endowment. The Subordinate Judge has found on the evidence, *first*, that the Plaintiff Jagannath Das was the senior *chela* of Raghavananda Das, and, *secondly*, that Achyutananda Das, the Defendant was not the *chela* of Sriram Das. In this view, the Subordinate Judge has decreed the suit. The Defendant has appealed to this Court, and has contended, *first*, that the Plaintiff was not the *chela* of Raghavananda Das, and, *secondly*, that he himself had been taken as *chela* by Sriram Das. Before these questions are discussed, it is necessary to determine the rule of succession applicable to this endowment.

It is the common case of the parties that the Khumbakul Muth is a *maurasi muth*. As was explained in the case of *Mohunt Ramanuj Das* v. *Mohunt Deb Raj Das* (1), *muths* are of three descriptions, *viz.*, *maurasi*, *panchayeti* and *hakimi*. In the *first*, the office of Chief Mohunt is hereditary and devolves upon the chief disciple of the existing Mohunt, who, moreover, usually nominates him as his successor; in the *second*, the office is elective, the presiding Mohunt being selected by an assembly of mohunts; in the *third*, the appointment of presiding Mohunt is vested in the ruling power or in the party who has endowed the temple. The Subordinate Judge has found that in a *maurasi muth*, the *chela* succeeds, and in default of a *chela*, the *gurubhai* succeeds; and, where there are more *chelas* than one, the eldest generally succeeds, but a junior *chela* may succeed, if he be found more capable and if he be selected by the last Mohunt as his successor. This is in accord with the decisions of the Judicial Committee in *Greedharee Dass* v. *Nundo Kishore Doss* (2), *Genda Puri* v. *Chhatar Puri* (3) and *Ramalingam* v. *Vythilingam* (4). Consequently as the only law applicable to the Mohunts, their offices, functions and duties, is to be found in the custom and practice applicable to the particular institution the Plaintiff must prove that he is the *chela* of Raghavananda Das, and that the Defendant is not the *chela* of Sriram Das. He must succeed on the strength of his own title and not on the infirmity, if any, in the title of the Defendant.

Before we deal with the oral evidence on the record, it is necessary to consider the two Wills alleged to have been executed by Raghavananda Das and Sriram Das respectively. The Subordinate Judge was called upon to examine the question of the genuineness of the two Wills, as Letters of Administration have not yet been taken on the basis of either document. It has been explained that no application was made for Letters of Administration, in view of the decision of this Court in the cases of *Jib Lal Gir* v. *Jagamohan Gir* (5), *Parsania* v. *Hari Charan* (6), *Prosunno Kumari* v. *Ram Chandra* (7) and *Jaga-*

(1) 6 Mac. Sel. Rep. 262 (268); N. E. 328 (336) (1839).

(2) 11 M. I. A. 405 (1867).
(3) L. R. 18 I. A. 100: s. c. I. L. R. 19 All. 1 (1896)
(4) L. R. 20 I. A. 150: s. c. I. L. R. 16 Mad. 470 (1893).
(5) 16 C. W. N. 798 (1898).
(6) 17 C. L. J. 65 (1912).
(7) 17 C. L. J. 66 (1912).

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dindranath v. *Madhusudan Das* (8), *viz.*, that as the Mohunt is not the owner of the property of the *muth*, a person claiming to be his successor cannot, on his death, apply for Letters of Administration in respect of the *muth* property. This view has been controverted with reference to the decision in *Ranjit* v. *Jagannath Prosad* (9); but it is unnecessary to determine this point; because, notwithstanding sec. 187 of the Indian Succession Act, which is incorporated in the Hindu Wills Act, a Will not proved in the Probate Court may be used in evidence for a limited purpose. That section merely provides that no right as executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction shall have granted a probate of the Will under which the right is claimed or shall have granted Letters of Administration with the Will or with a copy of an authenticated copy of the Will annexed; this does not debar the use of a Will in evidence for a purpose other than the establishment of a right as executor or legatee. *Sukumari Gupta* v. *Bharat Mandal* (10), *Sarbamangala* v. *Mohendranath* (11), *Janaki* v. *Dhanu Lall* (12), *Caralapathi* v. *Cota* (13) and *Basanta Kumar* v. *Gopal* (14). Consequently, in the case before us, a reference to the terms of the Wills, though neither has been proved in the Probate Court, is permissible, if the genuineness is satisfactorily established and if reference to the terms is not made with a view to establish the right of a person as executor or legatee. Now as regards the will of Raghavananda Das, the Subordinate Judge has pronounced in favour of its genuineness. The Will was executed on the day of his death and was registered. On the evidence, there is no question that the document was executed by Raghavananda Das; the only point for consideration is, whether he had testamentary capacity at the time? He died of cholera in a lodging at Cuttuck. He was attacked with the disease on the night previous to the date on which he died. The Will was made on the morning of the day on which he died, and the Plaintiff suggested in the Court below that he was then unconscious. The Subordinate Judge has refused to adopt this view and we are disposed to accept his conclusion, although the appearance of the signature of the executant tends to indicate that he must have been at the time very feeble; but there is no reason to distrust the positive testimony that the testator asked the Will to be read over and gave his assent to the terms embodied therein. As regards the Will of Sriram Das, which is said to have been executed by him at the *muth* on the 28th September 1907, the Subordinate Judge has pronounced against its genuineness. The Appellant has failed to convince us that this view is erroneous. The evidence of its execution is by no means satisfactory, and it is inconceivable that the Plaintiff should have been allowed, without a protest, to assume the office of Mohunt after the death of Sriram Das, if the latter had left a Will in favour of the Defendant. On the other hand the evidence of the medical attendant Kasi Prusti shows that the illness of the deceased was pronounced hopeless two days before his death, and that he was unconscious on the day of his death. On the whole, we are not prepared to disagree with the Subordinate Judge in his view that the alleged testator was, on the day of

(8) 20 C. L. J. 307 (1912).
(9) I. L. R. 12 Cal. 375 (1885).
(10) 20 C. L. J. 148 (1914).
(11) I. L. R. 4 Cal. 508 (1879).
(12) I. L. R. 14 Mad. 454 (1891).
(13) I. L. R. 33 Mad. 91 (1909).
(14) 18 C. W. N. 1186 (1914).

his death, not in a condition to make a valid testamentary disposition.

The first question for consideration is, whether the Plaintiff, was as alleged by him, a *chela* of Raghavananda Das, and consequently, the *gurubhai* of Sriram Das. The oral evidence adduced by the Plaintiff upon this point has been rightly characterised by the Subordinate Judge as overwhelming and of the most reliable character. The witnesses who speak to the initiation ceremony of the Plaintiff are men of position and means, and no intelligible reason has been assigned why they should conspire to set up a false case. Reference may be made particularly to the evidence of Dharamdas the Mohunt of Arang, Radha Mohun Santra the *shebait* of an endowment in the neighbourhood. Pran Krishna Das, and Kishori Charan Das, two zemindars, and Gopal Das the Mohunt of Bara Akhra, to which the Khambakul *muth* is subordinate. There is on this oral evidence no room for doubt that Raghavanada Das had two *chelas*, the senior, Jagannath, and the junior Sriram. Against this view the weightiest evidence brought forward by the Defendant is the recital in the Will of Raghavananda that he had no one else as his *chela* except Sriram Das. There has been considerable discussion at the Bar upon the question of the admissibility of this statement in evidence. On behalf of the Defendant, it has been argued that the statement is admissible under cl. (5), of sec. 32 of the Indian Evidence Act. That section—we quote so much of it as is material for our present purpose—is in these terms: "Statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts in the following case: (5) when the statement relates to the existence of any relationship by adoption between persons as to whose relationship by adoption the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised." On behalf of the Plaintiff, it has been argued that the section should be strictly construed and that the statement in question should be excluded, *first*, because it relates not to the existence but to the non-existence of a relationship and, *secondly*, because the relationship between a Mohunt and his *chela* is not a relationship by adoption. On behalf of the Defendant, it has been argued that the section should be liberally construed, and that it is only by a liberal construction that the view taken in the cases of *Ram Chandra* v. *Jogeshwar* (15) and *Dhanmull* v. *Ram Chandra* (16) can be defended. In answer, it has been contended by the Plaintiff that the view taken in these cases, *viz.*, that a statement as to date of birth or marriage of a person is admissible as a statement relating to the existence of relationship though in accord with illustrations (L) and (M) of sec. 32 is opposed to the view taken in *Bepin Behary* v. *Sreedam* (17), *Satish Chandra* v. *Mohendra Lal* (18) and *Ram Krishna* v. *Manindra Mohun* (19). It is not necessary for our present purpose to determine whether the fluctuation of judicial opinion indicated in the two sets of decisions mentioned, is more apparent than real, and whether they may not be reconciled by a recognition of the principle that a statement as to the time of commencement of a relationship is so indissolubely associated with the existence itself of the relationship, that it may be rightly regarded, with-

(15) I. L. R. 20 Cal. 758 (1893): on P. C. L. R. 23 I. A. 87; I. L. R. 23 Cal. 670 (1896).
(16) I. L. R. 24 Cal. 265: s. c. 1 C. W. N. 270 (1899).
(17) I. L. R. 13 Cal. 42 (1886).
(18) I. L. R. 17 Cal. 849 (1890).
(19) 20 C. L. J. 82 (1914).

out undue stretch of language, as a statement which relates to the existence of that relationship. *Oriental, etc., Co., Ld.* v. *Narashinha* (20) and *Patinhar Kuru*, v. *Raman* (21). But whatever view may be adopted upon that question, it does not directly affect the points raised before us for consideration, *viz.*, *first*, is the relationship between a Mohunt and his *chela* a relationship by adoption, and, *secondly*, is a statement that A has one *chela* B, and has no other *chela*, a statement relating to the existence of a relationship? We are of opinion that both these questions should be answered in the affirmative. In the first place, there is no reason why the term "adoption" should be interpreted in a restricted sense; the expression that A has adopted B as his *chela* is found in judicial decisions of the highest authority. In the second place, the expression "relates to the existence" is obviously very comprehensive and need not be construed in the narrow sense suggested by the Plaintiff. This view is in accord with the decision of the judicial committee in *Mohunt Bhagwan* v. *Mohunt Raghunandan* (22). In that case the contest for the office of Mohunt lay between one Raghunandan, who claimed to be the *gurubhai* of the deceased Mohunt Hoygrib (both of them *chelas* of Chatturbhuj) and Bhagwan, who claimed to be the *chela* of Hoygrib. The Plaintiff contended that the Defendant was not the *chela* of Hoygrib, while the Defendant asserted that the Plaintiff was not the *chela* of Chatturbhuj, and, consequently, not the *gurubhai* of Hoygrib. A petition by Chatturbhuj adduced in evidence, contained the statement that he had no other *chela* or heir besides Hoygrib, and this was sought to be used to disprove the allegation of Raghunandan that he also was a *chela* of Chatturbhuj. The statement was treated as admissible in evidence but was held to be not conclusive. We hold accordingly that the statement of Raghavananda in his Will, dated the 13th November 1906 that Sriram Das was his *chela* and that he had no other *chela*, has been rigtly admitted in evidence. The only question is, that whether, as Sir Richard Couch said in *Mohunt Bhagwan* v. *Mohunt Raghunandan* (22), having regard to the other evidence in the case, the statements in the Will should be accepted as true. In our opinion, the question must be answered in the negative. It is clear on the oral evidence that the Plaintiff, Jagannath, though the senior *chela* from the point of view of the date of his initiation, was younger in age than Sriram. As is explained by Mohunt Gopal Das, Sriram was not only older than Jagannath, but was more intelligent. It is further plain that Jagannath had, on one occasion, attempted to commit suicide, and was sentenced to simple imprisonment for one month. This may have displeased his *guru* Raghavananda who obviously intended to have him superseded by Sriram; and with a view to strengthen the position of the latter, whom he expressly nominated as his successor, he may have stated in his Will that he had no other *chela*. This could not possibly prejudice the right of Jagannath to succeed as Mohunt, should Sriram die without a *chela*. We hold accordingly that, notwithstanding the statement of Raghavananda in his Will, the oral evidence establishes satisfactorily that Jagannath was the senior *chela* of Raghavananda.

The second question for consideration is whether the Defendant Achyutananda was adopted as a *chela* by Sriram. The story

(20) I. L. R. 25 Mad. 583 (1901).
(21) 24 I. C. 519 (1914).
(22) L. R. 22 I. A. 94 : s. c. I. L. R. 22 Cal. 843 (1894).

(22) L. R. 22 I. A. 9 : s. c. I. L. R. 22 Cal. 843 (1894).

for the Defendant is that he was taken as *chela* by Sriram on the day of his death. The Subordinate Judge had disbelieved the oral evidence on this point, and we are not prepared to hold that he has taken an erroneous view. In the first place, it is plain from the evidence on the side of the Plaintiff that Sriram was, on the day of his death, in a more or less unconscious condition, and was not physically able to perform the elaborate ceremonies essential for the initiation of a *chela*. In the second place, the alleged Will of Sriram puts forward an entirely different story, *viz.*, that the Defendant was taken as *chela* six years earlier, when a boy only three years old, during the lifetime of Raghavananda himself; whoever may have manufactured the Will, whether on the day of or immediately after the death of Sriram, did not venture to put forward the story of the initiation of the Defendant on the day of the death of Sriram. In the third place, it is indisputable on the evidence that at the *mahotsab* ceremony held on the thirteenth day after the death of Sriram the Plaintiff was installed as the Mohunt in the presence of a large assembly of Mohunts and respectable men. No claim appears to have been put forward on behalf of the Defendant as the *chela* of Sriram. If the Defendant had been so recently adopted as *chela*, it is inconceivable that his supporters should have allowed the installation of the Plaintiff to go unchallenged. The case for the Defendant is certainly not improved by the suggestion that the Plaintiff was allowed to assume the office of Mohunt, because he had been appointed by the Will of Sriram as the guardian of the Defendant. On the other hand it is plain that this was an ingenious device adopted by the framers of the Will, to propitiate the Plaintiff is possible, and to secure his acquiescence in the claim subsequently put forward on behalf of the Defendant. We feel no hesitation in holding that the Defendant is not the *chela* of Sriram Das.

We confirm accordingly the two-fold finding of the Subordinate Judge, *viz.*, that the Plaintiff is the *chela* of Raghavananda and consequently the *gurubhai* of Sriram and that the Defendant is not the *chela* of Sriram. In this view the decree of the Subordinate Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

[CRIMINAL APPELLATE JURISDICTION.]

Govt. App. No. 3 of 1915.

Chitty, J. Richardson, J. 1915, Heard, 24 and 25, August. Judgment, 2, September.	Deputy Legal Remembrancer, Behar and Orissa, Appellant, *v.* Matukdhari Singh & and ors., Accused, Respondents.

Criminal Procedure Code (Act V of 1898), sec. 417, appeal from an acquittal—Distinction if any between such appeal and appeal from conviction with regard to consideration of evidence—General rule applicable to criminal cases—Appellate Court's duty to give due weight to decision of lower Court—Indian Penal Code (Act XLV of 1860), secs. 141, 147, 430—Rioting and mischief by injury to works of irrigation—Bonâ fide claim of right—Written statement filing of, by accused, propriety of.

An appeal from an acquittal does not stand on a different footing with regard to the consideration of evidence to an appeal from a conviction. No distinction is drawn in the Code of Criminal Procedure between an appeal from an acquittal and an appeal from a conviction. There are no special rules for dealing with the evidence in an appeal from an acquittal which, it is expressly provided in the Code, may lie on a question of fact. Due weight must of course be given to the decision of the

DEPUTY LEGAL REMEMBRANCER, BEHAR AND ORISSA *v.* MATUKDHARI SINGH.

Court below and the reasons advanced for that decision.

Only one broad rule can be laid down with regard to the consideration of evidence in all Criminal cases and that is that the innocence of the accused person must be presumed and the burden lies upon the prosecution of completely rebutting that presumption. If after the consideration of the whole evidence any doubt is felt by the Court as to the guilt of any accused person he is entitled to the benefit of that doubt and the verdict must be in his favour.

There may be an unlawful assembly and a riot in respect of a right which the rioters desire to enforce. There cannot be a conviction under sec. 430. I. P. C., where there is a right or a bonâ fide *claim of right.*

The practice of filing written statements on behalf of accused persons condemned.

This was an appeal preferred by the Government on the 21st June 1915 against the order of acquittal passed on appeal by Mr. H. Foster, Sessions Judge of Gaya, on the 1st February 1915 against the conviction and sentences passed on them by Babu Har Sahai Lal, Deputy Magistrate of Gaya, on the 15th January 1915.

The facts of the case will appear from the judgment.

Sir S. P. Sinha, Mr. Sultan Ahmed and *M. Khurshed Hossain* for the Crown.

Mr. Caspersz and *Babu Monmotha Nath Mukherjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHITTY, J.—Matukdhari Singh and nine other persons were convicted by Babu Har Sahai Lal, Deputy Magistrate, 1st class, of Gaya, under various sections of the Indian Penal Code and sentenced to various terms of imprisonment. They appealed to the Sessions Judge of Gaya who allowed the appeals of all the ten persons. From that order of acquittal, the present appeal has been filed by the Local Government.

It is urged on behalf of the Local Government that the matter is one of considerable public importance inasmuch as the accused in this case claimed to use force in asserting their rights of irrigation. It is argued that there would be considerable danger to the public peace if such action on behalf of private individuals was allowed to go unpunished. For the defence it is argued that an appeal from an acquittal stands on a different footing with regard to the consideration of evidence to an appeal from a conviction. Reference was made to the cases of *Queen-Empress* v. *Gayadin* (1) and *King-Emperor* v. *Madan Mandal* (2). These decisions were considered in Government appeal No. 8 of 1914 by a Bench of which I was a member. It is sufficient for me here to say that no distinction is drawn in the Code of Criminal Procedure between an appeal from an acquittal and an appeal from a conviction. It is expressly provided that an appeal from an acquittal may lie on a question of fact. Only one broad rule can be laid down with regard to the consideration of evidence in all criminal cases and that is that the innocence of the accused person must be presumed; and the burden lies upon the prosecution of completely rebutting that presumption. If after the consideration of the whole evidence any doubt is felt by the Court as to the guilt of any accused person, he is entitled to the benefit of that doubt, and the verdict must be in his favour. There are, however, no special rules for dealing with the evidence in an appeal from an acquittal. Of course due weight must be given to the decision of the Court below and the reasons advanced for that decision.

(1) I. L. R. 4 All. 148 (1. 81).
(2) 18 C. W. N. 665 (1913).

Apart from this, however, an appeal from an acquittal must be considered in precisely the same manner as all other cases are considered and it must be determined whether the evidence is such as to warrant a conviction of the accused.

This is an appeal from an appellate order. There is a salutary rule which says that an Appellate Court should give weight to the opinion of the Trying Court which had the witnesses before it and was, therefore, able to judge from their demeanour whether or not they were telling the truth. In an appeal like this from an acquittal passed upon appeal this Court is obviously in as good a position as the lower Appellate Court to form an opinion with regard to the credibility of the witnesses. We must have, as the Appellate Court ought to have had, due regard to the opinion on this question formed by the trying Magistrate. The facts of this case are not seriously in dispute. There was undoubtedly an occurrence of the nature described by the witnesses in the early morning of Sunday 4th October 1914. It arose in consequence of the reluctance on the part of the people of Mauza Nimsar to allow the mauzas above them to take water from what is called the Nimsar Pyne. The Sessions Judge himself, who has acquitted the accused, says, "The Nimsar people, as is admitted and proved beyond a shadow of doubt, demolished the dam at Sikaria claiming that their turn had come for the use of the water."

Only two questions arise in this case, *first*, whether the action of the Nimsar people amounted to an offence under sec. 147, I. P. C., and the kindred sections, that is to say, whether there was in fact a riot; and, *secondly*, whether the accused, or any and which of them, participated in that riot?

The learned Sessions Judge has, in my opinion, fallen into an error with regard to the *parabandi* system which is in vogue in this locality and also with regard to the legal rights of the parties. These errors have undoubtedly vitiated his whole judgment and, in my opinion, driven him to an entirely wrong conclusion.

From the Mortar river flows what is known as the Nimsar Pyne—a channel constructed many years ago for purposes of irrigation. It flows southwards past several villages. Those villages originally all belonged to the Tikari Raj. Now some of the villages in question have passed to other owners. The several villages with which we are concerned in the present case are Noni, Maksudpur, Kalyanpur, Sekaria and Nimsar-Hasanpur. Nimsar-Hasanpur still form part of the nine anna Tikari Raj. Maksudpur, Kalyanpur and Sekaria which lie below Noni to the north have passed to the ownership of Babu Ishwari Persad Singh, whose people are the complainants in this case, and who himself resides at Gaya. The only document relating to the system of irrigation is the Lal Bahi—an old book of the Tikari Raj, of which an extract has been put upon the record as (Ex. 6). The system as we find it proved in this case is that the villages lying in proximity to the Nimsar Pyne are permitted in rotation each to erect a *bundh* across the Pyne when the water is flowing low so as to collect it and permit of its flowing into the *bhoklas* or distributories which thus pass the water from the Pyne into their fields. The rotation commences from the northernmost village which lies highest and descends in turn to the villages lying lower and to the south. Thus, in this case, the first village which has a right to construct a dam is Noni. Below Noni are some other villages with which we are not concerned. Then comes the group of three villages, Maksudpur, Kalyanpur and

Sekaria. They lie, Maksudpur and Kalyanpur to the west of the Pyne, and Sekaria to the east. Maksudpur and Kalyanpur have one *bhokla* on the western bank and Sekaria one *bhokla* on the eastern bank. Into these two *bhoklas* the water is compelled to flow by the construction of a single dam. Below these three villages, to which we may for the purposes of this case refer as Maksudpur, lie the villages of Nimsar-Hasanpur. The water is drawn off by the several villages in the *paras* or turns, which are specified in the Lal Bahi. Thus, Noni is allowed to take the water for two days, Maksudpur, Kalyanpur and Sekaria together for two days and Nimsar-Hasanpur for three days. These *paras*, in my opinion, clearly mean the actual time during which water is flowing into the *bhoklas*. When the water is running low, some time must necessarily be allowed both for the construction of the *bundh* and the period required for the filling of the *handar*, or space behind the *bundh*, so as to permit the water to rise high enough to flow into the *bhoklas*. It was suggested on behalf of the defence but not in any way proved that no time could be allowed for the erection of the *bundh* and the filling of the *handar*. This is clearly not the case. In September 1914 there had been a dearth of water, but some 10 days or so before the occurrence there appears to have been a very heavy storm and a consequent rush of water which carried away the *bundhs* which had been erected by Noni, Maksudpur and Nimsar. Noni, whether by reason of the heavy rainfall or for some other reason, did not require to re-erect its *bundh* or to draw water from the Pyne for its irrigation. Maksudpur and Nimsar, on the other hand, seem to have required water and to have taken steps to erect their *bundhs*. It may be that the Nimsar *bundh* was commenced before the Maksudpur *bundh*. As to this there is no certain evidence. It is, however, in evidence and proved beyond doubt that the Maksudpur people began constructing or reconstructing their *bundh* on Wednesday 30th September 1914. The Nimsar people, who wanted to draw the water for themselves, at that time objected. Some of their men came to the Muksudpur people who were constructing the *bundh* and asked them to desist. They declined to do so. Remonstrance was again made by the Nimsar people on Thursday 1st October. The Police were also informed with the result that the Sub-Inspector paid more than one visit to the *bundh* and ultimately 3 constables and 4 chowkidars were put to watch the Maksudpur *bundh* with a view to preventing any breach of the peace On Thursday, 1st October, a notice was given by the Sub-Inspector to Matukdhari Singh the first accused who was the Circle Officer of the Tikari Raj. In that he was asked to assist in preventing any breach of the peace which was apprehended at Maksudpur between the Nimsar raiyats and Tikari *amlas* on the one side and the raiyats of Maksudpur on the other. The Maksudpur people continued to erect their *bundh*. There is some slight discrepancy in the evidence as to at what precise hour it was completed; but, putting it as much against the prosecution and as favourably for the accused, as possible, there can be no doubt whatever that it was not completed until Thursday, 1st October, and that the water did not commence to flow into the *bhoklas* until the morning of Friday the 2nd. The general body of the prosecution witnesses puts the time when the water began to flow into the *bhoklas* at noon on Friday; but, assuming that it was 4 or 5 hours before that, it would not, in my opinion, make any difference to the position of the parties in

the present case. If it began to flow on the morning of Friday the 2nd, the *para* of two days would expire on the morning of Sunday the 4th. It would, in any case, not expire until, say, 7 A.M.; in all probability, it did not expire until noon on Sunday. On the Friday and Saturday, no objections were taken by the Nimsar people. On the night of Saturday and Sunday, there were 12 men of the three villages appointed to watch the completed *bundh*. The evidence shows that there were seven on one side and five on the other. We are unable to accept the evidence of the police constable and chowkidar which would put the number at anything from 25 to 100. It is extremely improbable that so many men would be left there simply for the purpose of watching the *bundh*. Besides these watchers, were the three constables and four chowkidars. At about 2 or 3 A.M. on Sunday morning a large crowd of Nimsar people—the number has been variously estimated at 100 to 200 or even more—came from the south on the western bank of the river headed by a man on an elephant. The evidence shows that one of them at least carried a sword, another a *garasa*, while many were armed with *lathis*. They came up to the *bundh*; and the man on the elephant—who was evidently in authority,—called upon the watchers to demolish the *bundh*. They replied that their *para* had not terminated and that it should not be demolished till the *para* was over, when, they said, the Nimsar people might demolish it themselves. It should be stated that, according to the *parabundi*, it is the right of the village below to demolish the *bundh* of the village above directly the *para* of that village has terminated. It would, therefore, be within the rights of the Nimsar people to demolish the *bundh* at Maksudpur when the Maksudpur *para* was over.

As the Maksudpur people declined to accede to their request, the elephant was directed to the *bundh* which it proceeded to demolish under the orders of its *mahuts*. It trampled down or removed with its tusks the bundles of sugarcane and the earth forming the *bundh* and made a breach through which the water began to flow. The flow of water rapidly increased the breach and the *bundh* was soon demolished, the water flowing southwards. In consequence of the action of the Nimsar people, the Maksudpur people made a small show of resistance. Some of them were pursued by the elephant and frightened away. That was before it had actually demolished the *bundh*. Others were attacked by the persons who carried the sword, the *garasa* and *lathis*. The evidence is clear—and, indeed, the fact cannot be disputed—that Kunja Singh and Enayet Khan of the Maksudpur people were very seriously injured by the sword, *garasa* and *lathi* blows. After the *bundh* had been demolished and the Maksudpur people had been put to flight, the Nimsar people dispersed. One of the constables Ram Dahim Singh, who was pronounced a hostile witness in the Trying Court, instructed one of the chowkidar Gopi Dusadh—who also appears to have been a hostile witness and not being called by either side was examined by the Court, to lodge a first information. This he did at the Tikari Police Station—three miles from Bhaismera—the place of occurrence. In that information, he did not identify any of the rioters except Beni Singh who, he then said, was seated on the elephant with another man whom he could not identify. He was, in my opinion clearly in error in putting Beni Singh on the elephant; and the trying Magistrate has given good reason for holding that he did this deliberately with the object of shield-

ing Matukdhari Singh. That information was lodged at about 4 A.M. Soon after that Matukdhari Singh was undoubtedly arrested at his residence, which is not very far from the thana, by the Police officials of their own motion. His arrest must have taken place at about 6 or 6-30 A.M. Thakur Singh—the *gomasta* of Maksudpur and Kalyanpur,—distrusted the Tikari Police who, he thought, might be unduly favourable to the Raj and so to the Nimsar people who were tenants of the Raj. He accordingly took steps to bring the occurrence to the notice of the authorities without the intervention of the Tikari Police. He sent Kunja Singh and Enayet Khan to the hospital and at about 8 A.M. caused to be written out the telegram-(Ex. 9)-to the District Magistrate of Gaya. In that telegram he accused all the eight persons who are now before the Court other than the two *palwans*. An information also was laid by Kunja Singh said to be of mauza Sekaria on 4th October 1914 in which he, too, named the eight accused other than the two *palwans*. The consequence was that all the 10 accused persons were put upon their trial with the results as above stated.

As I have said, the learned Sessions Judge has fallen into an error both with regard to the *parabundi* and the legal rights of the parties. What his precise finding is as to the *parabundi* it is difficult to say; but he apparently holds that the *para* of Maksudpur had in fact commenced at the time of the occurrence because he says that they had no right to erect the *bundh* and dam up the water for irrigation at all at that time. His reason for this appears to be that Noni had not exercised its right of taking the water and, therefore, the right had in some manner been lost to Maksudpur and passed to Nimsar who had commenced, he says, to erect their *bundh* shortly before the Maksudpur people commenced to erect theirs. I fail to see how the waiver by Noni, if there was such a waiver, of its right to erect a *bundh* and take the water for its *para* could possibly affect the right of Maksudpur as between Maksudpur and Nimsar. The Maksudpur people were undoubtedly entitled to take the water before the Nimsar people. They had, therefore, the right to erect their *bundh* and have their *para* completed before the Nimsar people could insist on having the channel opened for the irrigation of their fields.

The learned Sessions Judge has also fallen into an error with regard to the legal rights of the parties, which the counsel for the accused did not attempt to support. The learned Judge says that, in his opinion, the riparian owners were entitled to the free flow of the water and that anything which stopped that flow amounted to a nuisance which they were entitled to abate. Therefore, he says, the Nimsar people were entirely within their rights in demolishing the dam erected by the Maksudpur people because it constituted a nuisance so far as Nimsar was concerned. It need hardly be pointed out that this is not a question of nuisance or abatement of nuisance at all. The view also of the learned Sessions Judge entirely overlooks the rights of the Maksudpur people which, after all, are co-ordinate with the rights of the Nimsar people and are governed by the same system.

I am clearly of opinion that the Maksudpur people were within their rights in erecting their *bundh* as they did. I also find that their *para* would last until at least 7 A.M. on Sunday 4th October and that the Nimsar people had no right whatever to demolish it before that hour.

I, then, pass to the consideration of the question whether there was, in fact, a riot

within the definition of sec. 141, I. P. C. As to this there cannot be the shadow of a doubt. The common object of the mob in this case was by means of criminal force or show of criminal force to deprive the cultivators of Maksudpur and Sekaria of the use of water of the Nimsar Pyne of which they were in enjoyment or thereby to enforce their right or supposed right to the said water. That the Nimsar people—the mob which came from the south that night—formed an unlawful assembly, there can be no doubt. They came with that object and they insisted on demolishing the *bundh* inspite of the remonstrances of the Maksudpur people. Even if the Maksudpur *para* had, in fact, terminated, it would still be a riot within the meaning of sec. 141, I. P. C. But in this case there can be no doubt whatever that the Maksudpur *para* had not terminated when the occurrence took place. At the very least it had three or four hours more to run. Even the learned Sessions Judge does not hold, as I read his judgment, that there could be any right of private defence in those circumstances. I therefore, hold without any hesitation that this band formed an unlawful assembly and were guilty under sec. 147, I. P. C.

It is also clearly proved that violence was used and Kunja Singh and Enayet Khan were both seriously wounded by the rioters. This was in furtherance of the common object and that would render them liable to punishment under secs. 324 or 326 read with sec. 149 and whoever of them was armed with a deadly weapon or with anything which used as a weapon of offence was likely to cause death was also punishable under sec. 148. They were further charged under sec. 430, I. P. C., that is to say, with mischief by injury to works of irrigation or by wrongly diverting water. The learned counsel for the Crown said that he did not press for a conviction on this charge, as the question of public importance was the charge of rioting. The learned counsel for the accused claimed to be convicted under sec. 430. By that I take it that he meant that, if the charge under sec. 430 was not established, there would be no unlawful assembly and that they would be entitled to an acquittal on the other charges. That, however, by no means follows. There may be an unlawful assembly and a riot in respect of a right which the rioters desire to enforce. There cannot be a conviction under sec. 430 where there is a right or a *bonâ fide* claim of right. We do not think that we need consider the question of a conviction under sec. 430 in view of the attitude taken up by the Crown in this case with regard to it.

I, then, pass to the second question as to the participation of the several accused in this riot. The prinicipal offender is no doubt Matukdhari. He is a Circle Officer of the Tikari Raj and a man in authority. We are told that he draws a salary of Rs. 200 per mensem and has other emoluments which bring his monthly income to more than double that sum. It is complained that he has been falsely accused in this case, that he was not present and that the identification of him as being present is wholly insufficient. We have been taken through the whole of the evidence by one side or the other and we think that it is proved beyond all doubt that Matukdhari Singh was the man on the elephant, who was directing the proceedings on that night. He is identified as having been there by eight eye-witnesses and we see no reason to take a different view of the evidence of these men to that which was taken by the trying Magistrate. It was suggested by the learned counsel for the accused that they had no proper means

of identifying Matukdhari at that time because it was said that the face of the man on the elephant was concealed in a *galaband* or muffler and that the elephant was at a very great distance from the Maksudpur people who purported to recognise Matukdhari Singh. There is really no force whatever in this contention. It is clearly proved that the elephant pursued and chased away from the Pyne a number of these eye-witnesses. They were, therefore, at very close quarters to the elephant and not, as the counsel suggested, at a distance of 75 yards, *i.e.*, on the other side of the Pyne. Further, it is clear from the evidence of Thakur Singh—the *gomasta*—that he had conversations with the man on the elephant and that the muffler which he is said to have had on was a *galaband* or comforter wrapped round his throat. It may possibly have concealed a portion of his face: but on that night the moon was full. There was, therefore, ample light and ample opportunity for these persons to recognise Matukdhari Singh, whom they well knew as the Circle Officer of the Tikari Raj. He was named both by Thakur Singh and Kunja Singh as having taken the lead in the attack on the Maksudpur people. It was argued for him that when Thakur Singh sent the telegram (Ex. 9) at 10-30 A.M. he must have known of the arrest of Matukdhari and took his cue from that and included him among the persons implicated. We were taken through the evidence bearing on this point by the learned counsel for the accused and I may say that it is not at all proved that Thakur Singh knew of the arrest when he sent his telegram. On the contrary, it would appear from the fact that he was working behind the back of the Tikari Police and had no communication whatever with them, that he could not have learnt of the arrest but spoke to Matukdhari being present from his own knowledge. It is true that the evidence with regard to the detection of Matukdhari when passing the thana is not such as the Court can rely on. There was a story put forward by the Sub-Inspector and several of the police witnesses that Matukdhari Singh, when hurrying away from the scene of the occurrence passed the thana on his elephant at an early hour. He was seen by one of the men at the thana who communicated it to a constable with the result that he was followed up at once and arrested at his residence when alighting or just as he had alighted from the elephant. These witnesses have undoubtedly told their story in such a way that it cannot be accepted without some corroboration of the fact. The learned Trying Magistrate very properly rejected their evidence in detail, but he accepted it as to the cardinal point that Matukdhari Singh was arrested by the police on their own responsibility at about 6 or 6-30 A.M. as having taken a part in this riot. That fact is proved to demonstration and there can be no doubt whatever about it. When we asked the learned counsel for the accused what Matukdhari's explanation was as to his whereabouts on that night he replied that he was in bed and asleep until he was roused in the morning and was arrested by the police. Now, that is not only not supported by any evidence but is directly contrary to other evidence in the case. Not only have we the evidence of the eye-witnesses that he was seen at the place of the occurrence and directed the operation but it is proved conclusively by the evidence of Bikoo Misser a head-constable of Tikari—that Matukdhari Singh was a spectator of a play at Bahelia Bigha on the night of 3rd-4th, and that he was present at that play up till about 1 A.M. on Sunday when he left it almost at the same time as the witness.

In this connection we may point out that the accused declined to make any statement in the Trying Court. All the accused denied their guilt and said that they would file written statements. This Court has recently animadverted on this practice of filing written statements, which is not provided for by the Code of Criminal Procedure and enables statements to be put before the Court as statements of the accused when such statements are not, in fact, drawn up by the accused themselves but by their legal advisers or friends and are entirely irresponsible. In his written statement, Matukdhari does not profess to explain what he was doing on that night. He merely says that he was not there, and that the charge against him was due to his being on bad terms with the Tikari Police. With regard to this last statement, it appears to be incorrect so far as the evidence of the Police in this case is concerned. The constable Ram Dahim Singh has undoubtedly proved hostile to the prosecution and given evidence to some extent in favour of the accused. Gopi Dusadh the chowkidar is in much the same position. Taking the evidence against Matukdhari as a whole and giving it our most careful consideration we have no doubt whatever that he was the man on the elephant who directed the proceedings and was, as the person in authority, directly responsible for the riot.

With regard to Beni Singh, it is suggested that he was not there. Now, Gopi Dusadh in his first information says, that there were four men on the elephant, that is to say, the two *palwans* and two others of whom Beni Singh was one. As I have above stated, this appears to be a deliberate falsehood spoken by Gopi Dusadh for the express purpose of shielding Matukdhari Singh. There is, however, no doubt whatever on the evidence that Beni Singh, who is one of the *gomastas* of that side, was present on that occasion and that he was armed with a sword with which he struck Enayet Khan. His presence there is proved by a number of witnesses—the same who speak to the presence of Matukdhari Singh; and we see no reason whatever to disbelieve their statements. We think, therefore, that he was a member of the unlawful assmbly and that he is guilty under secs. 148, 324/149 and 326/149, I. P. C.

Bahadur Singh, the other *gomasta*, was admittedly at the scene of the occurrence. He was armed with a *garasa* with which he wounded Kunja Singh. His complicity is clearly proved and his guilt is the same as that of Beni Singh.

With regard to Punnit and Kamala, they also were admittedly present on the occasion as members of the Nunsar *bundh*. They were armed with *lathis* and must, therefore, be taken to be guilty under secs. 147, 324/149 and 326/149, I. P. C.

Chhedi, Harekku and Kuldip have been satisfactorily proved to have been present and to have been members of the unlawful assembly. Their complicity is proved by the same witnesses as speak to the other accused. They are, therefore, guilty under the same sections as Punnit and Kamala.

The only two remaining accused are Noor Khan and Mahamad Jan—the two *palwans* or *mahuts*. It may be noted that they were only sentenced each to one month's rigorous imprisonment. The learned Sessions Judge had, therefore, no jurisdiction to entertain appeals by them against their conviction. Their offence was undoubtedly of a lesser nature inasmuch as they were merely the drivers of the elephant and, no doubt, acted under the orders of their master Matukdhari Singh. At the same time, we

THE

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REPORTS (*See* Index).

Death of Lord Alverstone.

Lord Alverstone whose death was cabled out to India last Friday removes another very notable figure from the field of law. He was Lord Chief Justice of England after the death of Lord Russel of Killowen in 1900 and before that he was the Master of the Rolls. His rise at the Bar was very rapid and he became Attorney General in 1885, that is, within seventeen years of his call to the Bar in 1868. He held this office up to 1900 with a short break from 1892 to 1895. As Sir Richard Webster he was the leader of the Chancery Bar and was one of the ablest lawyers of his time. He like many distinguished members of the English Bench scored a blue both in sports and in the School. This harmonious development of his mind and body enabled him to work at the Bar and on the Bench up to the age of 70 years. He died within three years of his retirement. As Lord Chief Justice from 1900 to 1913 he gave many important decisions both in the King's Bench Division, the Court of Appeal and the Court of Criminal Appeal over which he was the first Lord Chief Justice of England to preside.

[redacted]

J. P., I.C.S., who was Registrar of the Calcutta High Court on its Appellate Side a few months before the European War broke out, and who went home on leave and joined the British Army in Flanders. It is announced that he died fighting there. He was under no compulsion to give up the comfortable berth he was holding in India and the handsome salary he was drawing for the position of a Lieutenant in Lord Kitchener's Army. We convey our sincerest condolence to the members of the bereaved family and it may be some consolation to them and his friends to know that his memory will be cherished with pride by even those who were not acquainted with him and that his example will serve as an inspiration to many to sacrifice all that they prize in this world for doing their duty in the present world struggle for liberty and freedom. It is no exaggeration to say that Mr. Cullis has in his death covered himself with the glory of martyrdom. As a Civilian he was a very capable and popular officer and was uniformly polite and courteous to all. Members of the legal profession and ministerial officers of the High Court entertained alike a high opinion of him.

His Lordship the Chief Justice of Bengal taking his seat on the Bench on last Thursday morning addressing the Bar mentioned the death of Mr. Cullis in very sympathetic terms.

Interpreters on the Original Side of the High Court.

Babu Trailakhya Nath Goswami, B.A., retired on pension last Thursday from the position of an Interpreter in the Original Side of the High Court after a very meritorious service amidst the general regret of the members of the legal profession and he carries with him their best wishes in his retirement. It is no secret that the standard of efficiency amongst Interpreters on the Original Side has been falling off considerably for some time past. Several men have been [redacted] some have acquitted themselves [redacted] have not given the

same satisfaction in their work as their predecessors. It is a well-known fact that the position of Interpreter on the Original Side used in the past to be filled by men who not only discharged their duties as Interpreters with singular ability but some of whom were well-known for their erudition. For instance, Babu Shyama Charan Sirkar, the author of *Vyavastha Darpan*, one of the most authoritative treatises on Hindu law, was an interpreter on the Original Side of the High Court. The senior members of the profession regret to this day that interpreters of the type of Beni Madhab Mukerjee, an erudite Persian and Sanskrit scholar, or Abinash Chandra Ghose, an ideal interpreter who was also a good scholar, have not been replaced since their retirement. Senior members of the profession will bear us out that counsel had never in the past to question the accuracy of interpretation in Court but can it be said that the same is the case to-day? We are always sorry to find any deterioration of efficiency in any department of the High Court. We have often wondered why men of the type some of whom we have named have not been selected in recent years to fill such responsible positions. As the post of an interpreter requires both scholarship and technical knowledge in the art of interpretation, such posts when they fall vacant may be advertised for in the Government Gazette stating the required qualifications and appointments made after trial in Court. His Lordship the Chief Justice has already displayed a keen desire for reform and we have every confidence that during his administration he will endeavour gradually to remove defects wherever they may exist and raise the efficiency of the High Court in every way.

Conspiracy with Alien for act not an offence under Alien law.

On the 28th of October last an application was made before the Judicial Committee of the Privy Council in *Beechey* v. *The King* in which the applicant was convicted of conspiracy by the Consular Court of China-Korea. The petitioner is a British subject and was charged at Shanghai with having conspired with a Belgian subject for committing fraud. According to Belgian law conspiracy to defraud is not a criminal offence. The Belgian subject could only be punished before the Consular Court under the Belgian law, and the Court had no jurisdiction to try the Belgian subject. But the British subject was convicted. The Court in charging the jury directed that they could not convict Beechey unless they were satisfied that his alleged co-conspirator was also guilty in fact, and would have been convicted if he was a British subject. It was urged before the Judicial Committee that conspiracy in English law involves the existence of at least two conspirators amenable to the English law and capable of being jointly tried. It was admitted that subject to this qualification one conspirator may be tried if the other could not be found. But the Judicial Committee regarded the argument as too technical and rejected the application as in their Lordships' opinion it did not disclose such a failure of justice as would justify their Lordships in interfering with the conviction. It seems to us that the direction of the Consular Court was quite consistent with the principles of the English law of criminal conspiracy. In *R.* v. *Brisac* 4 East 164, the indictment was against Brisac and Scott. Brisac was tried alone and convicted after Scott had absconded. Here too on the same principle Beechey could be tried alone.

Rules under Defence of India Act and Ordinance.

The *Gazette of India* of the 11th D[illegible] last publishes a new set of Rules under sec. the Defence of India (Criminal Law Ame[illegible]ment) Act IV of 1915 read with the Defe[illegible] of India Ordinance, 1915 (III of [illegible] which consolidates the old Rules and add[illegible] new ones for empowering the military [illegible]he authorities to have a more effective co[illegible] is persons, property, communications, [illegible] dence, news, etc, for safeguarding t[illegible]k to of peace and order and the defe[illegible]fore, country during the pendency [illegible]unnit Though the Rules seem to be so[illegible] in some respect yet they may [illegible]sed are extraordinary measures which [illegible]e two not be lightly availed of except military or civil exigency. Th[illegible]ed that first place confer power for des[illegible]o one pects by assigning them suitable [illegible] The imposing reasonable control over t[illegible], no conduct. When required they m[illegible] graphed or their thumb-impress[illegible]hem The power of search conferred by [illegible]nce P. C., is somewhat extended and pow[illegible]as for disposal of articles that may b[illegible] such search.

Powers are also taken for taking [illegible] sion of land, buildings, roads, ga[illegible] tric or water works as also for cutti[illegible]

trees, etc., for defensive purposes but power is given to the Chief Presidency Magistrate and the District Magistrates of awarding reasonable compensation. Competent military authorities may also require any person residing in any house or land to furnish information regarding all goods, animals, commodities in their control therein and furnish all particulars specified in the order. A District Magistrate or Commissioner of Police may also restrict access to public buildings or public places. Navigation in territorial waters and rivers and channels connected therewith may also be put under control and powers of search, arrest and seizure are conferred in this connection. Powers are also given to suitable authorities for the prevention of any letters or other communications being brought into or conveyed out of British India by any person for being transmitted by post or delivered otherwise. Officers empowered by Local Government may examine people's baggages for the purpose and take possession of such communications and dispose of the same.

The photographing of any naval or military [redacted] without permission is prohibited. The [redacted]mission of any letters or written messages [redacted] any person of any nationality resident in any [redacted]nemy country except through the post is pro[redacted]bited. But a person found with any such At[redacted]ter or message may prove that he did not sever[redacted] or suspect that the letter or message was He he[redacted]nded. Transmission of letters or mes- break f[redacted] means of invisible or other modes of Webster [redacted]riting by post or otherwise is also and was o[redacted]. Obstruction of military training or He like m[redacted] from enlistment is prohibited; so English Be[redacted]g with Government servants or in the Schoo[redacted]publication or circulation of reports of his mind [redacted]rejudicial to public safety or to the Bar and c[redacted] forces or those of the Powers in years. He d[redacted]spicious trespassing on railways tirement. As[redacted]near bridges is punishable with to 1913 he g[redacted]t which may extend to seven years. in the Kin[redacted] of the Rules for which special Appeal and[redacted] is not provided therein may be which he [redacted]h imprisonment which may extend Eng[redacted]land to[redacted]ears. A safeguard is provided that [redacted]is to take cognizance of any offence [redacted] Rules unless proceedings are taken [redacted] written consent of the Chief Presi- The la[redacted]Magistrate or a District Magistrate or a It is[redacted]ant-Colonel and only in the case of cir- we no[redacted]n of reports or rumours which are likely the na[redacted]anger public safety or to jeopardise the [redacted] of the British or the Allied military operations, the sanction of the Local Government or the Government of India will be required.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

VISCOUNT HALDANE. LORD PARMOOR. LORD WRENBURY. SIR JOHN EDGE. MR. AMEER ALI. 1915, 16, November.	AKSHOY KUMAR DAS SARKAR and others, Appellants, *v.* BILAS CHANDRA MUKHOPADHYA and ors., Respondents.

Purchaser of a share at a revenue sale—When time begins to run against him—Special leave.

This was an application for special leave to appeal from a judgment of the Calcutta High Court, dated the 11th March 1912. The parties were two neighbouring landlords. The Respondents instituted the present suit, claiming some lands on the ground that they were a reformation *in situ* of lands originally forming part of a *taluk* purchased by them at a revenue sale, in 1892. The Defendants pleaded *inter alia* that the suit was barred by limitation, inasmuch as they had been in adverse possession for more than 12 years since 1885.

The Subordinate Judge of Comilla held that the suit was barred, and his judgment was affirmed by the District Judge of Tipperah. On second appeal the High Court reversed that decision on the ground that the Respondents' contention that time began to run against them from the date of their purchase in 1892 and not before was well founded. The High Court refused to grant leave to appeal to His Majesty in Council on the ground that the subject matter of the appeal was under the appealable value.

Mr. L. DeGruyther, K. C., (with him *Mr. G. C. O'Gorman*) for the Petitioners submitted that the appeal raised a substantial question of law of great public importance, *viz.*, the nature and extent of the interest acquired by a purchaser of a share at a revenue sale held under secs. 13 and 53 of the Bengal Land Revenue Sales Act, 1859, and the Statute of Limitations. Their Lordships granted leave on special terms.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Petitioners.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA and NEWBOULD, JJ. APPEAL FROM APPELLATE DECREE No. 1229 OF 1914. ABDUL KARIM MEAN, Plaintiff, Appellant *v.* MIAJAN MIANJI AND ORS., Defendants, Respondents. 24th November 1915.

Conveyance—Holding—Division—Surrender of a part of holding, if valid.

The Plaintiff-Appellant sued to recover possession of the disputed land on the ground that it had been surrendered to him by Defendant No. 4 who was one of the tenants who held the tenure which comprised the land in suit. The Court of first instance gave the Plaintiff a decree; but on appeal that decree was reversed; and the main ground upon which the lower Appellate Court dismissed the suit was that the tenancy of Ahmed Ali and his co-sharers being a joint one there could not be a valid surrender of a portion of the holding by one of the tenants.

There was a division of the lands of the holding as between themselves. Ahmed Ali used to pay his share of the rent to the landlord and being unable to pay the arrears of rent he executed a registered document in favour of the landlord transferring his interest in the holding.

Held, that the division of the lands of the holding was not binding upon the landlord.

That even if there could be no valid surrender, the deed operated to pass his interest in the holding in favour of the landlord.

The case was remanded to the lower Appellate Court for a finding on the evidence whether Ahmed Ali had any subsisting right to the land in suit at the date when he executed the document.

Babu Dhirendra Lal Kastgir for the Appellant.

Babu Ramdoyal Dey for the Respondents.

A. T. M. *Case remanded.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE No. 30 OF 1913. LALA BALDEO NARAIN, Defendant, Appellant *v.* MUSSAMMAT BECHNA CHOWDHURAIN, Plaintiff, Respondent. 1st December 1915.

Mortgage—Paramount title—Limitation Act (IX of 1908), sec. 20—Duly authorized agent—Pleader.

On the 26th September 1889, Mussammat Tofa Koer executed a conveyance purporting to convey a certain property in the name of Lala Rajbansi Lal. On the 17th May 1898, Lala Rajbansi Lal executed a mortgage of this property in favour of the Plaintiff. But sometime after the execution of the mortgage, A was recorded in the Collectorate as the proprietor of this property. On the 20th March 1907, A executed a conveyance purporting to convey the property to Lala Baldeo Narain. The suit out of which this appeal arose was a suit brought upon the mortgage bond executed by Lala Rajbansi Lal in May 1898. Lala Baldeo Narain and A were made parties to the suit on the allegation that the mortgagor Lala Rajbansi Lal in order to defeat the Plaintiff fraudulently procured the registration of A's name as the proprietor of the mortgaged property and with the same object subsequently fraudulently procured a fictitious conveyance by A in favour of Lala Baldeo Narain. The suit was contested by Lala Baldeo Narain alone. He contested the *bonâ fides* of the mortgage, alleged that he was the owner of the mortgaged property and that the mortgagee never had any title to the property; he also contested the allegation [illegible] payment which the Plaintiff had made [illegible] order to save his claim from limitation. Lala Baldeo Narain was defeated upon all the points. He then appealed to the High Court.

A sum of Rs. 186 was lying in deposit to the credit of the mortgagee and this deposit was withdrawn by one Madan Behary Lal [illegible] at the time the pleader of the mortgagee is Rs. 66 out of this sum was paid by the bank to pleader to the mortgagee in discharge [illegible] before, interest due upon the mortgage bond. Punnit Lal mortgagor was present when this payment was made.

Held, that when the Appellant [illegible] decision of the Court upon the questions used are title to the mortgaged property, it was open to the two to him to ask the second Appellate Court to [illegible] noted that aside the order directing him to pay [illegible] to one of litigation which he invited. The *Joggeswar Dutt* v. *Bhuban Mohun* [illegible] ore, no L. R. 32 Cal. 425), referred to.

That from the circumstance, the pleader them held to be an agent duly authorized within meaning of sec. 20 of the Limitation Act to make the payment on account of interest.

Babu Akhoy Kumar [illegible] *jee* for the pellant.

Babu Jogendra Chunder Ghose for the pondents.

A. T. M. *Appeal dismissed.*

DEPUTY LEGAL REMEMBRANCER, BEHAR AND ORISSA *v.* MATUKDHARI SINGH.

think, be held to have been members of the unlawful assembly in the act in which they undoubtedly took part by directing the action of the elephant in destroying the *bundh*.

We accordingly set aside the order of acquittal in the case of all the 10 accused. Matukdhari Singh is convicted under secs. 147, 324/149 and 326/149, I. P. C. and sentenced under sec. 147 to a fine of Rs. 2,000 or in default six months rigorous imprisonment. Beni Singh and Bahadur Singh are convicted under secs. 148, 324/149 and 326/149, I. P. C., and are each sentenced under sec. 148 to nine months rigorous imprisonment. Chhedi, Punnit, Harakku, Kamala and Kuldip are convicted under secs. 147, 324/149 and 326/149, I. P. C., and sentenced each under sec. 147 to six months rigorous [illegible] risonment. We pass no separate sen- [illegible] nces under secs. 324/149 and 326/149. [illegible] Noor Khan and Mahamad Jan are convict- [illegible] d under sec. 147, I. P. C., and sentenced [illegible] h to one month's rigorous imprison- seven[illegible]

He hel[illegible]ARDSON, J.—I concur in the con- break fi[illegible] Webster [illegible]nd sentences and think that the and was o[illegible]lear one against all the accused. He like m[illegible] English Ben[illegible] in the Schoo[illegible] of his mind [illegible] the Bar and c[illegible] years. He di[illegible]M THE CHIEF COMMISSIONER tirement. As[illegible] AJMER-MERWARA.] to 1913 he g[illegible]LDANE. in the Kin[illegible]OOR. Appeal and[illegible] which he [illegible]BURY. Engl[illegible]DGE. [illegible] ALI. [illegible]915, The la[illegible]9, Octob[illegible] It i[illegible]nt, 2, Nov[illegible]. we no[illegible] Procedure C[illegible] Act V [illegible] 190[illegible], Sch. II, the na[illegible]reement to [illegible] signed by adult parties

Appeal allowed;
Acquittal set aside.

[illegible]RIVY COUNCIL.]

THAKUR UMED SINGH, and anr., Appellants,

v.

RA[illegible]AHADUR SET[illegible] SOBHAG MAL [illegible]HADHA & anr., Respondents.

and by guardian ad litem *of a minor party—Application for order of reference assented to by guardian but not signed by him—Proceedings if valid—Decree upon award—Revision—Review—Secs. 114, 115.*

Sec. 1 of Sch. II to the Civil Procedure Code does not require that the application in writing for an order of reference should of necessity be signed by the parties to the suit who have agreed to refer the matter in difference to arbitration.

Where one of the parties to a suit being an infant the agreement to refer was signed by the adult parties and by the guardian ad litem *of the infant, and the parties then appeared before the Trial Judge and, producing the agreement, applied for an order of reference in the presence of the guardian* ad litem *and with his assent,*

Held—*That the fact that the application was not signed by the guardian* ad litem *did not invalidate the proceeding.*

This was an appeal from a judgment of the Chief Commissioner of Ajmer-Merwara, dated 23rd May 1912.

The facts of the case sufficiently appear from their Lordships' judgment. The Trial Judge made a decree in terms of the award under the provisions of sec. 16, Sch. II, Code of Civil Procedure, 1908. The Respondents applied to the Chief Commissioner under sec. 115 of the Code to revise the said decree and order and to set aside the award. But the Chief Commissioner dismissed the application and held that there was no irregularity or illegality of the Trial Judge such as would justify revisional interference. The Respondents thereupon applied to the Chief Commissioner to review his judgment on practically the same grounds which had been urged before, and the Officiating Chief Commissioner, in the absence of the permanent Chief Commissioner who had gone on leave, heard the said application

and allowed it. He made an order setting aside the whole of the arbitration proceedings and remanding the cause to the Trial Judge to hear and to determine the same according to law.

Hence this appeal by special leave.

Mr. Bhagwandin Dubé for the Appellants submitted that the decree of the Trial Judge made under sec. 16, Cl. 2, Sch. II, of the Code of Civil Procedure was final, and that no appeal lay from that decree except in so far as it was in excess of or not in accordance with the award. There was neither appeal nor revision allowed by the Code. Reliance was placed on *Ghulam Jilani* v. *Muhammad Hussain* (1) and *Hansraj* v. *Sundar Lal* (2).

In any case the Officiating Chief Commissioner had no jurisdiction to review his predecessor's judgment under sec. 114 and Or. 47, cl. 1, of the 1st Schedule of the Code. No discovery of new and important matter or evidence was alleged, much less proved. The minor's guardian was a party to the agreement of reference and was actually present in Court when application to the Court was made to refer the matter to arbitration. Sec. 1, Sch. II, only required a written application (which was filed here). It did not provide that the application must be signed by all the Applicants.

(Their Lordships intimated that they did not wish to hear counsel any further.)

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—In this Appeal the question is whether the Officiating Chief Commissioner of Ajmer-Merwara has properly set aside the award in certain arbitration proceedings. The Respondents had brought a suit to recover from the Appellants Rs. 88,320 alleged to be due under a mortgage. The Appellant first on the record is the father of the second Appellant, who was at the time of the proceedings a minor. The Trial Judge appointed one Bhur Singh guardian *ad litem* of this minor Appellant. Before the trial came on all the parties entered into an agreement to refer the questions in dispute to two arbitrators and, in the event of these differing, to an umpire. The agreement was signed by the Appellants and Respondents each with his own hand, excepting in the case of the minor Appellant, on whose behalf it was signed by the guardian *ad litem*. The parties appeared before the Trial Judge and produced the agreement and applied for an order of reference. The guardian *ad litem* was present in Court and was party to the application. The Trial Judge thereupon made an order of reference. The arbitrators differed, and the parties then concurred in an application to refer the dispute to the umpire, and an order was made accordingly. The umpire made an award allowing the Respondents' claim to the extent of Rs. 17,510 only. This award was filed in Court. The Respondents, being dissatisfied with it, applied to the Trial Judge under the provisions of sec. 15 of the Second Schedule of the Code of Civil Procedure, 1908, to set the award aside. The Trial Judge refused the application. He found that all the parties to the suit, including the guardian *ad litem*, had been consenting parties to the application, and further that there was no ground for the objections made on the merits to the award. The order was made under sec. 16 of the Second Schedule to the Code already referred to. This section provides that

"(1) Where the Court sees no cause to re-

(1) L. R. 29 I. A. 51 : s. c. 6 C. W. N. 226 (1901).

(2) L. R. 35 I. A. 88 at p. 97 : s. c. 15 C. W. N. 585 (1908).

THAKUR UMED SINGH *v.* RAI BAHADUR SETH SOBHAG MAL DHADHA.

mit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award. (2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree, except in so far as the decree is in excess of, or not in accordance with, the award."

The Respondents then presented an application to the Chief Commissioner under sec. 115 of the Code of Civil Procedure. This section provides that :—

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court, and in which no appeal lies thereto, and if such subordinate Court appears (*a*) to have exercised a jurisdiction not vested in it by law, or (*b*) to have failed to exercise a jurisdiction vested, or (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order as it thinks fit."

The Chief Commissioner dismissed the application. He held that the point taken that the application to the Court for reference to arbitration was not signed by the guardian *ad litem*, was not a good one, having regard to the fact that the agreement itself was signed by all parties concerned. Moreover, he thought that it was for the minor or his guardian, and not for the Applicants, to raise such an objection. He also held that even if an agreement or compromise entered into on behalf of a minor without the leave of the Court was voidable against all parties other than the minor, that did not make it necessarily void against the minor. As to the merits he was of opinion that there was nothing in the case made for the Applicants, the present Respondents, based on misconduct or irregularity on the part of the arbitrators and umpire.

The Respondents then applied to the Court of the Chief Commissioner for a review of this order, relying on sec. 114 of the Code which, subject to such conditions and limitations as may be prescribed, allows a person aggrieved to apply for a review of any decree or order from which no appeal is allowed by the Code, and relying also on Or. 47 (1) of the First Schedule to this Code which provides that he may apply for such review on :—

"the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason."

These rules are, under sec. 121 of the Code, to have effect as if enacted in it, until altered as the Code provides.

This application for review was heard, not by Sir Elliot Colvin, the Chief Commissioner, but by Mr. Stratton, who was officiating in his absence. The Appellants were not represented on this hearing. The main point urged was that in dismissing the application for review the High Court was in error in regarding the omission to sign the application for arbitration by the minor or his guardian as unimportant, and as covered by the agreement which all the parties had signed. The Officiating Chief Commissioner acceded to the application, and set aside the whole of the arbitration proceedings, on the ground, apparently, that this error in the proceedings, though technical only, was fatal. The only other arguments before him appear to have been that even if the umpire had proper jurisdiction his action was illegal, because he opened the case *de novo*, whereas all he had to do was to consider the points on which the arbitrators had failed to agree, and because he had

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not taken evidence, although he called for it.

Their Lordships have had to hear the appeal *ex parte*, as the Respondents, the Plaintiffs in the suit, did not appear on the appeal, but they have examined closely the documents and the various judgments in the Courts below. They are of opinion that the decisions of the Trial Judge and of the Chief Commissioner were right, and ought not to have been interfered with by the Acting Chief Commissioner.

In the first place the Second Schedule to the Code of Civil Procedure, which provides by sec. 1 that where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an Order of Reference, does not require that the writing should of necessity be signed. As the guardian in this case was in Court and assented to the application it is plain that no injustice has arisen. They think, therefore, that there is no substance in the technical objection relied on. Nor can they find any defect on the face of the award, or any misconduct of the arbitrators or umpire, or concealment of facts by any of the parties which would bring the case within those provisions in the Second Schedule which might enable the Court to set it aside. They have accordingly arrived at the conclusion that the Acting Chief Commissioner was not justified in interfering with the Order refusing revision made by the Chief Commissioner.

They are, therefore, of opinion that the appeal must be allowed with costs here and in the Courts below, and they will humbly advise His Majesty to that effect.

Messrs. Barrow, Rogers and *Nevill* for the Appellants.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 61 OF 1915.

SANDERSON, C. J.
WOODROFFE, J.
MOOKERJEE, J.
1915,
29, November.

In the matter of GOBERDHONE SEAL, an Insolvent :
SM. LAKHYPRIA DASI
v.
SM. RAJKISHORI DASI.

Security for costs—Appeal from an order in insolvency—Jurisdiction of Appellate Court—Or. 41, r. 10, Civil Procedure Code (Act V of 1908)—Secs. 117 and 151, C. P. C.—Sec. 8 (2) (b), Presidency Towns Insolvency Act (III of 1909)—Practice.

On an application for security for costs in an appeal against a judgment passed by the High Court in its Insolvency Jurisdiction, it was held that in conformity with the previous practice and also under sec. 117, C. P. C., and Or. 41, r. 10, C. P. C. the Appellate Court has power to entertain the application.

SHISHA AYYAR *v.* NAGARATHNA (1) *not followed.*

On the 9th November 1911 one Goberdhone Seal transferred his 1/3rd share in his family dwelling house in favour of his wife Sarbosundary Dasi. Subsequently Sarbosundary Dasi transferred the said property to the Appellant. The Appellant is the mother-in-law of one Gajendra Chunder Seal a brother of Goberdhone Seal.

On the 27th February 1912 Goberdhone Seal was adjudicated an insolvent on his own petition. Then an application was made by the Respondent who is the only substantial creditor of the insolvent for a declaration that the said transfers were void and inoperative as against the Official Assignee.

Mr. Justice Chaudhuri held that the sale by the insolvent to his wife [illegible] a

(1) I. L. R. 27 Mad. 121 at p. 128 (190[illegible]

fictitious sale and he also held that the transfer by Sarbosundary in the name of Lakhypria, the Appellant herein, was a fictitious one and accordingly he held that both the transfers are void as against the Official Assignee.

From this order Lakhypria appealed.

On appeal the Respondent made this application for security for costs.

Mr. B. K. Lahiri (with him *Mr. K. N. Majumdar*) for the Applicant-Respondent.

Mr. N. Sircar (with him *Mr. S. K. Chakravarty*) for the Appellant.

Mr. Lahiri.—This is the only property of the insolvent. The Appellant is a *purdanashin* Hindu lady without any means. The findings of fact are all against the Appellant. I am entitled to get an order for security for costs.

Mr. Sircar.—Mere poverty is no ground for granting this application. Woodroffe's C. P. C., p. 1237 (1st Ed.). This Court has no jurisdiction to entertain this application. The only provision under which such an application can be made is Or. 41, r. 10, of the C. P. C. This section is not applicable in an Insolvency Appeal. Refers to sec. 8, (*2*), (*b*), Insolvency Act. *Shisa Ayyar* v. *Nagarathua* (1).

Mr. Lahiri.—If the contention made on the other side is right, then there cannot be any order for security for costs in any appeal from judgments passed in the Original Side. But according to an established practice orders for security have often been made in this Court. There is nothing in the Code to disturb it. On the other hand sec. 117 of the Civil Procedure Code makes Or. 41, r. 10, applicable to all appeals and gives the Court ample jurisdiction. The power of appeal in Insolvency matters is conferred by sec. 8 (*2*) of the Insolvency Act and is not by virtue of cl. 39 of the Letters Patent. Security for costs is ordered for ends of justice and every Court has inherent power to order it in a proper case. *Vide* sec. 151 of the Civil Procedure Code. The Madras case cited has never been referred to or followed in any reported case. Further it refers to a Mofussil case and the judgment was passed before the present Insolvency Act came into operation.

(1) I. L. R. 27 Mad. 121 at p. 123 (1903).

THE JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—This is an application for security for costs in an appeal against a judgment passed by Chaudhuri, J., in Insolvency. It is unnecessary to recapitulate the facts which are set out in the petition. The application is opposed both on grounds of law and fact. As regards the first question the point is whether Or. 41, r. 10, applies to the case of an appeal from an order passed by a Judge in Insolvency under Act III of 1909. Sec. 8 (*b*) of that Act states that an appeal shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the Ordinary Original Civil Jurisdiction. The question then is, does the order apply to the latter case. No doubt the case of *Shisa Ayyar* v. *Nagarathua* (1) answers this question in the negative. This case was decided prior to the present Code and has not been referred to nor followed so far as we are aware in this Court where the previous practice has been to entertain such applications. Under sec. 117 of the Code its provisions apply to the High Courts save as provided in Parts IX and X. I am of opinion, therefore, that we have power to entertain and adjudicate this application under sec. 117 and Or. 41, r. 10, of the Code. This conclusion is in conformity with the previous practice under which such appli-

(1) I. L. R. 27 Mad. 121 at p. 123 (1903).

cations have been adjudicated. It cannot be reasonably held that this Court when sitting in appeal from a decision on the Original Side is deprived of powers necessary to an effective jurisdiction admittedly existent on the Appellate Side of the same Court. For, if Or. 41, r. 10, does not apply, there is no other provision applicable and in such a case it would be necessary to invoke the provisions of sec. 151. On the facts stated in the petition, and in particular on the findings of the learned Judge there stated, I am of opinion that security should be required of the Appellant. The Applicant is entitled to the costs of this application.

SANDERSON, C. J.—I agree.

MOOKERJEE, J.—I agree.

Mr. J. N. Mitter, Attorney for the Appellant.

Mr. R. N. Chatterjee, Attorney for the Respondent.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 261 OF 1913.

FLETCHER, J. RICHARDSON, J. 1915, Heard, 10 and 11, June and 13 and 14, July. Judgment, 21, July.	CHOUDHURY SURESSUR MISSER and another, Plaintiffs, Appellants, *v.* MUSSTT. MOHESH RANI MESRAIN and others, Defendants, Respondents.

Hindu Law—Widow, alienation by, when binds reversioner—Relinquishment for a consideration—Relinquishment of whole estate necessary—Widow retaining movable and getting back some land to hold as life estate—Mithila law—Family arrangement—Mortgage-debt, if movable or immovable property.

It may be taken as established without doubt that a Hindu widow may relinquish her estate and this will have the effect of accelerating the estate of the next reversioner. Further, an alienation by a Hindu widow will be valid where there was consent of the next heirs and the alienation is capable of being supported by reference to the theory of relinquishment and consequent acceleration of the interest of the consenting heirs. But the alienation in such a case must be of the whole of the estate.

DEBI PROSAD CHOWDHURY v. GOLAP BHAGAT (3) *referred to.*

The widow is not precluded from obtaining a benefit for relinquishing her estate.

NOBOKISHORE v. HARI NATH (4) *followed.*

BAJRANGI v. MANOKARNIKA (5) *referred to.*

Under the Hindu, as under English law, a mortgage is treated as personal or moveable property, the land being considered as merely a pledge or security for the money lent.

Where under a compromise made between the mother, the sisters and M the immediate male reversionary heir of a deceased Hindu infant governed by the Mithila school, the whole of the immovable property of the deceased was relinquished by the mother M, and the mother herself was given the whole of the movable property inclusive of certain mortgage bonds, and M gave half of the immovable properties to the deceased's sisters, and the latter and M respectively gave 50 bighas of land to the deceased's mother with remainder to the respective donors and their heirs,

Held—*That, under Mithila law the movable properties (including the mortgage bonds) had passed by inheritance to*

(3) I. L. R. 40 Cal. 721 : s. c. 17 C. W. N. 721 (1913).

(4) I. L. R. 10 Cal. 1102, 1108 (1884).

(5) L. R. 35 I. A. 1 : s. c. I. L. R. 30 All. 1 (8) ; 12 C. W. N. 74 (1907).

the deceased's mother on his father's death.

That the life estate in 100 bighas which the deceased's mother got back was essentially different from the widow's estate which she formerly enjoyed and could in no way be regarded as a reservation or restoration of the widow's estate.

That under the terms of the compromise the lady had effectively relinquished and destroyed her estate as a Hindu widow and accelerated that of M.

Semble :—*The compromise might be supported as a family arrangement between all the parties competent to deal with the whole of the property (the daughters having claimed under a will of their father which had been probated).*

This was an appeal preferred on the 22nd July 1913 against the decree of Babu Satish Chandra Bose, Additional Subordinate Judge of Zillah Darbhanga, dated 30th May 1913.

The material facts will appear from the judgment.

Sir S. P. Sinha, Babus Dwarkanath Chakrabarty and *Chandra Sekhar Banerjee* for the Appellants.

Dr. Dwarkanath Mitter, Babus Sorashi Chara Mitter, Sailendra Nath Palit and *Ajendra Nath Dutt* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an appeal by the plaintiffs against the judgment of the learned Additional Subordinate Judge of Darbhanga dismissing their suit.

The Plaintiffs are the sons of one Kesab Misser deceased. Kesab was step-brother of Madhab the father of the Defendants, 3rd party. The Defendant No. 1 is the widow of and the Defendants Nos. 2 to 5 the daughters of Nunoo Pershad Misser who died on the 18th of Baisakh 1313. Nunoo also left him surviving a son Nageswar Pershad. He died childless on the 24th Bhadro 1313.

The plaint in this suit alleges that on the death of Nunoo his son Nageswar succeeded to his properties and that on the death of Nageswar his mother, the Defendant No. 1, took the properties. Further that the Defendant No. 1 wishing to benefit her daughters the Defendants Nos. 2 to 5 caused a false Will of Nunoo to be filed before the District Judge of Darbhanga by her daughters and that in that case Madhab Misser at the instigation of the Defendants Nos. 8 and 9 (who are alleged to be servants of the Defendant No. 1) filed a fictitious objection which was rejected by the Judge. That the servants of the Defendant No. 1 knew full well (the word is given in the translation of the plaint as "probably" but this must be a mistranslation) that the Will was invalid; so with a view to establish a permanent title in future got a Suit No. 277 of 1907 instituted by Madhab for declaring the said Will (of which Letters of Administration with the Will annexed had been already granted) declared invalid. That with a view to deprive the Plaintiffs of their rights the parties to that suit entered into a fraudulent and collusive *solenama* under which the immovable properties described in the Sch. (*i*) to the plaint and forming a portion of the estate of Nageswar Pershad Misser were given to Madhab, the properties described in the Sch. (*ii*) to the Defendants, 2nd party and the properties described in the Sch. (*iii*) to the Defendants, 4th party.

The Plaintiffs further allege that the Defendant No. 1 was won over and on the 25th of June 1909 executed a deed of relinquishment and that the Defendant

No. 1 is still in possession of the properties of Nageswar.

On these allegations the Plaintiffs asked the Court to make a declaration that the *solenama* and *baijnama* are invalid, null and void and are not binding on the Plaintiffs and cannot prejudice their right of inheritance.

The learned Judge at the trial found that all the transactions challenged by the Plaintiffs in their plaint as being fraudulent were in fact made and done in good faith.

On opening this appeal before us Sir S. P. Sinha, counsel for the Appellants stated that he did not intend to challenge the findings of the learned Judge negativing fraud. That being so, it is open to doubt whether the appeal should not be dismissed on that ground. The claim of the Plaintiffs to relief in this suit rests solely on the allegations of fraud made in the plaint. The Plaintiffs having failed to establish fraud are not at liberty to pick out allegations in the plaint which might have warranted them in asking for relief on some other ground. [*Hickson* v. *Lombard* (1) and *Rajendra Kumar Bose* v. *Gangaram Koyal* (2).]

The material facts relating to the case when they are disentangled from the allegations of fraud and collusion are simple. The deceased Nunoo Pershad Misser made his Will, dated the 21st of April 1906 and which was registered two days later.

Under the terms of the Will Nunoo gave the whole of his estate to his only son Nageswar subject to certain bequests in favour of his daughters and other relatives. The widow, the Defendant No. 1, took no interest under the Will.

By cl. 6 of his Will the testator provides that if Nageswar died without issue, his four daughters should succeed to his estate. As I have already said Nageswar died shortly after the testator, a minor and without ever having had any issue. The learned Judge has observed in the course of his judgment that "it is clear that Choudhury Nunoo Pershad had no right to make this Will while he and his sons (son?) lived in a joint family."

The learned Judge however overlooked the fact that the testator states in his Will "I have many movable and immovable properies, both ancestral and self-acquired and it is necessary to give to the said daughters and their heirs something out of the said properties according to the custom of the family." There was also evidence before the learned Judge that the testator was possessed of self-acquired properties. A person, claiming under the Will, if acting in good faith, might not unreasonably suppose that there were properties of the testator which passed under the terms of his Will. Next the three adult daughters of Nunoo applied to the District Judge for grant of Letters of Administration with the Will annexed. This application was opposed by Madhab Misser who was then the sole reversionery heir. A perusal of the Order-Sheet of the learned District Judge shows that his opposition was genuine and strenuous. The Letters of Administration were issued to the three adult daughters of the testator on the 3rd of October 1907.

On the 11th of August 1907—that is before the grant of the Letters of Administration—Madhab instituted a regular suit asking for a declaration that Nageswar took the whole of the properties on the death of Nunoo by right of survivorship and alternatively if Nageswar came into possession of the properties under the Will for a declaration that Nageswar took an

(1) L. R. 1 E. & Ir. App. 321 (1866).
(2) I. L. R. 37 Cal. 856 (1910).

absolute interest under the terms of the Will. This suit came on for trial and after the trial had proceeded for several days the parties came to a settlement.

On the 22nd of February 1909, the parties filed the petition of compromise in Court and on the next day the suit was decreed in terms of the compromise.

By the compromise the property was dealt with as follows :—

(*a*) The whole of the properties were deemed to be the estate of Nageswar.

(*b*) The movable properties were declared to be the absolute property of the Defendant No. 1.

(*c*) The Defendant No. 1 relinquished in favour of Madhab her widow's estate in the whole of the immovable property.

(*d*) Madhab granted to the daughters of Nunoo half of the immovable properties.

(*e*) Madhab granted to the Defendant No. 1, 50 bighas of land for her life with remainder to Madhab and his heirs. Similarly the daughters of Nunoo granted to the Defendant No. 1 another 50 bighas with remainder to the daughters and their heirs.

The other terms of the compromise are not material and have not been referred to on the hearing of this appeal. The terms of the compromise have been given effect to by deeds executed by and between the parties.

The sole argument addressed to us on behalf of the Appellants turned on the question as to whether or not the compromise was valid and binding.

The cases dealing with the power of a Hindu widow or mother to deal with the estate of her deceased husband or son to which she has succeeded as heiress are numerous. It is not necessary for us to go through the long list of authorities as they have all been considered by a Full Bench of this Court in the case of *Debi Prosad Chowdhury* v. *Golap Bhagat* (3). In that case all the earlier authorities were reviewed. First it may be taken as established without doubt that a Hindu widow may relinquish her estate and this will have the effect of accelerating the estate of the next reversioner. Further an alienation by a Hindu widow will be valid where there was a consent of the next heirs and the alienation is capable of being supported by reference to the theory of relinquishment and consequent acceleration of the interest of the consenting heirs. But the alienation in such a case must be of the whole of the estate.

The authorities, however, appear to show that the widow is not precluded from obtaining a benefit for relinquishing her estate. As was observed by Garth, C. J., in the case of *Nobokishore* v. *Hari Nath* (4) : "But there is no concealing the fact that although such a relinquishment may be made by a widow in perfect good faith and even under such circumstances as to be a meritorious self-sacrifice it is nevertheless possible and indeed it not unfrequently happens that a widow who is anxious to turn her husband's estate into money may arrange with the next heir of her husband for the time being to alienate the estate to some third person for their mutual benefit. They may both share in the profits of such a transaction, and it sometimes happens that in this way the estate is alienated from the husband's family so that the person who would be the next male heir at the widow's death is virtually deprived of his rights. But if it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being it seems impossible to prevent any alienation which the widow and the next

(3) I. L. R. 40 Cal. 721 : s. c 17 C. W. N. 701 (1913).

(4) I. L. R. 10 Cal. 1102, 1108 (1884).

heir may thus agree to make. And it seems equally impossible to deny that for a long series of years this Court has treated and considered such alienations as lawful." The latter part of this statement was approved of by the Privy Council in the case of *Bajrangi* v. *Manokarnika* (5). In the present case the compromise was challenged on the following grounds :—

First, it was said that the deed of relinquishment (Ex. H) executed by the Defendant No. 1 pursuant to the terms of the compromise does not include a house at Nadat. But the learned Subordinate Judge remarks that there is no evidence to support this argument. It is further to be observed that Ex. H was intended to apply to the whole of the immovable properties and in the schedule there is mentioned a property at Nadat which may be the house that is alleged to be there.

Next, it was objected that the whole of the movable properties had been given to the Defendant No. 1. But under the Mithila law the widow takes an absolute interest in the movables [*Birajun Koer* v. *Lachmi Narain* (6)]. A further point was raised under this head, namely, that the Defendant No. 1 was given absolutely the mortgage bonds. It was argued that under the terms of the Transfer of Property Act a mortgage is immovable property. But even if that be so, the Transfer of Property Act does not regulate the right of a Hindu widow or mother to succeed to the estate of her deceased husband or son. Under the Hindu law, as under the English law, a mortgage is treated as personal or movable property, the land being considered as merely a pledge or security for the money lent. Further it is to be noticed in the 4th schedule to the plaint the Plaintiffs treat the mortgages as movable property, the two decrees mentioned in the 4th schedule being decrees on mortgages. The clause of the compromise that was most strongly relied on was cl. 6 under which Madhab and the daughters of Nunoo respectively undertook to give to the Defendant No. 1, 50 bighas of land. It is argued that under this clause the widow's estate in a portion of the property remained. This however, in my opinion, is not so, in one case the 50 bighas was given to the Defendant No. 1 for her life with remainder to Madhab and his heirs and in the other case it was given to the Defendant No. 1 for life with remainder to the daughters of Nunoo and their heirs. This can in no way be considered as a reservation or restoration of the widow's estate that the Defendant No. 1 formerly enjoyed in the property. The life estate in the 100 bighas is essentially different from the widow's estate which the Defendant No. 1 formerly enjoyed. For example if a case of legal necessity arose the Defendant No. 1 would not be at liberty to mortgage the 100 bighas and the course of succession thereto is different to what it would have been if the Defendant No. 1 had retained her estate as a Hindu widow.

I think that under the terms of the compromise and the deed of relinquishment (Ex. H) the Defendant No. 1 effectually relinquished and destroyed her estate as a Hindu widow. That being so, having regard to the decisions mentioned above the parties were at liberty to make any bargain they thought fit for the division of the property.

I may further mention that I consider that the compromise might be supported as a family arrangement between all the parties competent to deal with the whole of the property, namely, the daughters who

(5) L. R. 35 I. A. 1 : s. c. I. L. R. 30 All 1 (18) ; 12 C. W. N. 74 (1907).
(6) I. L. R. 10 Cal. 892 (1884).

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claimed under the Will on the one hand and the Defendant No. 1 and Madhab the sole reversioner on the other hand. On the principles laid down by the Privy Council in the case of *Khumi Lal* v. *Gobind Krishna* (7) the compromise in this case would be binding as acknowledging and defining the antecedent title in the parties.

In the result the present appeal fails and must be dismissed with costs. Two sets of costs are allowed, one set to Dr. Mitter's client and another set to Babu Sorashi Charan Mitter's client.

RICHARDSON, J.—I agree.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 248 OF 1911.

SHARFUDDIN, J.
COXE, J.
1915,
Heard, 25, February and 2, March.
Judgment, 10, March.

HANUMAN PERSAD THAKUR, Plaintiff, Appellant,
v.
JADUNANDAN THAKUR and anr., Defendants, Respondents.

Civil Procedure Code (Act V of 1908), sec 66—Suit to recover property from certified purchaser, alleged to be benamdar, if lies where real purchaser was put in possession and was later on dispossessed.

Sec. 66 of the Civil Procedure Code aims at discouraging benami *purchases at execution sales by rendering the real purchaser helpless if he is cheated by his* benamdars.

To allow the real purchaser to sue his benamdar *on the fact of possession would be to defeat the object of the section.*

SASTI CHARAN NANDI *v.* ANNAPURNA (1) *doubted.*

BISHAN DIAL *v.* GHAZIUDDIN (2) *approved.*

This was originally Title Appeal No. 152 of 1910 preferred on the 8th July 1910 in the Court of the District Judge of Muzaffurpore against the decree of Babu Prasanna Kumar Gupta, Additional Subordinate Judge of Zillah Muzzaffurpore, dated the 31st of May 1910 and was transferred to the High Court by an order of Mookerjee and Carnduff, JJ., made on the 19th June 1911.

The facts of the case material to this report will appear from the judgment.

Mr. Caspersz and *Babu Gonesh Dutt Singh* for the Appellant.

Babus Umakali Mukerjee, Lakshmi Narain Singh and *Baidyanath Narain Singh* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

COXE, J.—This appeal arises out of a suit for recovery of possession of certain land that was sold in execution of a decree against one Harnandan Thakur in May 1900. It was purchased ostensibly by the Defendant, Jadunandan Thakur. The Plaintiff is the heir of one Rajbati, the sister of Jadunandan, and his case is that Jadunandan purchased the property with Rajbati's money and on her behalf, and that she remained in possession till her death in January 1906, since when the Defendants are in possession. The 2nd Defendant is said to have purchased a portion of the property from Jadunandan in June 1904, in full knowledge that Jadunandan was merely a *farzidar*. The defence is that Jadunandan bought the property himself.

The Subordinate Judge has dismissed the suit, holding that it is barred by sec. 66 of the Code, and also that Jadunandan

(7) I. L. R. 33 All. 356 : s. c. 15 C. W. N. 545 (1911).
(1) I. L. R. 23 Cal. 699 (1895).
(2) I. L. R. 23 All. 175 (1901).

was the real purchaser. The Plaintiff appeals.

Against Shia Thakur, the 2nd Defendant, the Plaintiff has, in my opinion, no case whatever. There is no evidence worth a moment's consideration that Shia had any reason to think that Jadunandan was not the real purchaser. Bhaya Singh, an important witness for the Plaintiff, admits that Shia Thakur has been in possession since his purchase, which was 1½ years before Rajbati's death. Learned counsel contended that Rajbati being a *purdanashin*, could not be estopped from pleading that the ostensible owner was not the true owner, unless it was shown that everything had been explained to her. This seems to me an untenable contention. To accept it would be equivalent to holding that, though a purchaser is not bound to enquire whether his vendor is the *benamdar* for another man, he is bound to ascertain whether or not he is the *benamdar* of a woman. This is evidently unreasonable.

As regards Jadunandan I feel no hesitation in holding that the suit is barred by sec. 66 of the Code, and therefore need not examine the question whether Jadunandan was or was not the real purchaser. But I may say that I incline to the belief that the Subordinate Judge's view of the facts is correct. Learned counsel has subjected the Defendant's case to powerful criticism, but clearly the whole burden of proof rests on the Plaintiff. It is argued that there is a discrepancy between the Defendant's pleading and his proof. In the first he asserts that he bought the property himself, whereas in his evidence he says that he obtained the money from his brother with whom he lives in commensality. This does not seem to me of very much importance especially when it is remembered that the Defendant's case is that the sale certificate is conclusive. It is contended also that as Jadunandan was Rajbati's Mukhtear, the burden of proving the good faith of all transactions between them rests on him. But it is open to doubt whether the power-of-attorney authorised Jadunandan to purchase property for Rajbati or to manage her estates, and in any case we have not to decide what was the character of a transaction between them; but whether there was any transaction between them or not. No real explanation has been given why Rajbati should want to buy this property which is many miles away from her home. It can hardly have been with a view to enrich the estate, because that had to descend to the Plaintiff with whom she had quarrelled. The reason assigned in the evidence, namely, that she wanted to restore it to the judgment-debtor who was her kinsman, would have appealed with equal strength to her brother Jadunandan.

As I have said, however, the suit is, in my opinion, barred by sec. 66 of the Code which lays down that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the Plaintiff or on behalf of some one through whom the Plaintiff claims. Now here the Defendant certainly claims under a certified purchase and the suit is based on the ground that the purchase was made on behalf of the Plaintiff's predecessor-in-interest. Learned counsel contends that the Plaintiff also sues on the ground that Rajbati remained in possession till her death and relies on the decision in *Sasti Charan Nandi* v. *Annapurna* (1) which certainly is in his favour.

If the decision quoted is correct, it makes a very serious inroad on the section, and

(1) I. L. R. 23 Cal. 699 (1895).

indeed I do not think it would be going too far to say that, if it is accepted, the section is for all practical intents and purposes repealed. The section is clearly aimed at *benami* purchases at execution sales. We have no need of a specific provision of law that a suit against a real purchaser, based on a false allegation that he is a *benamdar*, must fail. The clear intention of the section is to stop *benami* purchases by making it impossible for the real owner to question the *benamdar's* title. It is sometimes said that the Legislature cannot have intended to enable fraud to be practised. But I cannot attach any other meaning to the section than this, that it aims at discouraging *benamis* by rendering the real purchaser helpless if he is cheated by his *benamdars*.

Now if the view taken in the case cited above is correct, namely, that the real purchaser can base a suit against his *benamdar* on the fact of possession, it is evident that the section at once loses all its effect. The purchase being *ex hypothesi* a *benami* purchase, the real purchaser would naturally get possession in every case, so that the only cases in which the section would be of any practical use would be those rare instances, in which the parties quarrel immediately, even before possession is delivered. It can never have been the intention of the Legislature to enact the section for this limited purpose.

I agree with the decision in *Bishan Dial* v. *Ghaziuddin* (2). It is not necessary however to refer the decision in *Sasti Charan Nandi* v. *Annapurna* (1) to a Full Bench because the present case can be distinguished, as the Trial Judge has pointed out, though it must be conceded that the distinction is somewhat unreal. Reading para. 7 of the plaint it cannot be disputed that this suit was brought "on the ground that the purchase was made on behalf of some one through whom the Plaintiff claims."

The appeal fails and must be dismissed with costs. Defendant No. 2 is entitled to separate costs.

SHARFUDDIN, J.—I agree.

[In the memorandum of appeal we are informed that the value of the appeal has been put down as Rs. 2,249-8-6 which is a mistake for Rs. 6,005.]

Appeal dismissed.

(2) I. L. R. 23 All. 175 (1901).
(1) I. L. R. 28 Cal. 699 (1895).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 2902, 3624 TO 3627 OF 1912.

N. R. CHATTERJEA, J.
ROE, J.
1915,
Heard, 18, August
Judgment, 19, August.

KHAGENDRA NATH CHATTERJEE and others, Plaintiffs, Appellants,
v.
SONATAN GUHA and others, Defendants, Respondents.

Part performance, equitable doctrine of, it may be invoked by stranger to contract—Relinquishment of share in tenure without registered deed but for consideration by purchaser out of possession to person in possession—Remand order, scope of.

Where a permanent tenure having been sold in execution of a decree for rent obtained against G, the question was whether C at the date of the sale had a subsisting interest in the tenure, so that (if he had) certain under-tenures held by G were not touched by the sale, and it appeared that C having acquired a share in the tenure at an execution sale, had subsequently for consideration relinquished the share to G who was and continued in possession but no conveyance was executed to give effect to this transaction:

Held (*in a suit by the purchaser at the rent sale to eject G*) *that though a mere*

KHAGENDRA NATH CHATTERJEE *v.* SONATAN GUHA.

admission or disclaimer cannot operate to pass title to property where a conveyance is required under the law to transfer title, here G could have sued C for specific performance of the contract and G could have successfully resisted a suit to recover possession by C.

That by the application of the equitable doctrine of part performance, C was precluded from setting up any title against G and had no subsisting right to the share at the date of the rent suit.

WALSH *v.* LONSDALE (4), PUCHHA LAL *v.* KUNJ BEHARI LAL (5) *and* MOHAMED MUSA *v.* AGHORE KUMAR GANGULI (6) *relied on.*

JADUNATH PODDAR *v.* RUP LAL PODDAR (1), OODEY KOOWUR *v.* LADOO (2) *and* DHARAM CHAND BAID *v.* MAUJI SAHU (3) *distinguished.*

Held—*Further, that the purchaser though no party to the contract was entitled to invoke the aid of this doctrine in the same way as a creditor could in respect of a contract of purchase made by his debtor with a stranger.*

That a remand order by the High Court directing a trial upon the issue whether C had a subsisting interest in the property covered an enquiry as to whether C had lost his interest in the property by the operation of the equitable doctrine of part performance.

These were appeals preferred on the 6th September 1912, against the decrees of Babu Romesh Chandra Sen, Officiating Subordinate Judge at Barisal, of Zilla Backergunje, dated 5th July 1912, reversing the decrees of Babu Promatha Krishna Singha, Munsif, 1st Court at Barisal, dated 4th May 1904.

The facts of the case will appear from the judgment.

Dr. Rash Behary Ghose, *Babus Tara Kishore Choudhury* and *Brojo Lal Chakravarti* for the Appellants.

Babus Jogesh Ch. Roy and *Gunada Ch. Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The facts connected with the litigation out of which these appeals arise may be stated as follows :—

The lands in dispute are included in a permanent tenure called Taluk Kamdeb Guha appertaining to the zemindary *mahal* No. 2691 belonging to the Plaintiff-Appellant. The *taluk* was sold in execution of a rent decree and purchased by one Ganga Charan in 1864, who sold it to four persons—Ramsagar, Gokul, Krishnapriya and Chandrakala who were members of the Guha family to whom the *taluk* belonged before the sale under the rent decree. The first three mortgaged a 14 as. 4 gs. share of the *taluk* to certain persons who sued and obtained a decree upon the mortgage and one Chandra Kumar Bose ostensibly purchased the said share at the sale held in execution of the said decree, but it has been found that Chandra Kumar was the *benamdar* of the said mortgagors. The fourth purchaser from Ganga Charan, *viz.*, Chandrakala appears to have had a 1 a. 16 gs. share in the *taluk*, which on her death devolved on her three sons in equal shares, two of whom Ananda and Iswar mortgaged their 1 a. 4 gs. share to one Kashinath whose successors-in-interest (who are described in these cases as the Chakravartis and the Kanjibalis) purchased

(1) 4 C. L. J. 23 : s. c. 10 C. W. N. 650 (1906).
(2) 13 M. I. A. 585 (1870).
(3) 16 C. L. J. 486 (1912).
(4) L. R. 21 Ch D. 9 (1882).
(5) 18 C. W. N. 445 (1918).
(6) L. R. 42 I. A. 1 : s. c. 19 C. W. N. 250 (1914).

the said share at a sale held on the 1st June 1888 in execution of a decree obtained upon the said mortgage. These Chakravartis and Kanjibalis deposited the landlord's fee as required by sec. 12 of the Bengal Tenancy Act but it was not accepted by the Plaintiff, as Iswar and Ananda whose interest they purchased or their mother had not got their names registered in the Plaintiff's *sherista*. It appears that out of the four persons named above who purchased the *taluk* from Ganga Charan in 1864 only Ramsagar and Gokul got their names registered in the landlord's *sherista* and it was from them, that the landlord used to realise rent for the tenure amicably or by suit. After the death of Ramsagar and Gokul the landlord in 1889 brought a suit for rent against the four sons of Ramsagar and the widow of Gokul and the *taluk* having been sold in execution of the decree was purchased by one Chandra Kumar Chakravarti on the 17th March 1890. Then another decree was obtained for rent in 1890 for the period prior to the said sale. When execution of this decree was taken out, a mortgage (*kistibandi*) bond was executed by Chandra Kumar Chakravarti, Dinamani (widow of Gokul) and by three other persons who were memebers of the Guha family, *viz.*, Rasik, Sonatan and Amar in which it was stated that Chandra Kumar Chakravarti was the real owner of the *taluk* by purchase. From that time the zemindar sued Chandra Kumar alone for rent, the last suit being No. 2767 of 1893. At the sale in execution of the decree passed in that suit, the *taluk* was purchased by one Manitara, on the 29th April 1895. By this time the zemindar suspected that Chandra Kumar and Manitara were *benamdars* for the Guhas, and in the next two rent suits No. 1572 of 1895 and No. 1574 of 1895, he joined the four sons of Ramsagar and the widow of Gokul (who were the Defendants Nos. 4 to 8 in that suit), and Rasik, Sonatan and Amar who had joined Chandra Kumar in the *kistibandi* mortgage bond and were made Defendants Nos. 1 to 3, the 9th Defendant in the 1st suit being the said Chandra Kumar and the 9th Defendant in the second being Manitara. The defence of the first eight Defendants in those two rent suits was that Defendants Nos. 4 to 8 (the heirs of Ramsagar and Gokul) were the real owners of the *taluk*, that the Defendants Nos. 1 to 3 had no interest therein and that the Defendant No. 9 Chandra Kumar in the first suit and Defendant No. 9 Manitara in the second were the real auction purchasers and decrees for rent should be passed against the said purchasers in each suit. The Court however found that Chandra Kumar and Manitara were *benamdars*, that Defendants Nos. 1 to 3 had no interest in the *taluk* and that Defendants Nos. 4 to 8 were the real owners of the *taluk*, and accordingly passed decrees against them. In execution of the decree in suit No. 152 of 1895, the *taluk* was sold and purchased by the zemindar-decree-holder on the 20th June 1898 and he obtained delivery of possession through Court on the 29th July 1899. The judgment-debtors applied to have the sale set aside but the application was dismissed and the order of dismissal upheld up to this Court. On the Plaintiff attempting to take *khas* possession, the judgment-debtors set up several under-tenures and notices under sec. 167 of the Bengal Tenancy Act were thereupon served upon them and the Plaintiff instituted several suits for recovery of possession.

In three cases it was found that the notices were not served within the time allowed by law and with respect to those three, the Plaintiff instituted 3 rent suits

which gave rise to Second Appeals Nos. 3625 to 3627. In the other two cases the notices were served in proper time and they were for possession of the lands in respect of which the Defendants had set up under-tenures.

The defence of the Defendants, so far as it is necessary to state for the purpose of the present appeals, substantially was that as some of the owners of the *taluk*, *viz.*, the Chakravartis and Kanjibalis were not made parties to the rent suit of 1895, the decree cannot operate as a decree for rent under the Bengal Tenancy Act and the sale held in execution of such a decree could not pass the *taluk* free of incumbrances, and the under-tenures held by the Defendants therefore were not affected by the sale.

These two suits (which gave rise to 2nd Appeals Nos. 3624 and 2902) were decreed by the Munsif, but on appeal the suits were dismissed, on second appeal (Second Appeal No. 2719 of 1914) the cases were remanded to the lower Court and that Court again decreed the suits. There were again second appeals (Second Appeals No. 2627 of 1907 and analogous appeals) and this Court was of opinion that if the Chakravartis and Kanjibalis had any subsisting interest at the date of the institution of the rent suit in 1895 the suits must be dismissed, but if they had no subsisting interest at that time the suits must be decreed, and the Court below was directed to determine the said question.

On remand the learned Subordinate Judge came to the conclusion that the Chakravartis and Kanjibalis had a subsisting interest in the *taluk* at the date of the rent suit, and accordingly dismissed the suits. The Second Appeals Nos. 3624 and 2902 have been preferred by the Plaintiffs against the said decision.

The question for consideration in these appeals therefore is whether the Chakravartis and Kanjibalis had any subsisting interest at the date of the rent suit in 1895.

As regards the question of possession of the 1 a. 4 gs. share the learned Subordinate Judge said "were it necessary to come to a decision on this point I would have unhesitatingly held that the Guhas were all along in possession of the land, that the Chakravartis and Kanjibalis never received rent from them and that evidence of payment of rent to and grant of *dakhilas* by the latter is concoction pure and simple to defeat the claim of the Plaintiffs," but he was of opinion that as there was no conveyance by the Chakravartis and Kanjibalis in favour of Iswar and Ananda, nor possession for the statutory period by the latter, the former were not divested of their right and no title was created in favour of the latter. But his finding as to whether the Chakravartis and Kanjibalis relinquished their right on receipt of the decretal amount was not clear and definite. We accordingly remanded the case for a definite finding on the point. The finding has now been returned to this Court and the Court below has clearly found that the Chakravartis and Kanjibalis relinquished the share purchased by them on receipt of the decretal amount from the Guhas. As stated above the Court below was of opinion that notwithstanding that the Chakravartis and Kanjibalis disclaimed their title to and possession of the share purchased by them, the Guhas could not have acquired any title to the share for want of a registered conveyance and relied upon the case of *Jadunath Poddar* v. *Rup Lal Poddar* (1).

We think that the Court below is wrong in the view it took of the legal effect of

(1) 4 C. L. J. 23 : s. c. 10 C. W. N. 650 (1906).

the relinquishment in the present cases. It is true, a mere admission or disclaimer cannot operate to pass title to property where a conveyance is required under the law to transfer title. In the case relied upon there was a release executed by the real owner in favour of another person, in order to protect his property from the claims of his creditors. The nominal transferee sold a portion of the property to another. The creditors were not defrauded and it was held that the real owner could recover the property from the *benamdar* and the transferee from him. There is an observation of Mookerjee, J., that the title of the real owner could not pass by an admission. But in that case the original transferee and the purchaser from him were found not to be *bonâ fide* purchasers for value, and they were fully aware of the real nature of the transaction. It was under these circumstances that Mookerjee, J., observed that title could not pass by a mere admission. In the case of *Oodey Koowar* v. *Ladoo* (2) in a suit to redeem a mortgage of an estate, A in order to avoid an objection taken as to parties, filed a petition disclaiming all interest in the estate. The Judicial Committee held that in the circumstances and in the absence of any consideration given to A, the petition did not operate as a conveyance of A's right or as an estoppel to a suit by her for possession of the estate. Mookerjee, J., relied upon that case and observed that although under certain circumstances a person may be estopped from setting up a title in himself, title of the real owner could not pass by mere admission. The opinion expressed in that case was followed by Mookerjee and Beachcroft, JJ., in *Dharam Chand Baid* v. *Mauji Sahu* (3). There a partnership business was sought to be transferred by means of a deed of release. It does not appear that any consideration was paid or that there were circumstances which would in equity have precluded the transferer from challenging the validity of the transfer.

In the present case the matter did not rest upon a mere admission. The Chakravartis and Kanjibalis on receipt of consideration gave up their rights as purchaser in favour of the Guhas and it is found that the former never took possession and the latter were allowed to remain in possession of the property. There is no doubt that the Guhas could sue the Chakravartis and Kanjibalis for specific performance. They could have successfully resisted a suit by the latter if they sued the Guhas for possession of the share. It is contended on behalf of the Respondents that under sec. 54 of the Transfer of Property Act, and sec. 12 of the Bengal Tenancy Act, there can be no transfer except by a registered conveyance. But the equitable principle is well-established and we need only refer to *Walsh* v. *Lonsdale* (4) and *Puchha Lal* v. *Kunj Behari Lal* (5) decided by Jenkins, C. J. and Mookerjee, J. In the latter case a purchaser under an unregistered conveyance paid the agreed price to his vendor and was placed in possession, and it was held that in the absence of circumstances showing that such purchaser was not entitled to sue his vendor for specific performance a subsequent purchaser of the property under a registered conveyance could not succeed in a suit to recover possession of the property from the former purchaser. Coxe, J., relied upon the provisions of sec. 54 of the Transfer of Property Act and was of opinion that the transaction was a nullity and that the vendor himself was not estopped from disputing

(2) 13 M. I. A. 585 (1870).
(3) 16 C. L. J. 436 (1912).
(4) L. R. 21 Ch. D. 9 (1882).
(5) 18 C. W. N. 445 (1913).

the validity of the transaction. He was however overruled by the Court of Appeal, and Jenkins, C. J., observed :—" There is no invasion or evasion of the Registration Act. It is merely securing a party those rights to which he is entitled apart from the Acts—rights to which he has a good title in Courts to which the abiding direction has been given to proceed in all cases according to equity and good conscience."

In the recent case of *Mohamed Musa* v. *Aghore Kumar Ganguli* (6) where by a compromise made in a suit in 1873 it was agreed that mortgaged property should be released from two mortgages, the *malikana* being thenceforth allotted in agreed proportions to the two mortgagees and the mortgagor, and that the latter should execute deeds of absolute sale or transfer of the proportions allotted to the respective mortgagees. A decree was made in pursuance of the compromise, but the compromise agreement was not registered, nor were the transfers executed. All parties however, thenceforward acted in every respect as if the transfers had been made, and there were dealings both by the mortgagor and the mortgagees, with the shares allotted to them under the agreement. In 1908 a suit was instituted to redeem the mortgages and it was held by the Judicial Committee :—

" That whatever defects of form there might be in relation to the compromise agreement as a transfer of the equity of redemption were cured by the conduct of the parties in continuously acting upon it, and that the right to redeem the mortgages was extinguished." Their Lordships observed :—" The point which is made against giving effect to this compromise is that a conveyance was not made by Khodajanessa in completion of the contract of purchase narrated in the *razinama*. This is true. But no written conveyance by the law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882.

But even if transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the Appellants in the attempt made in the present suit to redeem the mortgages. For the points against opening up the transaction are manifold and are in their Lordships' opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors-in-title from that date to this." Then referring to the case of *Maddison* v. *Alderson* (7), their Lordships observed :—" Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison* v. Alderson (7), founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the Defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow."

It is contended on behalf of the Respondents that all the cases where the above principles were applied, were cases between parties claiming under the contract, that the Chakravartis and Kanjibalis are no parties to these suits, and neither

(6) L. R. 42 I. A. 1 : s. c. 19 C. W. N. 250 (1914).

(7) L. R. 8 App. Cas. 467 (1883).

the Plaintiffs nor the Guha Defendants claim under them. But the Plaintiffs purchased the tenure of which the Chakravartis and Kanjibalis were at sometime part owners and they had given up their rights in favour of Iswar and Ananda, and the Guhas set up the rights of those persons as having had a subsisting interest in the *taluk* when the rent suit was brought. If the contention of the Respondents were valid, a creditor cannot avail himself of any estoppel or equities to which his debtor is entitled. If the debtor paid the purchase money for a property and the vendor delivered possession of the property to him, the creditor cannot according to the Respondents' contention avail himself of the equities arising from the transaction. We do not think that this case can be distinguished in principle from the cases cited above; and we are of opinion that the Chakravartis and Kanjibalis having given up their rights on receipt of consideration and allowed the Guhas to remain in possession of the 1 a. 4 gs. share, were precluded from setting up any title against the Guhas, and they had no subsisting right to the share at the date of the suit for rent. In the rent suits, the Guha Defendants stated that they were the only owners of the *taluk*, but that their interest had passed to Chandra Kumar and Manitara who had purchased the *taluk* at sales held in execution of previous rent decrees. They did not say a word about the Chakravarties and Kanjibalis having any subsisting interest in the *taluk*. Kamini Chakravarti the head of the Chakravartis was examined in the rent suits, and he disclaimed all interest, in the *taluk*. The Court found that Chandra Kumar and Manitara were *benamdars* for the Guhas, and it was the Guhas (The Defendants Nos. 4 to 8 in these suits) who were the real owners of the *taluk* and exclusively liable for rent, and it is they who now plead that the Chakravartis and Kanjibalis had a subsisting interest at the date of the suit.

It is contended on behalf of the Respondents that the question of relinquishment or estoppel was never raised before; the only question raised being whether the Chakravartis and Kanjibalis were *benamdars* and that the order of remand made by Mookerjee and Beachcroft, JJ., precludes us from considering the said questions. We do not think that there is any substance in this contention. The Plaintiffs did not allege in their plaint, that the Chakravartis and Kanjibalis were *benamdars;* it was the Defendants who set up their title, and when Kamini Chakrabarty was examined, the question of relinquishment was raised. The question of reliquishment was considered by the Munsif so far back as the 15th February 1907 in certain suits between the parties. The question of relinquishment and the equities arising from it, are involved in the decision of the question whether the Chakravartis and Kanjibalis had any subsisting interest, which Mookerjee and Beachcroft, JJ., by their remand order directed the lower Court to determine. It is contended that the only question for decision which the remand order contemplated was whether the Chakravartis and Kanjibalis were *benamdars* for the Guhas. But if they were *benamdars* for the Guhas, we fail to see how any question of their having a subsisting right could arise. Then it is said that the learned Judges who remanded the case would have gone into the question of relinquishment and the other contentions founded upon it, had the question been raised before them. But the fact of relinquishment on receipt of consideration had not been found before the case was

remanded, and in the absence of such a finding, the question of equitable considerations could not be gone into. Admittedly the Chakravartis and Kanjibalis did not execute any conveyance. The question whether their interest had determined otherwise than by execution of a conveyance, for example, by relinquishment operating as estoppel or giving rise to equitable considerations was therefore involved in the order of remand and in no way inconsistent with it, and we do not see how we are precluded by the remand order from going into those questions when the remand order directed the Court below to decide the question whether the Chakravartis and Kanjibalis had any subsisting right at the date of the rent suit.

From what we have said above it is clear that the Chakravartis and Kanjibalis had no subsisting interest at the date of the rent suit and that their rights had vested in the Guhas. The suit for rent therefore was brought against proper parties and the sale held in execution of the rent decree passed the entire *taluk* with power to annul incumbrances. Notices under sec. 167 of the Bengal Tenancy Act having been served in the two title suits, the under-tenures set up by the Guhas must be held to have been cancelled.

These two appeals (Appeals Nos. 3624 and 2902 of 1912) are accordingly decreed, the decrees of the Court of Appeal below are set aside, and those of the Court of first instance are restored with costs here and in the Court below.

Appeals Nos. 3625, 3626 and 3627 arise out of three rent suits mentioned above. The lower Appellate Court gave a decree for rent in respect of only 14 as. and odd gundas share, but having regard to our finding that the Chakravartis and Kanjibalis had no subsisting right, the Plaintiffs should get a decree for the entire rent and the decrees of the lower Appellate Court will be varied accordingly, the result being that the suits will be decreed in full with costs in all Courts.

Appeals allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES.

Nos. 2539, 2698 TO 2707 OF 1912.

MOOKERJEE, J. NEWBOULD, J. 1915, 31, March.	NAWAB SIR SALIMULLA BAHADUR and others, Plaintiffs, Appellants. *v.* RAHEMDDI and ors., Defendants, Respondents	

Bengal Tenancy Act (VIII of 1885) secs 163, 164—Sale subject to registered and notified incumbrances—Amount bid less than decree with costs—Sale if one under Civil Procedure Code.

Where a tenure is notified for sale subject to registered and notified incumbrances, the sale which takes place operates as one under sec. 164, sub-sec. (1), of the Act and not as a sale under the Civil Procedure Code, even though the amount for which it is sold does not reach a sum sufficient to liquidate the amount of the decree and costs.

The procedure in sec. 165 is permissive and enacted solely for the benefit of the decree-holder.

BANBEHARI KAPUR v. KHETRAPAL SINGH ROY (1) *referred to.*

This was an appeal preferred on the 21st November 1912 from a decree of Babu Romes Chandra Sen, Subordinate Judge, Bakergunge, dated 20th July 1912, reversing that of Babu Raman Chandra Banerjee, Munsif, Patuakhali, dated 28th February 1912.

The facts of the case will sufficiently appear from the judgment.

(1) I. L. R. 38 Cal. 923: s. c. 16 C. W. N. 259 (1911).

NAWAB SIR SALIMULLA BAHADUR *v.* RAHEMDDI.

Babu Surendra Nath Guha for the Appellants.

Babu Gunada Charan Sen for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

No. 2539 of 1912.

This is an appeal by the Plaintiffs in a suit for declaration of title to land for and recovery of possession thereof. The Plaintiffs are the superior landlords of a *nim osat taluk*. The *talukdars* defaulted to pay rent, with the result that they were sued and a rent decree was obtained against them on the 7th April 1909. On the 5th August 1909, the Plaintiffs applied to execute the decree in accordance with the provisions of the Bengal Tenancy Act; five days later, an order was made for the simultaneous issue of the writ of attachment and the sale proclamation under sub-sec. (*1*) of sec. 163. The sale was held under sub-sec. (*1*) of sec. 164. on the 23rd September, when the decree-holders themselves purchased the defaulting tenure. The sale was confirmed in due course and symbolical delivery was made to the purchasers. They could not, however, obtain actual possession of the land, as they were resisted by the Defendants who set up under-tenures in the property sold. The Plaintiffs thereupon took proceedings under sec. 167 of the Bengal Tenancy Act and the requisite notices for the annulment of the alleged encumbrances were duly served. On the 18th April 1911, the Plaintiffs commenced this action to eject the Defendants. The Court of first instance found that the decree was for arrears of rent that it had been executed in accordance with the provisions of the Bengal Tenancy Act, that at the sale held under sub-sec. (*1*) of sec. 164, the purchasers had acquired the tenure with power to annul the encumbrances thereon, other than registered and notified encumbrances, and that steps had been taken in conformity with sec. 167 to annul the encumbrances set up by the Defendants. In this view, the Court decreed the suit. Upon appeal the Subordinate Judge has reversed that decision on the ground that the sale, though held under the Bengal Tenancy Act, operated only as a sale under the provisions of the Code of Civil Procedure, and that the decree-holders, auction-purchasers had acquired nothing beyond the right, title and interest of their judgment-debtors. This decision is based on the ground that as the sum realised at the sale, was not sufficient to liquidate the amount of the decree and costs, the sale must be deemed to have been held, not under sub-sec. (*1*) of sec. 164, but under the provisions of the Code of Civil Procedure. The Subordinate Judge, in this view, has dismissed the suit. On the present appeal, it has been argued on behalf of the Plaintiffs that the view taken by the Subordinate Judge as to the effect of the sale held on the 23rd September 1909 is erroneous and that the purchaser at that sale acquired the defaulting tenure with power to annul all encumbrances other than registered and notified encumbrances. This view has been controverted by the Respondents, on the authority of the decision in *Banbehari Kapur* v. *Khetrapal Singh Roy* (1). It has been, indeed, broadly argued on their behalf that a sale in execution of a decree for arrears of rent operates as a sale under sub-sec. (*1*) of sec. 164, only if the sum realised at the sale is sufficient to liquidate the amount of the decree and costs. We feel no doubt that this contention is

(1) I. L. R. 38 Cal. 923 : s. c. 16 C. W. N 259 (1911).

erroneous and is not supported by the provisions of the Bengal Tenancy Act.

Sec. 159 formulates the fundamental principle that where a tenure or holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as "protected interests," but with power to annul the interests defined as encumbrances. Sec. 163 provides that when the decree-holder makes the application for execution mentioned in sec. 162, the Court, if it admits the application and orders execution of the decree as applied for, shall issue simultaneously the order of attachment and the proclamation required by rr. 66 and 70 of Or. 21, of the Civil Procedure Code. Sub-sec. (2) of sec. 163 lays down that the proclamation shall announce that the tenure or holding will first be put up to auction, subject to the registered and notified encumbrances, and will be sold subject to those encumbrances, if the sum bid is sufficient to liquidate the amount of the decree and costs, and that, otherwise, it will, if the decree-holder so desires, be sold on a subsequent date of which due notice will be given, with power to annul all encumbrances. Sub-sec. (1) of sec. 161 provides that when a tenure has been advertised for sale under sec .163, it shall be put up to auction, subject to registered and notified encumbrances; and if the bidding reaches a sum sufficient to liquidate the amount of the decree and costs including the costs of sale, the tenure shall be sold subject to such encumbrances. The Respondents argue that if the bid does not reach a sum sufficient to liquidate the amount of the decree and costs, the sale, if concluded, operates only as a sale under the provisions of the Code of Civil Procedure, with the consequence that the purchaser acquired merely the right, title and interest of the judgment-debtor. We are clearly of opinion that this contention is not well-founded. If we were to accept the contention of the Respondents, we would have to read into sub-sec. (1) words which are not to be found there. The intention of the legislature, as can be gathered from secs. 163, 164 and 165, is to entitle the decree-holder, if he so desires, to proceed under sec. 165 in the event of the sale on the first notification not realising a sum sufficient to liquidate the amount of the decree and costs. It is not obligatory upon him, however, in this contingency, to avail himself of the provisions of sec. 165; he may nevertheless be contented with the sale under sec. 164; and if the sale is held under that section, the result described therein follows, namely, the purchaser becomes entitled to annul all encumbrances other than registered and notified encumbranches, provided he follows the procedure prescribed in sec. 167. The consequence of the sale does not depend upon the amount of the bid offered by the successful purchaser; it is independent of the value of the bid. It is obvious that sect. 165 was enacted solely for the benefit of the decree-holder; if the bid is not sufficient to satisfy his decree and costs, it entitles him to have the property sold, with power to annul all encumbrances; but it is not obligatory on him to adopt this extreme measure, and he is not in peril if he decides not to pursue this special remedy.

We have been pressed, however, to adopt the contrary view on the strength of some observations in the case of *Banbehari Kapur* v. *Khetrapal Singh Roy* (1) which support the contention of the Respondents. With all respect for the learned Judges who decided that case, we are

(1) I L. R. 38 Cal. 926: s. c 16 C. W. N. 259 (1911).

unable to accept their view as a correct exposition of the law on the subject. But we do not think it necessary to refer the matter for decision to a Full Bench, because the observations mentioned were not necessary for the purpose of the decision of that case. It further appears that in that case the sale certificate stated that the purchaser had acquired merely the right, title and interest of the judgment-debtor, while in the case before us, the sale certificate shows, on the face of it, that the purchaser acquired the defaulting tenure itself which had been brought to sale. In our opinion, the view taken by the Subordinate Judge cannot possibly be supported.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below.

It is conceded that this judgment will govern the other appeals, *viz.*, Nos. 2698 to 2707 of 1912 and similar decrees will be drawn up in each case.

Let the records be sent down as soon as possible.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 361 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 27, February and 2, March.
Judgment, 2, March.

KALI KANTA SHAHA,
Plaintiff, Appellant,
v.
ISMAIL,
Defendant, Respondent.

Contract of sale—Exception clause excusing delay due to late shipment—Failure of seller to deliver on due date—Tender on a subsequent date—Onus on party relying on exception—Shipment to be shown to be unavoidably delayed—"Shipment," meaning of—Measure of damages.

Defendant contracted with Plaintiff to deliver to him in Calcutta 50 tons of Rangoon rice in June 1909, and another 50 tons in July 1909. A clause in the contract provided that no objection was to be raised by the Plaintiff in case of the delivery of the goods being delayed by reason of the non-arrival in time of the steamer carrying the goods on account of the shallowness of water at Diamond Harbour, damage to the steam engine, accidents of the sea and other causes not under human control, as also owing to late shipment at Rangoon. The June consignment was not tendered by Defendant until the 9th of July and the July consignment until the 3rd August. The market rates on both these days were the same as those on 30th June and 31st July respectively. The Plaintiff refused the tenders on both days and sued for damages, being the difference between the contract price and the market price on the said two dates. Defendant relying on the clause relating to late shipment pleaded that under the contract there was no particular due date of delivery.

Held—*That the Defendant could not rely on that clause unless he was able to prove that the circumstances which led to delay in shipment were not attributable to his negligence.*

DUNN *v.* BUCKNALL (2) *followed.*

That the burden of establishing that his case was covered by the exception on which he relied was on the Defendant.

SANDEMAN & SONS *v.* TYZACK AND BRANFOOT STEAMSHIP CO., LD. (1) *followed.*

The term "shipment" in the contract

(1) [1913] A. C. 680 at p. 689.
(2) [1902] 2 K. B. 614 (621).

included not merely the loading of goods on board the ship but also the starting of the ship.

That as soon as the contract had been broken, the obligation of the purchaser to take delivery of the goods vanished and he was not bound to accept the goods when they were delivered and that the right measure of damages was the difference between the contract price and the market price on the dates of delivery originally agreed upon by the parties.

GRENON *v.* LACHMI NARAIN (4) *relied on.*

This was an appeal from a decision of J. C. K. Paterson, Esq., District Judge, 24-Parganas, dated 4th January 1912, reversing that of Babu Bhagabati Charan Kundu, Munsif, Sealdah, dated 14th November 1910.

The facts of the case fully appear from the judgment.

Mr. Caspersz, Babus Satis Chandra Ghose and *Smritis Chandra Ghose* for the Appellant.

Babus Provas Chandra Mitter and *Satish Chandra Bose* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff in a suit for damages for breach of contract. The Defendant entered into a contract with the Plaintiff, on the 19th February 1909 to deliver 50 tons of Rangoon rice in June 1909 and another 50 tons in July 1909. The contract was in these terms : "We have this day sold to you the undermentioned goods of the following description and condition, namely, one hundred tons of No. 1 small mill rice of average quality of the season at the time of delivery, at Rs. 3-6 only per bazar maund, bazar dustoor nett and empty gunnies being packing of the said rice at Rs. 25 per cent. bags. Terms cash before delivery. Deliverable fifty tons in June and 50 tons in July 1909." There was a further clause in the contract to the following effect; "It is hereby likewise agreed that no objection is to be raised by you in the case of the delivery of the goods being delayed by reason of the non-arrival in time of the steamer carrying the goods on account of the shallowness of water at Diamond Harbour, damage to the steam engine, accidents of the sea and other causes not under human control, as also owing to late shipment at Rangoon." The June consignment was not delivered on or before the 30th June. The result was that on the 30th June the Plaintiff wrote to the Defendant and tendered him the price for the consignment and intimated that if the Defendant failed to deliver the rice in question within that date, he would be held liable for the difference of price. On the 6th July the Plaintiff again wrote to the Defendant a letter in which he stated that the amount tendered had been refused, and that he consequently claimed damages to the extent of Rs. 510. On the 9th July the Defendant replied to these letters. The position he took up was that under the terms and conditions of the contract, the Plaintiff was not entitled to any damages for late delivery. The ground on which this defence was taken may be stated in his own words; namely, "that as the deliveries are subject to and controlled by the shipments during the months mentioned in the contract, there can be no question of any particular due date for delivery, and, therefore, no tender is possible on the part of the buyer." The Defendant further intimated that the rice was on that date ready for delivery at Howrah Ghât. The Plaintiff, however, took no notice of,

(4) I. L. R. 24 Cal. 8 (1896)

this letter and refused to accept delivery of the rice. As regards the July consignment, on the 30th July the Plaintiff wrote again to the Defendant and tendered the price thereof. He further stated that if the rice was not delivered in terms of the contract within 24 hours, that is, on or before the last day of July, the Defendant would be held responsible for damages. The Defendant in answer took up the position that under the terms of the contract the delivery was controlled by and made according to the shipments made at Rangoon during the month for which delivery was mentioned in the contract. On the 3rd August, the Plaintiff claimed damages as on the previous occasion. On the next day, the Defendant intimated to the Plaintiff that the July shipment had arrived at port and was ready for delivery at Howrah Ghât. The Plaintiff took no notice of this, and on the 27th September 1909 commenced the present action for damages for breach of contract.

The Court of first instance found that there had been a breach of the contract, made a decree in favour of the Plaintiff, and estimated the damages at the difference between the contract price and the market rate when the goods were to be delivered. Upon appeal, the District Judge has reversed the decision of the Subordinate Judge and dismissed the suit. He has held that there was no breach of contract and that the Plaintiff was not entitled to any damages. He has further found that whatever the real meaning of the contract might be, the Plaintiff should have accepted the goods on the dates on which they were offered to him, as the market price was then the same as on the dates on which the goods were agreed to be delivered.

On the present appeal by the Plaintiff, it has been argued that the contract has been broken. To determine the validity of this contention, it is necessary to interpret the contract. It is plain that the goods were to be delivered on or before the 30th June and 31st July 1909 respectively. It is admitted that the goods were not so delivered. *Primâ facie*, there was thus a breach of the contract. The Defendant however, relies upon the clause already mentioned which states that no objection would be raised by the purchaser in the case of the delivery of the goods being delayed owing to late shipment at Rangoon. It is plain that as the Defendant relies upon the exception, the burden is upon him to establish that the case is covered by the exception upon which he relies. If any authority is needed for this self-evident proposition, reference may be made to the decision of the House of Lords in the case of *Sandeman & Sons* v. *Tyzack and Branfoot Steamship Co., Ld.* (1) where Lord Loreburn observed that the burden of proving that the case comes within the exception lies upon the person who sets it up. To make this clause fit in with his case, the Defendant seeks to interpret it in the manner following: He argues that according to this clause literally construed, he was at liberty to delay the shipment at Rangoon to any day within the month on the last day of which the goods were to be delivered to the purchaser, and that it is immaterial whether the delay was due to avoidable reasons or to circumstances over which he had no control. This construction strikes one as, on the face of it, eminently unreasonable. There has been considerable discussion at the bar as to the meaning of the expression "late shipment," but one point is absolutely plain, namely, that the term "shipment" includes not merely the loading of goods on board the ship but

(1) [1913] A. C. 680 at p. 689.

also the starting of the ship. It could never have been intended by the parties that one of them, the purchaser, would be placed absolutely at the mercy of the vendor, who was to be at liberty capriciously to delay the shipment of the goods at Rangoon to the detriment of the purchaser. What they clearly intended was that the goods should be put on board in such time as to make it possible to have them delivered to the purchaser at Calcutta on the dates specified, if the ship started on such a day as to arrive in Calcutta in time, but that if for any reason for which the vendor was not responsible, the ship could not start in time and consequently arrived in Calcutta too late to make it possible for the vendor to deliver to the purchaser the goods on the appointed day, the vendor was not to be held liable in damages. In this view of the matter it would be obligatory upon the Defendant to establish that the delay is attributable to circumstances for which he is not responsible. This, indeed, is clear from the decision of the Court of Appeal in the case of *Dunn* v. *Bucknall* (2) where it is stated that if a party relies upon an exception, to take his case out of the contract, he must prove that the circumstances are not attributable to his negligence. In the case before us, there is no evidence on the record to show that the Defendant is not responsible for the delay which actually took place. Indeed, his case has never been that the delay was unvoidable. Before the suit was commenced, as soon as the claim for damages was made against him, he took up the position that under the terms of the contract he was entitled to delay shipment up to the last day of the month in which the goods were to be delivered. This, clearly, he was not entitled to do upon a reasonable interpretation of the contract. The Defendant has clearly failed to bring his case within the exception, and we must accordingly hold that there was a breach of the contract.

The question next arises, whether the Plaintiff is entitled to damages. On behalf of the Defendant the view taken by the District Judge has been reiterated before us, namely, that inasmuch as the market price had not varied between the dates on which the contract was to be performed and the dates on which the goods were actually offered, the Plaintiff was bound to accept them. There is obviously no foundation for this contention. As was pointed out in the case of *Behn* v. *Burness* (3), as soon as the contract has been broken, the obligation of the purchaser to take delivery of the goods vanishes; he is not bound to accept the goods when they are delivered late. In these circumstances, there can be no question, as was pointed out in the case of *Grenon* v. *Lachmi Narain* (7), that the right measure of damages is the difference between the contract price and the market price on the date of delivery originally agreed upon by the parties. This was correctly accepted as the basis for the determination of damages by the Court of first instance.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the court of first instance restored with costs both here and in the Court of Appeal below.

Appeal allowed.

(2) [1902] 2 K. B. 614 (621).

(3) 3 Best and Smith 751 at p. 759 (1868).

(4) I. L. R. 24 Cal. 8 (1896).

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 1941 OF 1912.

HOLMWOOD, J. CHAPMAN, J. 1914, Heard, 31, July and 3, August. Judgment, 3, August.	KALI KUMAR CHUCKERBUTTY, Plaintiff, Appellant, *v.* ASLAM and others, Defendants, Respondents.

Civil Procedure Code (Act V of 1908), Or 2, r. 2 —Omission to sue for a portion of claim—Subsequent suit for that portion if lies.

The Plaintiff sued for the possession of a holding consisting of a homestead and arable lands attached thereto. He had previously sued for khas *possession of that portion of the holding only which included the homestead on the allegation that the Defendant had dispossessed him of the homestead. This suit was dismissed.*

Held—*That as it appeared from the evidence in this case that Plaintiff had been dispossessed of the arable land at the same time as the homestead, the whole suit was barred. The Plaintiff having in the previous suit omitted to sue for a portion of his claim namely for the arable lands he could not under Or. 2, r. 2, of the Code of Civil Procedure be permitted to sue for them subsequently.*

JIBUNTI NATH KHAN *v.* SHIB NATH CHAKRABURTY (1) *and* PITAPUR RAJA *v.* SURIYA ROY (2) *distinguished.*

This was an appeal preferred on the 12th July 1912 against the decree of Mr. G. N. Ray, District Judge of Zillah Noakhali, dated the 19th April 1912, reversing a decree of Babu Paresh Nath Ray Choudhury, Munsif at Sudharam, dated 15th November 1911.

The facts of the case material to this report will appear from the judgment.

(1) I. L. R. 8 Cal. 819 (1882).
(2) L. R. 12 I. A. 116 : s. c. I. L. R. 8 Mad. 520 (1885).

Babus Baido Nath Dutt and *Jnanendra Nath Sircar* for the Appellant.

Babu Brojendra Nath Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for the possession of a holding which the Plaintiff had purchased at a sale in execution of a rent decree in January 1906. He obtained formal delivery of possession in September, 1906. The holding consisted of a homestead and the arable land attached thereto. In April 1907, the Plaintiff sued for *khas* possession of that portion of the holding only which included the homestead. His allegation was that the Defendants had dispossessed him of the homestead. That suit was dismissed for want of prosecution in November, 1907. An application to restore was also dismissed in February 1908. The Plaintiff had also brought a criminal case charging the Defendants with criminal trespass on the arable portion of the holding. The criminal case ended in acquittal in June, 1908.

The first Court held that the Plaintiff's suit was barred so far as the homestead was concerned, his previous suit for the homestead having been dismissed. The Court, however, decreed the suit for the arable land. The Court of first appeal has reversed this decision holding that by reason of the dismissal of the previous suit, the suit for the arable portion of the land was also barred under Or. 2, r. 2, Code of Civil Procedure.

The Plaintiff appeals. The contention in appeal is that the provisions of Or. 2, r. 2, do not apply to the case. The material portion of the rule referred to is to the following effect :—"Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of

the cause of action. Where a Plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted." The previous suit was for a portion of the holding only. The Plaintiff in that suit omitted to sue for the arable land. The present suit for the arable land has thus been held to be barred. The argument on appeal, however, is that the cause of action in the previous suit was a re-entry into the homestead only. The cause of action alleged in the present suit was a dispossession from the arable land on a subsequent date and on an entirely independent occasion namely after the application for review in the previous suit was dismissed. The argument is that the acts of dispossession being different the causes of action were different and the rule does not apply. The Court of first appeal has, however, found that in fact there were not two separate acts of dispossession; and that the Plaintiff never obtained anything more than formal delivery of possession of any portion of the land and that therefore the causes of action were not different: they were in fact the same and the allegations in the plaint in this respect were untrue. It is, however, contended that the learned District Judge fell into error in so dealing with the question and that he should not have gone outside the four corners of the plaints in the two cases. In support of this contention the case of *Jibunti Nath Khan* v. *Shib Nath Chakraburty* (1) is relied upon in which it is said that the cause of action must be sought for between the four corners of the plaint. The facts of that case were, however, entirely different. In that case the previous suit had been one for confirmation of possession and had been dismissed upon the ground that the Plaintiff had never been in possession. The suit which was before the learned Judges was for recovery of possession and it had been held in the suit before them that the Plaintiff had in fact been dispossessed. The learned Judges with reference to the facts of the case said that the findings in the previous suit must not be considered in determining whether the cause of action was the same. In the present case, however, we are not concerned with any finding in the previous suit. It is not the finding in the previous suit, it is the finding in the present suit now before us with which we have to deal and that finding was that the causes of action in the two suits were the same. In *Jibunti Nath Khan* v. *Shib Nath Chakraburty* (1) the finding in the suit before the Court was that the causes of action in the two suits were different. That is the distinction between the present case and the case cited and it goes to the root of the matter. The findings in the present case are that (1) that the title is the same (2) that the parties are the same (3) that the Plaintiff was never in possession and that, therefore, the cause of action was the same. We are of opinion that the learned District Judge fell into no error in so dealing with the case.

We have been referred in course of the argument to the case of *Pitapur Raja* v. *Suriya Roy* (2). That case, if it has any bearing on the question which is now before us, is against the contention of the Appellant. It was a case where the Plaintiff had sued to obtain his share of an estate in land under a Will in consequence of having been wrongfully dispossessed by the Defendant. He afterwards brought a suit for his share of the

(1) I. L. R. 8 Cal. 819 (1882).

(1) I. L. R. 8 Cal. 819 (1882).

(2) L. R. 12 I. A. 116: s. c. I. L. R. 8 Mad. 520 (1885).

personal property under the Will. It was held that the subsequent suit was not barred by reason of the omission to claim the personal property in the previous suit, the decision of the case being based on the fact that the dispossession of the Plaintiff from his land was an entirely different cause of action from that which formed the basis of his claim to the personal property. The cause of action was different both upon the pleadings and in fact. It has finally been argued that the learned District Judge was not justified in coming to the findings of fact above referred to. It appears that subsequently to the Plaintiff's purchase, the holding was sold in execution of a decree for arrears of rent obtained against the Plaintiff. The present Defendants deposited the amount due and obtained an annulment of the sale. The then auction-purchaser Janki Nath Choudhuri obtained a Rule in this Court against the Munsif's order allowing the deposit to be made. In the course of the judgment of this Court disposing of this Rule, it was said "Kali Kumar (the present Plaintiff) purchased the holding in execution of a rent decree obtained by the landlords against Hamid Ali and obtained possession of the lands of the holding except the homestead portion which inspite of the sale, Hamid Ali retained in his possession: It is argued that in view of this expression of opinion the learned District Judge ought not to have held that the Plaintiff never obtained possession of any portion of the land. It is clear however, that there was no estoppel.

The statement in the judgment of this Court was nothing more than introductory recital of the facts. Moreover the present Plaintiff was merely a formal party to the proceeding. The real contest was between the then auction-purchaser Janki Nath and the present Defendants. Further the result of the Rule would have been the same if the facts had been stated to be that Kali Kumar had never obtained possession of any portion of the land. For the purpose of the Rule it was quite immaterial whether the present Defendants were in possession of the whole land or only of a portion. In either case they were entitled to make the deposit. It is clear there was no estoppel. To what extent there was any admission in that case we are unable to determine. The Rule was obtained on the application of Janki Nath not of the Defendants. We do not know what statement, if any, the Defendants made in the case. It has further been argued that as there was admittedly formal delivery of possession to the Plaintiff by the Court, the District Judge ought not to have held that actual possession was not obtained. There is no substance in this contention. The fact that there was formal delivery of possession is not relevant to the question whether the causes of action in the two suits were the same or not. The formal delivery of possession was the common fact in both suits. If that was all that took place, the causes of action were identical. It is finally argued that the dispossession of the arable land must in any case have been by a different act from the re-entry in the homestead. The Plaintiff's specific allegation however that he was dispossessed in March 1908 was not believed. We should have to have recourse to surmise if we were to say that the finding that there was not more than one act of dispossession was wrong.

We are of opinion that the findings of fact cannot be successfully assailed on any ground of law.

Those findings are that the cause of action in the previous suit was the same

as the cause of action in the present suit. In the previous suit the Plaintiff omitted to sue for a portion of his claim namely for the arable lands. He cannot under Or. 2, r. 2, of the Code of Civil Procedure be permitted to sue for them now.

The appeal is dismissed with costs.

Appeal dismissed.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 552 OF 1915.

CHAPMAN, J. ROE, J. 1915, 31, August.		SUMANTA DHUPI and ors., Appellants, *v.* KING-EMPEROR.

Indian Penal Code, sec. 201, 302 Murder, causing evidence of murder to disappear—Propriety of alternative indictments—Principal and accessory after fact—Principal if can be convicted under sec. 201.

The accused were committed to the Court of Session under secs. 302 and 201, I. P. C. In that Court the charge under sec. 201, I. P. C., was first investigated the other charge being postponed for future consideration. The Sessions Judge found that the accused had a sufficient motive for committing murder, that they disposed of the body of the deceased and were loitering near his house at the exact hour of murder. On these facts the accused were convicted under sec. 201, I. P. C.

Held—*That sec. 201, I. P. C. is an attempt to define the position known in England as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory. Where it is impossible to say definitely, however strongly it might be suspected, that an accused was guilty of murder, mere suspicion is no bar to a conviction under sec. 201. But if it be accepted as a proved fact that the accused before the Court disposed of a dead body and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present at the murder and taking part in the murder they cannot be convicted of the minor offence of causing evidence of the murder to disappear even though by an error of the Judge or by a misconception of the position by the Public Prosecutor the charge of murder is subsequently withdrawn.*

That on the facts found the accused were principals and the conviction under sec. 201 could not stand.

Per CHAPMAN, J.—*It is unsatisfactory to have an alternative indictment one count charging the accused as principal and the other as accessory after the fact.*

QUEEN-EMPRESS *v.* LIMBYA (1) *and* TORAP ALI *v.* QUEEN-EMPRESS (2) *relied on.*

This was an appeal preferred on the 12th July 1915 against the order of R. Garlick, Esq., Sessions Judge of Noakhali, dated the 11th May 1915.

The facts are stated in the judgment.

No one appeared for the Accused.

Babu Atulya Charan Bose for the Crown.

The JUDGMENT OF THE COURT was as follows :—

ROE, J.—The facts of this case as set forth in the judgment of the learned Sessions Judge are as follows :—On the 3rd February one Girish Kahar disappeared and was never seen again alive. On the 12th February a dead body was found in a pond which appears to be an overflow from a tidal river. The body was lying under three feet of mud and on it was a heavy ladder. It was so far decomposed that the Medical Officer who held the

(1) Unreported. Cr. Case Bom. H. C., 1895 at p. 799.

(2) I. L. R., 22 Cal. 678 (1895).

post-mortem examination was unable to give any cause of death; but from its clothing it was identified as the body of Girish by his relations. As soon as the body was discovered a first information was lodged before the Police in which it was stated that the undoubted cause of the killing of Girish Kahar was that his cousin was an idiot and that his wife Nandarani was an immoral woman, her chief visitors being Sumanta Dhupi and Bhagwan Dhupi, two of the accused now before us and that Girish was an obstacle to these intrigues. After investigation two other Dhupies, Bharat Dhupi and Pyari Dhupi were arrested by the Police and were brought before the Deputy Magistrate for the recording of statements which for the purpose of the present case it is not necessary to consider. It is sufficient to say that they are not admissible in evidence against the two accused Sumanta and Bhagwan. Evidence was placed before the Committing Magistrate to the effect that from the condition of the rice in the stomach of the deceased he must have died three or four hours after his last meal which was taken at 6 P.M. A number of witnesses gave evidence that they saw Sumanta and Bhagwan, Pyari and Bharat between 6 and 8 P.M. loitering near the house of Girish and two boatmen saw Sumanta the same night at 11 P.M. with two other men at a spot a short distance from the place where the body was found. The men that they saw were muddied to the waist. Other witnesses saw Sumanta and Bhagwan about midnight returning to thier homes with mud upon their legs. Upon this evidence the four accused Sumanta, Bhagwan, Bharat and Pyari were committed to the Sessions Court under secs. 302 and 201, I. P. C.

On the case coming on for trial it was at once evident that it would be illegal to try both these offences together. Accordingly the charge under sec. 201, I. P. C., was first investigated, the charge under sec. 302 being postponed for future consideration.

The facts as found by the Sessions Judge amount to this, that the Medical Officer is wrong in his deductions from the digestion of the food in the stomach of the deceased as to the exact hour of his death. That hour would more rightly be fixed at between 7 and 8 P.M. The Sessions Judge finds on the evidence that it is conclusively proved that Bhagwan and Sumanta disposed of the body of Girish by sinking it in the pond. He finds that it is conclusively proved that Girish was murdered between 7 and 8 P.M. on the night of the 3rd February. He is satisfied that Sumanta and Bhagwan had a sufficient motive for killing him. He finds that they were loitering near the house of Girish at the exact hour of the murder. On these facts he has convicted them under sec. 201.

Sec. 201 is an attempt to define the position known in England as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory after the fact. The learned Judge recognises this. His argument is that the evidence on the record is insufficient to justify him in saying definitely that either Sumanta or Bhagwan was actually guilty of the murder and that therefore there is no bar to their trial under sec. 201. I have considered carefully the opinion of many learned Judges upon this section, particularly the opinion of Jardine, C. J. and Ranade, J., in the case of *Queen-Empress* v. *Limbya*, (1). I accept with confidence the rule laid down in that case that, where it is impossibile to say, defi-

(1) Unreported. Cr. Case Bom H. C., 1895 at p. 798.

nitely, however strongly it might be suspected, that an accused was guilty of murder, mere suspicion is no bar to a conviction under sec. 201. But I am satisfied that if it be accepted as a proved fact that the accused before the Court disposed of a dead body and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present at the murder and taking part in the murder, they cannot be convicted of the minor offence of causing evidence of the murder to disappear, even though by an error of the Judge or by a misconception of the position by the Public Prosecutor the charge of murder is subsequently withdrawn.

We must take it as a fact conclusively proved that the accused on the night of the murder of Girish disposed of his dead body. We must take it that before any investigation had been made by the Police Sumanta and Bhagwan were clothed with a motive for the murder. We must take it as proved beyond dispute that the murder was committed between 7 and 8 P.M. and that between 7 and 8 P.M. Sumanta and Bhagwan were seen by numerous witnesses loitering near the house of the deceased. If all these facts are accepted as being conclusively proved it is beyond question that they amount to a chain of circumstantial evidence amply sufficient to justify the conviction of the accused as principals. If we accept the facts found the Appellants were certainly principals. If we do not accept the facts found they are on the merits of the case not guilty. There is in this case no escape from that position. The Appellants Sumanta Dhupi and Bhagwan must be acquitted.

With regard to Pyari Dhupi there are two flaws in his conviction. In the first place on the facts found by the Sessions Judge all that he did was to tie the body of Girish to a ladder. In one part of his judgment he says that it is not shown for certain whether Girish was dead when he was tied to the ladder. In another part of his judgment he says that Pyari helped to tie the body to the ladder because he was abused. Accepting these findings of fact it is clear in the first place that when Pyari lent his assistance it is not certain that the offence of murder had been committed. In the second place if indeed he only tied the ladder to the body of the deceased to avoid being abused it cannot be said that he assisted in disposing of the body with the intention of screening the murderers.

For these reasons I am of opinion that the three Appellants should be acquitted and released.

CHAPMAN, J.—I agree that the Appellants must be acquitted and released. I desire however to guard myself from saying what my opinion would be if this case were one of first impression. I consider that I am bound by the decision in *Torap Ali* v. *Queen-Empress* (2). I am unable to distinguish the facts of the present case from the facts of that case. The Crown might well consider in a case of this kind which charge to prove and proceed upon that charge alone. It is unsatisfactory to have an alternative indictment one count charging the accused as principal and the other as accessory after the fact.

(2) I. L. R. 22 Cal. 688 (1895).

THE

Calcutta Weekly Notes.

Vol. XX.] MONDAY, JANUARY 3 1916. [No 6.

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Sir Herbert Holmwood.

The honour of a Knighthood has not been conferred on Mr. Justice Holmwood too soon. We have in these columns drawn attention before to the omission of his name from previous New Year and Birthday Honours Lists. Since joining the Calcutta High Court in 1906 he has been a very industrious and popular judge. During the time he has been on the Bench, he has more than any other judge, been entrusted with the task, which is often the most arduous and not unoften very thankless, of disposing of criminal appeals and revision cases. It is a well-known fact that while he has been able to clear off sometimes very heavy arrears and always keep himself abreast of the work on the Criminal Appellate and Revisional Bench, he has also displayed an amount of tact, judgment and regard for justice in the disposal of cases which has justly made him popular both with the legal profession and the public. In private life he is a most affable gentleman and is always ready and willing to be of service to the public and to individuals whenever his assistance is sought for a good cause. The honour conferred on him will be appreciated alike by the Indian and the European community.

Knighthood to Mr. Justice Chamier.

The conferment of a Knighthood on Mr. Justice Chamier of the Allahabad High Court is also very [illegible] in both an experienced lawyer and able Judge and has been always very energetic in his work. [illegible] elect of the Behar High Court the honour conferred on him is only befitting the prospective head of the judiciary in our sister Province. We are very glad to note that the honours this year are very equally distributed amongst all sections of the community and that Judges have not as in some previous years been left in the lurch.

The late Sir Arthur Wilson.

Last week's cables bring, amongst other news, that of the death, at a fairly advanced age, of Sir Arthur Wilson, at one time a puisne Judge of the Calcutta High Court, and until recently an active member of the Judicial Committee of the Privy Council. The memory of Sir Arthur is still held in high esteem by the senior members of the legal profession and the public in Calcutta as of a Judge who combined erudition and industry with patience and a strong sense of justice. He was a Judge of the Calcutta High Court from 1878 to 1892 when he resigned and became Adviser to the India Office. In 1902 he became member of the Judicial Committee of the Privy Council. Many important judgments delivered by him in the Judicial Committee have been reported in our columns.

The late Mr. Justice Beverley.

News of the death of Mr. Henry Beverley, who was a Judge of the Calcutta High Court from 1885 to 1897, was received in Calcutta during the Christmas Vacation. He was a member of the Indian Civil Service and was held in high regard both as an able and successful Judge and a man of sterling qualities.

The late Mr. C. P. Hill.

It is with deep sorrow that we received the news of the death of Mr. C. P. Hill as we were going to the press. He was with one exception almost the last of the old school of advocates of the Calcutta High Court who have made the name of the Calcutta Bar respected throughout the length and breadth of the country for its

observance of a high standard of professional duty and singular independence. Mr. Hill was universally respected not merely for his legal erudition, his power of clear exposition of fact and law and fair and fearless advocacy but for his character and sense of honour which was an example to the whole Bar. There never was a greater friend of the junior members of the Bar whom he took every opportunity to help not merely by advice but also very materially in getting on in the profession. He retired amidst universal regret in 1911 and we would refer our readers to the editorial notice of his retirement in our issue of 13th March 1911. He has passed away at the mature age of 70 and the memory of his remarkable personality and kind, frank and earnest nature will never be forgotten by those who had known him.

The Late Sir Henry Cotton.

We draw our readers' attention to a communication which is published in another column reminding us and the public of a fact, generally overlooked in obituary notices concerning the late Sir Henry Cotton, that amongst the many offices which he filled with credit was that of the Registrar of the High Court in its Appellate Side.

Gifts over and sec. 111 of the Indian Succession Act.

Sec. 111 of the Indian Succession Act has frequently been a stumbling-block to the Courts in this country placing upon Wills made by Hindus the meaning which the testators very presumably intended to convey by the language they used. In *Nirendranath Sircar* v. *Kamalabasini*, I. L. R. 23 Cal. 563 : s.c. 23 I. A. 18, the High Court of Calcutta tried to read it as a rule of interpretation, so that if from the tenor of a Will it could be gathered that a gift over was intended to take effect upon the happening of an uncertain event *after* the death of the testator, the rule laid down in sec. 111 was not to be applied to defeat the gift on the ground that the uncertain event did not happen before the date of distribution which in that case was taken to be the death of the testator. The Privy Council overruled the High Court, and Lord Macnaghten, who seldom thought it necessary to qualify his views on any matter in which his Lordship differed from others, in delivering the judgment of the Board, said sec. 111 had in regard to contingent or executory bequests laid down a hard and fast rule which must be applied wherever it is applicable without speculating on the intention of the testator. Banerjee and Rampini, JJ., in *Monohur Mukerjee* v. *Kasiswar Mukerjee*, 3 C. W. N. 478, had to accept, as they could not but do, this view of the section and when they were confronted with illustrations (*d*) and (*e*) to sec. 111, which certainly to some extent militate against the Privy Council's reading of the section could only say that the language of the illustrations could not be allowed to control the "hard and fast rule" laid down in the body of the section.

The section again came up for consideration before the Judicial Committee in the case of *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* reported in this issue (p. 169). Their Lordships who had been irrevocably committed to the view laid down by Lord Macnaghten however took little pain to conceal their opinion that the rule enunciated in the section was not a very salutary one. The Right Hon'ble Mr. Ameer Ali who delivered their Lordships' judgment said that it embodied the rule laid down in *Edwards* v. *Edwards*, 15 Beav. 361– a rule which has been in a great measure departed from in later English decisions—and that it should be applied only to cases strictly coming within its scope; that the present case did not do so, because the period of distribution under the present Will was the death, not of the testator, but of his widow, who according to their Lordships' interpretation of the Will was to take a life-estate—though nowhere in the Will was this expressly indicated. Courts in this country will now know how to take a case out of the operation of the section, *viz.*, by fixing upon a date of distribution later in point of time than the testator's death. It is also clear that illustrations (*d*) and (*e*) to sec. 111 are not, as suggested in *Monohur Mukerjee's* case, to be cast out of the statute as instances of blundering legislation. They will obtain support from the manner in which the Will in the present case has been interpreted by the Judicial Committee.

Correspondence.

To the Editor, "Calcutta Weekly Notes."

Sir,—Your very appropriate notice of the death at the front of Mr. H. T. Cullis, lately a Registrar of the Calcutta High Court on its Appellate Side, emboldens me to point out that

some other Registrars of the Court have won for themselves more than ordinary distinction by their meritorious services under the State as also in public life. Amongst them the name of Sir Henry Cotton, who in the past fought strenuously to make the lot of Assam labourers happier and who up to the time of his death worked hard towards securing to India her just rights, deserves special mention. It would be out of place to canvas in your columns all his varied claims to distinction. But the fact that the late Sir Henry Cotton was at one time a Registrar of the High Court, and filled that office with credit, has been overlooked in nearly all the obituary notices that have appeared in the Newspaper Press, and many of your readers would like to see this omission made good, at least in a legal journal. It may not also be generally known and it will surely interest lawyers to know that at an early part of his distinguished career Sir Henry Cotton had served for some time as a Judge of the Presidency Court of Small Causes at Calcutta. In his days a member of the Indian Civil Service had a more varied experience of the affairs of the State and the people than he can lay claim to to-day.

Yours faithfully,
"Vakil."

Review.

THE HINDU LAW OF MARRIAGE AND STRIDHANA. Being the Tagore Law Lectures for 1878. *By Sir Gooroodass Banerjee, Kt., M A., D.L., Ph.D. Fourth Edition. S. K. Lahiri & Co. 56, College Street, Calcutta. 1915.*

It would be an act of supererogation to notice at length a new edition of this standard work, specially as the services it has rendered as a pioneer in its particular field of research have up till now not been emulated by any other worker in the field. The author has in fact had to do little more in the present edition than revise the work and bring it up-to-date. In doing so, however, he has found himself in disagreement with two recent Full Bench decisions of the Calcutta High Court and we are gratified to find that his criticisms of both are generally on similar lines to those recorded in this journal. The two Full Bench decisions are respectively *Hiralal Singha* v. *Tripura Charan* (I. L. R. 40 Cal. 650 : 17 C. W. N. 679) and *Debi Prosad* v. *Gopal Bhagat* (I. L. R. 40 Cal. 74 : 17 C. W. N. 701). In the former the Full Bench held that the rule laid down in earlier cases that the tie of kinship between a degraded Hindu woman and her undegraded relations is severed by her lapsing into prostitution is erroneous and that her undegraded relations (it may even be the husband) succeed to the property according to the ordinary law of inheritance. In the latter, it was laid down that an alienation by a Hindu widow with the consent of the immediate reversioner will not, in the absence of legal necessity (proved or presumed), be binding unless the alienation be of the whole of the widow's estate and is supportable on the theory of relinquishment. As regards the former, we ventured to express the opinion (17 C. W. N. clxv) that though reconcileable with the ordinary rules of inheritance (or rather with their application in accordance with canons of construction borrowed from English law) the decision was opposed to Hindu social sentiment, and that it seemed preposterous to permit the very kinsmen who outcasted her, and who would if they could avoid contact in her life with her shadow, to come forward on her death and claim kinship for the sole object of appropriating the profits of her shame; and we threw out the query "whether the recognition of the right of the undegraded relations to inherit might not have a reflex action on the position of the woman"? Sir Gooroodass's criticism of the decision, besides being more authoritative, is also more outspoken, but it should be read in the original to be appreciated (pp. 417-425). He has no doubt that "the effect of the decision upon Hindu Society will be lamentable." With regard to *Debi Prosad* v. *Gopal Bhagat*, we observed (17 C. W. N. clxxiii) that from the point of view of logic the decision of the Full Bench seemed unexceptionable, and that the "balancing of authorities" by their Lordships also was perfect, but the question that did not seem to have received the same degree of consideration was whether the decision would not unsettle old established practice and render insecure titles based upon it, different though it may be an anomalous and illogical rule. Sir Gooroodass does not seem to agree with our view of the "balancing of authorities" by the Full Bench (see pp. 237-239), but the strongest objection according to him also to the view of the Full Bench "is that the condition it imposes upon the alienation by the widow with the consent of the reversioner to make it valid is one which is most unlikely to have been fulfilled in the past and which will lead to the disturbing of numerous titles created in the past while it is likely to lead in

the future to alienation of the whole estate where alienation of a part might have satisfied the widow to the great injury to actual reversioners whose interest the condition is intended to protect."

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and CHAPMAN, JJ. APPEAL FROM APPELLATE ORDER NO. 496 OF 1914. TULSI ROUT, Applicant, Appellant *v.* SHEIKH NOBI BUX AND ORS., Auction-purchasers, Respondents. 16th December, 1915.

Auction sale—Application to set aside—Application allowed by first Court—Appeal by one of the auction-purchasers—Appeal allowed as regards whole property.

The appeal was against an order of the lower Appellate Court setting aside an order of the first Court.

An application was made to the Primary Court under Or. XXI, r. 90, C. P. C., and sec. 47 of the Code on the allegation that the *ex parte* decree in the execution of which the land was sold was obtained fraudulently and that the land was sold fraudulently which the decree-holder purchased himself in the name of his servant and relation.

The first Court held in favour of the Applicant and set aside the sale. On appeal this order was set aside.

There were three auction-purchasers. Two of them did not appeal to the lower Appellate Court. It was contended that the sale, so far as these two men were concerned, should be set aside. The Primary Court set aside the sale on the ground, *first*, that the decree on the strength of which the sale had taken place having been obtained fraudulently and having been set aside, all further proceedings after the decree was null and void; *secondly*, that there was fraud in the publication of the necessary notice of the sale which had caused inadequacy of price; and *thirdly*, that the real purchaser was the decree-holder himself and that he purchased *benami* for himself.

Held, that the sale being one sale, in execution of the decree and as it was impossible to make a division in the sale with regard to a portion of the property, it was allowed to stand with regard to the other portion.

Dr. Dwarka Nath Mitter for the Appellant.

Babu Harihar Prosad Singh for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and CHAPMAN, JJ. APPEAL FROM APPELLATE DECREE NO. 1763 OF 1914. PEARY MANDAR AND ORS., Defendants 1st, and 2nd party Appellants *v.* ANAND RAM, Plaintiff, Respondent. 16th December 1915.

Title—Civil Court's jurisdiction—Commutation of rent—Bengal Tenancy Act (VIII of 1885), sec. 40—Judgment if bar.

The appeal arose out of a suit for rent. The Plaintiff had acquired the landlord's right by purchase at a sale in execution of a mortgage-decree. He made the successors of the previous holder of the landlord's right parties to the suit. The main question which was determined by the lower Courts was the question whether the Plaintiff had obtained possession of the landlord's right or not. The suit was contested upon this ground both by the tenant and by the successors of the previous holder of the landlord's right. The first Court held that the Plaintiff had failed to prove that he obtained possession. The lower Appellate Court set aside this decision, held that the Plaintiff had obtained possession and decreed the suit. The successors of the previous owner of the landlord's right and the tenant both appealed to the High Court.

It was contended that it was not open to the Civil Court to go into the question of the Plaintiff's title inasmuch as that was determined under sec. 40 of the Bengal Tenancy Act.

The tenant had applied under sec. 40 for the commutation of his rent. Both the Plaintiff and the Defendant, 2nd party, the successors of the previous owner, were parties to that decision. But no question between the Plaintiff and the previous owner was decided.

Held, that the judgment in the case under sec. 40 of the Bengal Tenancy Act did not operate as a bar in the present suit.

Lala Saligram Singh v. *Mohunt Ramgir* (3 C. W. N. 311) distinguished.

Babu Gurudas Sinha for the Appellants.

Babu Nares Chunder Sinha for the Respondent.

A. T. M. *Appeal dismissed.*

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

VISCOUNT HALDANE.
LORD PARMOOR.
LORD WRENBURY.
SIR JOHN EDGE.
MR. AMEER ALI.

1915,
Heard, 19, October.
Judgment,
15, November.

BHUPENDRA KRISHNA GHOSE and anr., Appellants,
v.
AMARENDRA NATH DEY and another, Respondents.

Hindu Law—Will, interpretation of—Widow appointed executrix with power to adopt five sons in succession—Gift over on her dying without son to nephews—Son adopted if devests widow—Life-estate to widow inferred from tenor—Gift over void and not touched by sec. 111, Succession Act (X of 1865).

When a Hindu testator belonging to the Dayabhaga school appointed his wife sole executrix and authorised her to adopt a son, and five such sons in succession in case of death, and the Will finally provided that if the wife died without adopting a son or if such adopted son predeceased her without leaving any male issue, the estate, after the death of his wife, would pass to such of his sister's sons as might be living at his death.

Held—*That the estate was in the widow during her life, and it could pass only to the son who survived her or in case of his death in her lifetime, to his male issue if he left any.*

A son adopted by the widow predeceased her without issue.

Held—*That the gift over to the nephews took effect, on the death of the widow.*

That the gift to the nephews was not affected by sec. 111 of the Succession Act the event upon which, as distinctly mentioned in the Will, the distribution was to take place being the death of the widow.

Sec. 111, Succession Act commented on. It should be applied only to cases strictly coming within its scope.

Under the Dayabhaga, the testator has not only the power of authorising his widow to adopt a son to him, and in case of the death of such adopted son to make other adoptions in order to ensure the performance of those religious rites on which depends his salvation in after-life, but he can attach to such authority a direction that her estate should not be interfered with or devested during her life, just as he can postpone the succession of his natural-born son by interposing a life-estate.

This was an appeal from a decision of the Calcutta High Court, (Jenkins, C. J., and Woodroffe, J.), dated the 28th November 1913, which is reported in I. L. R. 41 Cal., p. 612 : s.c. 18 C. W. N. 360.

It raised questions relating to the construction of a Will which is quoted in their Lordships' judgment. The High Court held that the testator's intention was that his estate should be beneficially enjoyed by his wife or adopted son until the death of his wife without male issue; and that in the event of there being no adopted son or the adopted son predeceasing her without leaving any male issue, the testator's estate should go to the Respondents.

Sir Robert Finlay, K.C., Mr. Upjohn, K.C., Sir William Garth and *Mr. Dunne* for the Appellants submitted that there was no devise to the widow or the adopted son, and that in the absence of any gift by implication or otherwise the adopted son took by inheritance an estate of which he could not be subsequently divested. The testator's estate was in abeyance which is against the principles of Hindu law. It was therefore a case of intestacy and the adopted son took by adoption an absolute estate by inheritance. The Hindu law of devise is based on the law of gift, and the taking of possession by the donee is essential under that law. The gift over here was in *futuro* without any

gift is *præsenti*. That is bad under the Hindu law. If the testator had made a gift to the adopted son under the Will, and then a gift over, that would have been good, but there was no such prior gift to support the gift over. Reliance was placed on *Amrito Lall Dutt* v. *Surnomoni Dasi* (2) and reference was made to the following :—*Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (3), *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (4), *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (5), *Kally Prosonno Ghose* v. *Gocool Chunder Mitter* (6), *Bai Motivahoo* v. *Bai Mamoobai* (7) and *Gorahandas Soonderdas* v. *Bai Ramcoorer* (8).

Secondly, the gift over is bad under sec. 111 of the Indian Succession Act, 1865. The period of distribution on a proper construction of the Will was the date of the testator's death. Illus. B to sec. 111 applied to the present case. Sec. 111 ought to be applied without any regard to the intention of the testator. Reference was made to *Norendra Nath Sircar* v. *Kamalbasini Dasi* (9) and *Manikyamala Bose* v. *Nanda Kumar Bose* (10). Trevelyan's Hindu Law of Wills, p. 118.

Mr. L. DeGruyther, K. C. and *Mr. Bhugwandin Dubé* for the Respondents, submitted that the testator had fixed the period of date of distribution as being the death of the widow, and therefore the gift over was not affected by sec. 111. The section which embodied the rule in *Edwards* v. *Edwards* (1), laid down a rule for construction of Wills. The words "payable" or "distributable" in the section meant the payment or distribution of an absolute interest. The gift over was not bad under the principles of the Hindu law. There were only two rules which have been established under the Hindu law to limit a gift or devise, namely, (1) that a Hindu cannot create estates unknown to the Hindu law, and (2) that a gift must be in favour of a person existing at the time of the testator's death. Both restrictions did not apply to the present case. *Bai Motivahoo* v. *Bai Mamoobai* (7).

Executory bequests are perfectly allowable under Hindu law, and have always been enforced in India. Sec. 107 of the Indian Succession Act recognizes it in terms. Reference was made to *Norendra Nath Sircar* v. *Kamalbasini Dasi* (9), *Radha Prosad Mullick* v. *Ranimoni Dassi* (11) and *Chunilal Parvatishankar* v. *Bai Samrath* (12).

The cases on which the Appellants relied *Gordhandas Soonderdas* v. *Bai Ramcoover* (8) and *Amrito Lall Dutt* v. *Surnomoni Dasi* (2), have no application. There was no gift in the first and no existing beneficiary. (Their Lordships intimated that they did not desire to hear Counsel for the Respondents any further.)

Sir Robert Finlay in reply submitted that there could be no valid gift under the Hindu law without delivery of possession to the donee.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This is an appeal

(2) I. L. R. 25 Cal. 662 at p. 690 (1898).
(3) 9 M. I. A. 123 at p. 136 (1862).
(4) 10 M. I. A. 279 at p. 308 (1865).
(5) 12 M. I. A. 1 at p. 37 (1867).
(6) I. L. R. 2 Cal. 295 at pp. 303-5 (1876).
(7) L. R. 24 I. A. 93, 104, 105 (1897).
(8) I. L. R. 26 Bom. 449 at p. 467 (1901).
(9) L. R. 23 I. A. 18 at p. 27 (1896).
(10) I. L. R. 33 Cal. 1306 at p. 1312 (1906).
(1) 15 Beav. 361 (1852).

(2) I. L. R. 25 Cal. 662 at p. 690 (1898).
(7) L. R. 24 I. A. 93, 104, 105 (1897).
(8) I. L. R. 26 Bom. 449 at p. 467 (1901).
(9) L. R. 23 I. A. 18 at p. 27 (1896).
(11) L. R. 35 I. A. 118 at p. 127 (1908).
(12) I. L. R. 38 Bom. 399 at p. 411 (1914).

from a judgment and decree of the High Court of Calcutta pronounced in a suit which relates to the Will of one Herumbo Nath Ghose, a Hindu inhabitant of the town of Calcutta, subject to the Dayabhaga School, who died on the 10th of November 1907.

The material portion of the will, which bears date the 26th June 1898, is in the following terms :—

"This is the last Will and Testament of me Herumbo Nath Ghose of No. 45 Pathuriaghata Street, Calcutta, son of Girindra Chunder Ghose, deceased zemindar. I revoke all prior testamentary writings and appoint my wife Srimati Poritoshini Dassi to be the sole executrix of this my Will. I hereby authorize my said wife to adopt Dattaka putra. In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife die without adopting a son or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Srimati Benodini Dassi who may be living at the time of my death."

On the testator's death his widow Poritoshini Dassi applied for and obtained probate of the Will. The estate of Herumbo accordingly vested in her as his legal representative and remained in her possession until her death three years later. It is alleged that in August 1909 she, in pursuance of the authority given to her by her deceased husband, adopted an infant of the name of Hem Chunder Dey. This child died on the 11th of March 1910 which was followed by the death of Poritoshini herself shortly after.

The present suit was instituted on the 30th of March 1910 by Kissory Moni Dassi, the adoptive mother of Herumbo, against the two sons of Benodini Dassi, his sister, for a declaration that in the events that had happened the devise to them had failed, and that the testator's estate had devolved on her. Kissory Moni died in September following, whereupon one Trailokya Nath Ghose, who alleged himself to be the next reversioner of the infant Hem, was substituted in her place. Trailokya has died since the trial; and the present Appellants are his son and widow who represent him as his executor and executrix respectively. The fact of the adoption by Poritoshini of the infant Hem was denied by the Respondents, but the question has not been tried. Both the Courts in India have dealt with the case on the assumption that the adoption was duly made as alleged by the Plaintiff; and on the construction of the Will have held that as the adopted son died without leaving male issue, on the death of the widow the bequest to the sons of Benodini took effect and they accordingly dismissed the suit.

The judgment of the High Court is challenged on two grounds; *firstly*, it is urged that on the adoption of the infant, the estate vested in him as full owner by virtue of the Hindoo law of inheritance, that he took it in his capacity of son and not as devisee under the Will, and on his death the property devolved on his heirs. Consequently, it is contended the executory devise in favour of the Respondents failed completely. *Secondly*, it is contended that it fails also under the provisions of sec. 111 of the Indian Succession Act (X of 1865) which has been made applicable to Hindoos by the Hindoo Wills Act (of 1870).

It is to be observed that the Will in this case does not infringe the rules which lay down the limitations on the testamentary powers of a Hindoo. The bequest is to persons who were in existence at the time of the testator's death, and he does not create any estate unknown to Hindoo law.

Before proceeding to examine the Will in order to discover the intentions of the testator, their Lordships desire to make one further observation, *viz.*, that under the *Dayabhaga*, the testator has not only the power of authorizing his widow to adopt a son to him, and in case of the death of such adopted son, to make other adoptions in order to ensure the performance of those religious rites on which depends his salvation in after-life, but he can attach to such authority a direction that her estate should not be interfered with or devested during her life, just as he can postpone the succession of his natural-born son by interposing a life-estate.

In the present case had the testator given to the widow a power to adopt without constituting her his executrix she would have taken merely a widow's interest which would have become devested on her adopting a son. It is clear, however, from the language of the Will that the testator was anxious that there being no natural-born son, a son should be adopted who and whose male issue should duly perform those religious rites which are considered essential in the Hindoo system for the salvation of the deceased. With this object he empowered her to make five successive adoptions and constituted her as his executrix to give effect to his wishes. If the first son so adopted died in her lifetime without leaving male issue, she had the power to adopt a second; or a third, fourth, or fifth in case the second, third, or fourth also died without leaving male issue. Thus the power to adopt confided to the widow could not be exhausted so long as she was alive until the directions of the testator had been fully carried out. It is obvious that the estate could pass only to the son who survived her, or, in case of his death in her lifetime, to his male issue, if he left any. Otherwise the whole object with which the power was given to the widow for making the adoptions would be defeated. The estate was in the widow during her life; the gift over is expressly declared to take effect after her decease in case of the failure of the adoptions without securing the object the testator had in view. Their Lordships conceive that a mere statement of the purpose of the testator which is apparent on the face of the Will and of the consequences resulting from the contention advanced on behalf of the Appellants is sufficient to show its fallacy.

The infant who was adopted by the widow died in her lifetime unmarried and without leaving any issue, and as she died a few days later she was unable to give further effect to the wishes of her deceased husband. On her death, therefore, the gift to the sons of Benodini, the testator's sister named in the Will, took effect, and the estate passed to them. But it has been strenuously contended that under the provisions of sec. 111 of the Indian Succession Act the bequest to them is void. That section runs as follows :—

"Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the Will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable."

Sec. 111 embodies the rule enunciated in *Edwards* v. *Edwards* (1). The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act, however, has given it statutory force. Even in India as regards Hindoos, its application is confined to special tracts such as the territories subject to the Lieutenant-Governor of Bengal and the Presidency towns of Bombay and Madras. Their

(1) 15 Beav. 361 (1852).

BHUPENDRA KRISHNA GHOSE *v.* AMARENDRA NATH DEY.

Lordships think that it should be applied only to cases strictly coming within its scope. In the present case the event on the occurrence of which the distribution was to take place is distinctly mentioned as being the death of the widow. That being so, the gift to the nephews is not affected by sec. 111 and must take effect.

Their Lordships are of opinion that the judgments of the Courts in India are correct and that this appeal shou'd be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor: *Mr. G. C. Farr* for the Appellants.

Solicitors: *Messrs. Watkins* and *Hunter* for the Respondents.

B. B. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 17 OF 1915.

SANDERSON, C. J. WOODROFFE, J. MOOKERJEE, J. 1915, 25, November.		KASSIM EBRAHIM SALEJI, *v.* JOHURMULL KHEMKA.

Civil Procedure Code (Act V 1908), Or. 5, rr. 12, 17 and Or. 9, r. 13, Or. 43, r. 1 (d)***—Appeal against order refusing to set aside ex parte decree—Service of summons, substituted service, sufficiency as to.***

Where it is a question of substituted service, the requirements of the Code should be strictly observed in every respect even though the Defendant knew of the issue of the writ.

Where the serving officer went to a Defendant's place of business and made enquiries about him, and, not finding him on any one of the three separate occasions when he went there, posted a copy of the writ on the outer door of the said house which he erroneously believed to be the Defendant's ordinary place of residence,

Held—*This was not sufficient service of the summons.*

Proper enquiries and real and substantial effort should be made to find out when and where the Defendant is likely to be found and proper effort made to find the Defendant in the place where he ordinarily resides or carries on business.

COHEN *v.* NURSING DASS AUDDY (1) *followed.*

The mere fact that the Defendant or his solicitor knew that a suit has been instituted would not dispense with the necessity of proper service of summons.

This was an appeal from an order of Imam, J., dated 3rd March 1915, refusing to set aside an *ex parte* decree made on the 9th December 1914.

The facts relating to service are sufficiently set out in their Lordships' judgment.

Mr. B. C. Mitter (with him *Mr. S. C. Roy*) for the Defendant-Appellant.

Mr. H. D. Bose (with him *Mr. K. P. Khaitan*) for the Plaintiff-Respondent.

Mr. Bose—I take a preliminary objection to this Appeal. No appeal lies, as all appeals from the Original Side to the Appellate Side must be under the provisions of cl. 15 of the Letters Patent, and not under the Civil Procedure Code. Such appeals lie only from "judgment." I contend that the order refusing restoration which has been appealed against is not a "judgment." Or. 43, r. 1 (*d*) of the Civil Procedure Code no doubt gives a right of appeal in similar cases. But this does not apply where the appeal is from one side of the Court to the other. That Order applies to mofussil Courts only. Refers to *Harish Chandar Chowdhry* v. *Kali Sundari Debi* (2), *Toolsee Money Dassee* v. *Sudevi*

(1) I. L. R. 19 Cal. 201 (1892).
(2) L. R. 10 I. A. 4 : s. c. I. L. R. 9 Cal. 482 (1882).

KASSIM EBRAHIM SALEJI *v.* JOHURMULL KHEMKA.

Dassee (3) and *The Justices of the Peace of Calcutta* v. *Oriental Gas Co.* (4). This contention was upheld in an unreported case before Jenkins, C. J., and Woodroffe, J., being Appeal No. 30 of 1914. Reads Court Minutes, dated 30th March 1915.

[WOODROFFE, J.—Is there a judgment in that case by the Appeal Court, showing the facts of the case?]

Mr. Bose.—No. All that happened is recorded in the Minutes of that date.

[Their Lordships being not disposed to accept the arguments of counsel on the preliminary point, it was not pressed any further.]

Their Lordships then proceeded to hear counsel on the question as to whether the summons had been properly served in this case.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This appeal is from an order made by Mr. Justice Hassan Imam on the 3rd of March in this year, in which he refused to set aside a decree for specific performance of an agreement between the Plaintiff and Defendant. The decree was made on the 9th of December 1914, and it was made *ex parte*, the Defendant not being present or taking any part in the proceedings. Then in consequence of a letter which was dated the 22nd of January 1915, and written by the Plaintiff's solicitor to the Defendant, an application was made to Mr. Justice Imam to set aside the decree on the ground that the writ of summons had not been served upon the Defendant. The learned Judge refused to set aside the decree and this is an appeal from his judgment.

Now, the service was supported in the first instance upon an affidavit in the usual form which is to be found at page 15 of the paper book, in which one Sitaram who was employed by the Plaintiff, and another, Ishak, who was in the employ of the Sheriff of Calcutta, swore that they had been to the Defendant's house where he ordinarily lived and resided on the 1st, 3rd and 4th day of August, that they could not find him there, that they could not see any adult male member of his family, that they had called out his name in the usual way but got no response and that therefore the writ had been posted upon the premises, and it was upon that affidavit of service that the learned Judge of the Court of first instance proceeded to give his decree.

Now, it turns out that the Defendant did not reside at the premises which are mentioned in the affidavit, namely, No. 1, Amratolla Lane in Calcutta. What took place was that these two men whose names I have already mentioned, one in the employ of the Plaintiff and the other in the employ of the Sheriff of Calcutta, went to the place where the Defendant carried on business with his partner, and tried to find him there on the days in question, that the bailiff went into the business premises and saw somebody seated on a chair on each occasion, who told him that the Defendant was not at that time at the place, and that then having cried aloud his name three times he posted the writ of summons upon the premises. The question is whether that is sufficient service. I may say at once that in one sense I regret that we have to allow this appeal, because I have not much doubt in my mind, speaking for myself, that the institution of these proceedings did come to the knowledge of the Defendant, and I do not think that the Defendant has any merits in this application. But that is not the question. If

(3) I. L. R. 26 Cal. 361 at p. 371 : s. c. 3 C. W. N. 347 (1899).
(4) 8 B. L. R. 433 at p 452 (1872).

we were to decide that what was done in this case was sufficient service of the writ, it might be taken as a precedent on other occasions. Inasmuch as I do not consider that what was done in this case was sufficient service, it would not be right for us to say that it was sufficient service, because we are strongly of opinion that the Defendant knew of the issue of the writ. In my judgment, where it is a question of substituted service, and the Defendant has not been served personally, it is most essential that the requirements of the Rules should be strictly observed in all respects.

Now, the Rules which are material to this matter have already been referred to, and I only intend to refer to them quite shortly. The first is Or. V, r. 12, which says, "Wherever it is practicable, service shall be made on the Defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient." Now, in this case there is no doubt that service upon the Defendant was not made personally, nor was it made upon an agent empowered to accept service. It is quite true that a letter was written by the Plaintiff's attorney to a gentleman who was acting in respect of the dispute about these premises on behalf of the Defendant, but that does not empower him to accept service, and unless he has authority from his client to accept service, and does accept service, the mere fact that the Plaintiff's attorney writes to the Defendant's attorney saying "Will you accept service," and he receives no reply, in my opinion—speaking for myself—is not sufficient. Therefore, it does not come within r. 12.

The next Rule which is really material is Or. V, r. 17. That has already been read by Mr. Bose, but I will read it again in part for the purpose of making my judgment intelligible. It says, "..... Where the serving officer, after using all due and reasonable diligence, cannot find the Defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the Defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court....." Now, the question in this case is whether the facts as set out in two or three affidavits which have been referred to by Mr. Bose show that the serving officer used all due and reasonable diligence. In my opinion, it would be dangerous for this Court to hold that the facts set out there show that all due and reasonable diligence was used. One must remember that the first affidavit represented that the serving officer had gone to the Defendant's dwelling-house and tried to find him on three separate occasions, that he could not find him or any adult male member of the family and that he then proceeded to call out, outside the house, the name of the Defendant and then posted a copy of the writ upon the premises of the Defendant. This is one thing. But it turns out that a very different matter occurred. The serving officer went to the Defendant's place of business, where he carries on business with his partner. There is no mention in the affidavit that the Defendant resides there: In fact the Defendant swears that he does not ordinarily reside there, and, I am not prepared to hold that merely going to a man's place of business on three separate days, a place of business where he carries on business with other partners, and where he may or may not be on these particular days or at the particular time of the day and merely

asking for him, and then when he does not find him, posting a copy of the writ on the outer door of the premises is sufficient service. I may adopt the very excellent common sense rule laid down by one of my predecessors, Chief Justice Sir Comer Petheram. It is this : he says, " It is true that you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make enquiries, and if necessary follow him. You should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found. Before service like this can be effected it must be shown that proper efforts have been made to find out when and where the Defendant is likely to be found not, as seems to be done in this country, to go to his house in a perfunctory way." I lay stress upon the words " perfunctory way." [See *Cohen* v. *Nursing Dass Auddy* (1).] Now, those are the words used by Chief Justice Sir Comer Petheram when he was dealing with a case where service was attempted to be made on a man at his dwelling house. I think that remark will apply *a fortiori* to this case where service was effected in a perfunctory manner, by going to a man's place of business where he carries on business with a partner, and where he may be or may not be on those days. As has been said, it is a very good rule to follow that proper enquiries, and real and substantial effort, and not perfunctory, should be made to find out when and where the Defendant is likely to be found.

Under these circumstances I think that although as I have said before—I have no sympathy with the Defendant, but having regard to the fact that if we allowed this service to pass we might be approving something which would be taken as a precedent which, in my opinion, should not be taken as a precedent, I think that the appeal should be allowed and we will hear Mr. Mitter on the question of costs.

[After hearing Mr. Mitter, His Lordship observed.]

We think that the proper order in this case is that the appeal will be allowed upon the undertaking by Mr. Mitter that no further service of the writ will be necessary. The suit will, of course, be restored.

The costs of the application before Mr. Justice Imam to set aside the decree will be costs in the cause, and each party will bear the costs of this appeal. Any costs if already paid by the Appellant will be refunded.

Woodroffe, J.—I agree that the appeal should be decreed. As there is no question in this case that the Respondent did not go to the house of residence it cannot be said that all due and reasonable diligence was used to find the Defendant. The fact that the Plaintiff went to the house where summons was posted under the impression that it was the Defendant's place of residence which it was not indicates an intent and knowledge that the Defendant was likely to be found at his place of residence, though in fact no search was made there. That the Defendant had otherwise knowledge of the institution of the suit is highly probable. But that is not sufficient, if service is not formally proved.

I would like to add that the decision referred to by the Chief Justice [*Cohen* v. *Nursing Dass Auddy* (1)] was followed by Sir Lawrence Jenkins, C. J., and myself in an unreported decision in appeal from Order No. 75 of 1912, dated the 28th November 1913.

Mookerjee, J.—I am of opinion that the order of Mr. Justice Imam cannot be

(1) I. L. R. 19 Cal. 201 (1892).

(4) 8

(1 I. L. R. 19 Cal. 201 (1892).

supported. The question for determination is, whether the Appellant, as an Applicant who seeks to set aside a decree made *ex parte* against him, has satisfied the Court, within the meaning of r. 13, Or. IX, of the Code, that the summons in the suit was not duly served upon him. The answer depends upon the true construction of rr. 12 and 17 of Or. V. R. 12 recognizes the fundamental proposition that, whenever practicable, service shall be made on the Defendant in person, unless he has an agent empowered to accept service, in which case service upon such agent shall be sufficient. The present case does not fall within the exception, as it is not suggested that the Defendant had an agent empowered to accept service. The notice given to Mr. Dutt, who had acted as his attorney on a previous occasion, was also clearly insufficient, and reliance has not been placed thereon in support of the order under appeal. The question, consequently arises, whether service was made in fulfilment of the requirements of r. 17. That Rule,.....I quote only so much of it as is relevant for our present purpose,—provides that where the serving officer, after using all due and reasonable diligence, cannot find the Defendant, he shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the Defendant ordinarily resides, or carries on business, or personally works for gain. Here the Plaintiff caused the notice to be affixed on the house at No. 1, Amratolla Lane. The Plaintiff erroneously assumed that the Defendant ordinarily resided there; as a matter of fact, it was not his residence; but, in that house, business was carried on by a firm whereof the Defendant was a partner. In these circumstances, can we say that the Plaintiff used all due and reasonable diligence to find the Defendant; if he did not, the service in the mode in which it was effected was not in fulfilment of the requirements of the Code. In my opinion, the answer must be in the negative. I am not prepared to affirm the proposition that if the Plaintiff makes no effort whatever to find the Defendant in the place where he ordinarily resides, and not finding him where he carries on business along with others, affixes the summons upon a conspicuous part of the business premises, the requirements of the Code are satisfied [*Cohen* v. *Nursing Dass Auddy* (1).] Indeed, the Plaintiff has not proceeded on the theory that it was permissible under the law to serve summons in this manner. He acted on the footing that the Defendant actually resided in the premises to which the summons was taken. He now discovers that he was under a misapprehension, and is consequently driven to maintain a position which is absolutely unsustainable. There is thus no escape from the conclusion that the summons was not duly served. It has finally been argued that there are ample indications that the Defendant was aware of the institution of the suit against him. But this is plainly of no real assistance to the Respondent; for, if the summons was not duly served, as I hold it was not, the Defendant is entitled under Or. 9, r. 13, to have the *ex parte* decree set aside as against him. Consequently, this appeal must be allowed and the application to set aside the *ex parte* decree granted.

Mr. J. C. Dutt, Solicitor, for the Defendant-Appellant.

Mr. D. P. Khaitan, Solicitor, for the Plaintiff-Respondent.

Appeal allowed.

(1) I. L. R. 19 Cal. 301 (1892).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDER

NOS. 222, 311 TO 327 OF 1912.

MOOKERJEE, J. N. R. CHATTERJEA, J. 1915, Heard, 9 and 19, August. Judgment, 19, August.	LOKENATH SINGH and ors., Judgment-debtors, Appellants, *v.* GUJU SINGH and ors., Decree-holders, Respondents.

Limitation Act (IX of 1908), Sch. I, Art. 182, col. 3, cl. (2)—Suit for ejectment—Decree against some Defendants on consent and against others on contest—Appeal by contesting Defendants—Dismissal of appeal—Execution of decree, application for, within three years of dismissal of appeal but more than three years after the first Court's decree, if barred as against consenting Defendants.

A suit for ejectment brought against two sets of Defendants, A and B, was decreed on 17th September 1903 against set A upon consent and against set B upon contest, the result being embodied in one decree which did not define the respective shares of the two sets of Defendants. An appeal preferred by set B alone in which they did not make set A parties was not disposed of until 8th May 1908. On 7th May 1910 application was made for execution of the decree against both sets of Defendants.

Held—*That the application was not time-barred as against set A, even though set A did not and could not appeal against the decree of 17th September 1903, inasmuch as the appeal of set B was of necessity against the entire decree—there being a chance or risk of the Appellate Court modifying the decree even as against set A.*

That on appeal by the contesting Defendants the whole matter was reopened and the decree-holders were entitled to the benefit of Art. 182, col. 3, cl. (2) of Sch. I of the Limitation Act.

BATUK NATH *v.* MUNNI DEI (24), ASHFAK HOSSEIN *v.* GOURI SAHAI (17) *and* LAW *v.* BENARASHI PROSHAD (5) *referred to.*

Quære.—*Whether time runs against the decree-holder from the date of the final decree in the appeal irrespective of the question whether the appeal did or did not imperil the decree whereof execution was ultimately sought.*

These were appeals from an order of F. R. Roe, Esq., District Judge, Patna, dated 11th March 1912, affirming that of Mr. Ibrahim Ahmad, Subordinate Judge, Bankipur, dated 22nd December 1911.

The facts of the case will appear from the judgment.

Sir Rash Behary Ghosh, Babus Jogesh Chandra Roy and *Gonesh Dutt Singh* for the Appellants.

Babus Umakali Mookerjee, Surendra Kumar Bose, Bankim Chandra Mukherjee and *Biraj Mohun Majumdar* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal is directed against an order in proceedings in execution of a decree for delivery of possession of land made on the 17th September 1903. The question in controversy is, whether an application for execution of this decree, made on the 7th May 1910, is barred by limitation. The Courts below have concurrently held that the application is not barred. We are now invited by the judgment-debtors to hold that this view is erroneous in law. For the determination of the question raised before us, it is necessary to recapitulate the essential facts, which are all admitted.

The Plaintiffs sued two sets of persons, who may be called A and B,

(5) 18 C. W. N. 287 (1914).
(17) L. R. 38 I. A. 37 : s. c. 15 C. W. N. 370 (1911).
(24) I. L. R. 33 All 350 : s. c. 18 C. W. N. 740 (1914).

for recovery of possession of land. A petition of compromise was filed on behalf of some of the Defendants. The Court came to the conclusion that the compromise was operative only as regards some of them (A) and gave effect to it to that extent. The suit was heard on the merits as against all the other Defendants (B). The result was a two-fold decree *first*, for possession as against the consenting Defendants (A), without mesne profits or costs, and *secondly*, for possession against the contesting Defendants (B) who were made liable for costs and mesne profits. B appealed to the District Judge and valued their appeal at the value of the subject-matter of the entire property involved in the suit in the Court of first instance. They did not join A as Respondents; the only Respondents to the appeal were the successful Plaintiffs. The appeal was preferred on the 25th January 1904. The parties, however, agreed to await the decision of this Court in an analogous litigation, which had been brought up here by way of first appeal. After the disposal of that appeal by this Court the appeal before the District Judge was taken up, and was dismissed on the 8th May 1907, on the footing of the agreement that the parties would abide by the decision of the High Court in the suit previously mentioned.

The present application for execution of the decree of the 17th September 1903 was made on the 7th May 1910. On the 28th August, writ for delivery was issued, and it is alleged that the decree-holders were placed in possession on the 5th September. On the 29th September, however, objection was taken by the judgment-debtors that the decree was incapable of execution, as the rights thereunder had been extinguished by the statute of limitations. The Courts below have overruled the contention. On the present appeal, the controversy has centered round cl. (2) of the third column of Art. 182 of the schedule to the Indian Limitation Act. That clause provides that an application for execution of a decree of a Civil Court not provided for by Art. 183 or sec. 43 of the Code of 1908 must be made within three years from the date of the final decree of the Appellate Court or the withdrawal of the appeal, where there has been an appeal. On behalf of the judgment-debtors Appellants reliance has been placed upon the cases of *Sreenath* v. *Brojonath* (1), *Wise* v. *Rajnarain* (2), *Hur Proshaud* v. *Enayet Hossein* (3), *Raghunath* v. *Abdul Hye* (4), *Law* v. *Benarashi Proshad* (5), *Sangram Singh* v. *Bujharat Singh* (6), *Moshiatunnessa* v. *Rani* (7) and *Badiunnessa* v. *Shamsuddin* (8). On the basis of these decisions the argument has been founded that as the decree-holders could have executed the consent decree obtained by them against A, notwithstanding the pendency of the appeal preferred by B, they could not claim the benefit of cl. (2) of the third column of Art. 182. The contention in substance is that in reality there are two completely distinct decrees on the same sheet of paper and the fact that an appeal had been preferred by B against one of the decrees, does not entitle the decree-holders to an extension of time against A in respect of the other decree. It is further pointed out that not only was not an appeal preferred against the consent decree, but under the law an appeal could not have been preferred against that

(1) 18 W. R. 309 (1870).
(2) 10 B. L. R. 253 ; 19 W. R. 70 (1872).
(3) 2 C. L. R. 471 (1878).
(4) I. L. R. 14 Cal. 26 (1886).
(5) 19 C. W. N. 287 (1914).
(6) I. L. R. 4 All. 86 (1881).
(7) I. L. R. 18 All. 3 (1895).
(8) I. L. R. 17 All. 184 (1895).

decree. Sir Rash Behary Ghosh, for the Appellants, has, however, drawn our attention to the decisions in *Ahmed Jumma* v. *Mahomed Syed* (9), *Basant Lal* v. *Najmunnessa* (10), *Gungamoyee* v. *Shib Shunkar* (11), *Nundun Lal* v. *Joy Kishen* (12), *Kristo Churn* v. *Radha Churn* (13), *Nurul Hassan* v. *Mahomed Hasan* (14), *Muthu* v. *Chellappa* (15) and *Gopal Chandra* v. *Gossain Das* (16). Some of these cases are possibly distinguishable, but it has not been disputed that from the others a Rule is deducible which would negative the contention of the Appellants. On behalf of the Respondents, reliance has been placed particularly upon the cases of *Badiunnessa* v. *Shamsuddin* (8), *Gopal Chandra* v. *Gossain Das* (16) and *Ashfak Hossein* v. *Gouri Sahai* (17) which, it has been contended, negative the position taken up by the Appellants.

It is not necessary for our present purpose to determine the true scope and meaning of the term "appeal" as used in cl. 2 of the third column of Art. 182; upon that matter there has been divergence of judicial opinion. While a narrow view was taken in some of the cases already mentioned, a wider interpretation was placed upon the term in the cases of *Abdul Rahiman* v. *Maidin Saiba* (18), *Shivram* v. *Sakharam* (19), *Viraraghava* v. *Ponnammal* (20) and *Kristnama* v. *Mangammal* (21). In these cases, the position was maintained that time ran against the decree-holder from the date of the final decree in the appeal, irrespective of the question whether the appeal did or did not imperil the decree whereof execution was ultimately sought. We do not propose to enter upon an examination of this wide problem for two reasons, *first*, because even if the view be maintained that a decree-holder is entitled to the benefit of the extended time contemplated by cl. (2) of Art. 182, only when the decree whereof execution is sought is imperilled by the appeal, the position taken up by the Appellants cannot be sustained, and *secondly*, because the contention of the Appellants must fail in view of the decision of the Judicial Committee in *Ashfaq Husain* v. *Gauri Sahai* (17).

As regards the first point, it is clear that although a person who is a party to a compromise cannot challenge the validity of the consent decree by way of appeal, it is competent to a party to the suit, who has not joined in the compromise to appeal against the decree, if he has been prejudiced thereby. This has been recognised in suits for partition of joint properties where a decree has been made by consent of some only of the parties to the litigation. [*Nityamoni* v. *Gokul Chandra* (22).] It is also clear that circumstances may be imagined in suits of other description, for instance, suits for contribution or even suits for possession of joint property, where in the event of a compromise amongst some only of the parties to the litigation, another person, a party to the suit but not a party to the compromise, may challenge the decree by way of appeal on the ground that he has been prejudiced

(8) I. L. R. 17 All. 103 (1895).
(9) I. L. R. 6 Cal. 194 (1880).
(10) I. L. R. 6 All. 14 (1883).
(11) 3 C. L. R. 30 (1878).
(12) I. L. R. 5 Cal. 598 (1889).
(13) I. L. R. 19 Cal. 750 (1891).
(14) I. L. R. 8 All. 573 (1886).
(15) I. L. R. 12 Mad. 480 (1889).
(16) I. L. R. 25 Cal. 594; s. c. 2 C. W. N. 556 (1898).
(17) L. R. 38 I. A. 37: s. c. 15 C. W. N. 370 (1911).
(18) I. L. R. 22 Bom. 500 (1896).
(19) I. L. R. 33 Bom. 39 (1908).
(20) I. L. R. 22 Mad. 60 (1899).
(21) I. L. R. 26 Mad. 91 (1902).
(22) 18 C. L. J. 16 (1910).

thereby. In the present instance, we have the unquestionable fact that the contesting Defendants did prefer an appeal against the entire decree. In that appeal, there was, to use the language of the decision in *Ram Chandra* v. *Antaji* (23) the chance or risk of the Appellate Court modifying the decree of the Trial Court. The entire decree was under appeal and was in peril. It is worthy of note that the contesting Defendants were in a manner constrained to appeal against the entire decree. The Plaintiffs sought a decree for ejectment of the Defendants, the relief claimed was a joint decree against all of them. The result of the consent decree and of the decree on contest was that there was a decree for possession in favour of the Plaintiffs against all the Defendants, but against some, the decree was by consent while against others, it was on contest. The decree did not define the precise position of the Defendants who had entered into the compromise. It did not specify their share in the property if they were in joint possession; if they were in occupation of demarcated plots, the decree did not define such portions. The result was that the decree, though made by consent as to a portion and on contest as to the remainder, was still a joint decree, in the sense that if maintained, it entitled the Plaintiffs to recover possession of the entire property in dispute from all the Defendants jointly. The contesting Defendants appealed against the decree. As the decree did not define their position, they were bound to appeal against the whole decree. It is thus plain that the validity of the entire decree was in controversy in the appeal, and from this point of view, the Plaintiffs decree-holders would undoubtedly be entitled to the benefit of cl (2) of Art. 182.

[*Gopal Chandra* v. *Gossain Das* (16) and *Badiunnessa* v. *Shamsuddin* (8).] Some stress has been laid upon the decision in *Christiana Sens Law* v. *Benarashi Prosad* (5) which is clearly distinguishable and is of no assistance to the Appellants. In that case there were two distinct decrees one in favour of some of the Defendants against the Plaintiff, the other in favour of the Plaintiff against the other Defendants. An appeal was preferred against the latter portion of the decree; that appeal did not and could not imperil the other portion of the decree. In these circumstances, the decree-holder was rightly held not entitled to the benefit of cl. (2) of Art. 182. Nor is the decision of the Judicial Committee in *Batuk Nath* v. *Munni Dei* (24) of any avail to the Appellants. In that case, there was no decree of the Court of Appeal because the appeal preferred to the Judicial Committee never came up for disposal by their Lordships. The appeal was dismissed by the Registrar for non-prosecution, and it was ruled that the order of the Registrar was not a decree of the Court of Appeal.

As regards the second point, namely the effect of the rule deducible from the decision of the Judicial Committee in *Ashfak Hossein* v. *Gauri Sahai* (17), we are of opinion that it is completely destructive of the contention of the Appellants. There a joint decree for sale of land was obtained by the Plaintiffs against the Defendants. The decree was *ex parte* against one of the Defendants and was on contest as against the others. The person against whom the

(5) 19 C. W. N. 287 (1914).
(8) I. L. R. 17 All. 103 (1895).
(16) I. L. R. 25 Cal. 894; s. c. 2 C. W. N. 556 (1898).
(17) L. R. 38 I. A. 87; s. c. 15 C. W. N. 870 (1911).
(23) 5 Bom. L. R. 735 (1903).
(24) I. L. R. 38 All. 284; s. c. 13 C. W. N. 740 (1914).

and the *patta* is proved and admitted to have been granted by Defendant No. 3, so I find that it is a valid *patta* and agree with the finding of the learned Munsif of the Court below."

Defendant No. 1 preferred this second appeal.

Babu Surendra Chandra Sen (with him *Babu Hemendra Chandra Sen*) on behalf of the Appellant contended that Plaintiff having claimed under a lease which was to last "*putra-poutradikramay*"; his lease was for a term exceeding 9 years and so under sec. 85, Bengal Tenancy Act, the lease was not admissible in evidence and did not create any title to the Plaintiff. *Jarip Khan* v. *Dorfa Bewa* (1); the lease being entirely void its invalidity could be raised not only by the landlord, but also by a trespasser in the position of the Defendant; Plaintiff in this case having based his title only upon his lease and not upon prior possession, he could not prove his title by any other means excepting his lease, and this lease being inadmissible in evidence, he had nothing to shew his title.

Babu Brajalal Chakravarti for the Respondent contended that Plaintiff was entitled to adduce evidence, irrespectively of the document, to prove his tenancy and this evidence consisted of the admission by Defendant No. 3 that he granted the lease, that he took an adequate *selami* and also that Plaintiff obtained possession of the remainder of the land covered by the lease and that upon this evidence Plaintiff was competent to prove tenancy by virtue of prior possession; that if the lease in question be inoperative, still Plaintiff was entitled from this to shew that there was an oral agreement creating the tenancy; that the Plaintiff's lease was not a perpetual lease, and the expression "*putra-poutradikramay*" in the lease only meant that the holding would be a heritable one."

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff's case was that he had obtained a settlement from Defendant No. 3 who was a raiyat and that upon his going to a portion of the land of which he had obtained the settlement he was opposed by Defendants Nos. 1 and 2. He, therefore, brought this suit for ejectment of Defendants Nos. 1 and 2. The Plaintiff claimed under a lease the term of which is described by the expression "*putra-poutradikramay*." The lease is, therefore, for a term exceeding 9 years and having regard to the case of *Jarip Khan* v. *Dorfa Bewa* (1) the document was not admissible in evidence and could not have operated to create any title in the Plaintiff. The lower Appellate Court, however, decreed the Plaintiff's suit.

On behalf of the Respondents the difficulty is sought to be got over in three ways. Firstly, it is said that the Plaintiff was entitled to adduce evidence irrespective of the document to prove his tenancy. This evidence, it is said, consists in the present case, of an admission by Defendant No. 3 that he had granted the lease, that he took an adequate *selami* and also that the Plaintiff seemed to have obtained possession of the remainder of the land covered by the lease. If the admission of Defendant No. 3 could be used against Defendants Nos. 1 and 2, we are of opinion that this is evidence relating to the transaction of the lease and that there being a document as evidence of that transaction the oral evidence is not admissible. We do not think that it is sufficient, to prove the Plaintiff's tenancy, to show that he was in possession of other lands covered by the

(1) 17 C. W. N. 59 (1912).

(1) 17 C. W. N. 59 (1912).

lease and we note that there does not appear to have been any evidence that the Plaintiff was in such a possession.

It is then contended that it would be possible for the Plaintiff to prove that there was an oral agreement by Defendant No. 3 to create a tenancy. There does not appear to have been any evidence oral or documentary, other than the evidence of the transaction—the transaction which could only be proved by the document of the lease.

It is then contended that the lease is not a perpetual lease. This contention cannot prevail having regard to the expression "*putra-poutradikramay.*"

The appeal is therefore allowed, the judgment and decree of the lower Appellate Court are set aside and the Plaintiff's suit is dismissed with costs in all Courts.

H. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 636 OF 1912.

HOLMWOOD, J.
CHAPMAN, J.
1914,
28, July.

ABDUL GONI CHOUDHURY, Plaintiff, Appellant,
v.
MAKBUL ALI and others, Defendants, Respondents.

Act (XI of 1859), sec. 37—Class of tenants entitled to protection under section—Raiyat at fixed rent and occupancy raiyat—Enhancement of rent—Record-of-rights—Presumption if may be rebutted by what happened before record—Duty of Appellant to place necessary materials before Court.

Plaintiff claiming under a purchase at a sale for arrears of revenue sued to have the holding of the Defendants annulled under sec. 37 of Act XI of 1859. It was found that the Defendants had cultivated the land themselves for 30 years before 1895 when they obtained pottah *as raiyats at fixed rates.*

Held—*That the protection of occupancy raiyats at fixed rates which is referred to in sec. 37 of Act XI of 1859 is not one of the ordinary exceptions in that section. It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation of the soil and are cultivating it.*

The term "rights of occupancy at fixed rent" meant in the year 1859 the successors of khademi khud khast *raiyats in the Regulations and to these persons have succeeded "raiyats holding at fixed rates" under the Bengal Tenancy Act. Raiyats holding at fixed rates therefore are primarily the persons referred to in the proviso to sec. 37 of Act XI of 1859.*

A person who takes the tenancy originally as a raiyat at fixed rates may not thereby acquire an occupancy right, but a person who has already obtained occupancy rights cannot by obtaining a grant of fixed rent lose that occupancy right.

BHUT NATH NASKAR *v.* SURENDRA NATH DUTT (1) *referred to.*

That the Plaintiff's prayer for assessment of fair and equitable rent should also be rejected as such a prayer was not within the scope of a suit under sec. 37 of Act XI of 1859.

Quære—*Whether a purchaser at a Revenue Sale can sue, according to the provisions of the Bengal Tenancy Act, to enhance the rents of occupancy raiyats not holding at fixed rents or fixed rates of rent.*

SARAT CHANDRA ROY CHOWDHRY *v.* ASIMAN BIBI (2) *referred to.*

(1) 18 C. W. N. 1025 (1909).
(2) 8 C. W. N. 601 (1904).

ABDUL GONI CHOUDHURY *v.* MAKBUL ALI.

When a decree has been passed against a person who desires to appeal it is for him to put forward all necessary materials for the purpose of getting the presumption which is against him on the lower Court's judgment set aside.

The presumption arising from a finally published record-of-rights can be rebutted by evidence of what happened before the record was made.

This was an appeal preferred on the 20th of March 1912 against the decree of Babu Rajani Kanta Chatterjee, Subordinate Judge, 1st Court of Zilla Chittagung, dated the 11th of January 1912, reversing the decree of Babu Rasick Mohan Bhattacharjee, Munsif, 3rd Court of that place, dated the 10th of July 1911.

The material facts will appear from the judgment.

Babus Probodh Kumar Das and *Khitish Ch. Chakravarty* (for *Babu Amulya Charan Chatterjee*) for the Appellant.

No one for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This Second Appeal arises out of a suit brought by the Plaintiff to have the holding of the Defendant declared such a holding as can be annulled under sec. 37 of Act XI of 1859.

It appears that the Plaintiff is the purchaser of the rights of Defendant No. 5 who purchased the *teraf* at a sale for arrears of revenue. The Defendants Nos. 1 and 2 are persons who, the Judge found, have cultivated the land themselves for 30 years before 1895 when they obtained *pottah* as raiyats at fixed rates. That *pottah* of course conferred upon them higher privileges than that of ordinary occupancy raiyats, but it certainly did not take away the occupancy right which they had already acquired, for they must have acquired that right prior to the Bengal Tenancy Act, not that in our opinion it would make any difference. The protection of occupancy raiyats at fixed rates which is referred to in sec. 37 of Act XI of 1859 is not one of the ordinary exceptions in that section. It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation of the soil and are cultivating it. The term "rights of occupancy at fixed rent" meant in the year 1859 apparently the successors of *khademi khud khast* raiyats in the Regulations while the ordinary *khud khast* raiyats became occupancy raiyats. The intention of the Legislature therefore was that these *khademi khud khast* raiyats should not only not be liable to ejectment but should not be liable to any enhancement of rents; and to these persons have succeeded what the Bengal Tenancy Act now classes as "raiyats holding at fixed rates." Raiyats holding at fixed rates therefore are primarily the persons referred to in the proviso to sec. 37 of Act XI of 1859. But this doctrine of protection has been extended by recent rulings of this Court to ordinary occupancy raiyats, and the judgment of Mr. Justice Mitra which is the leading case on this point* is frequently followed in this Court and has never been dissented from. The protection therefore is extended under the Bengal Tenancy Act from these *khademi khud khast* raiyats or raiyats at fixed rates to all classes of occupany raiyats; and the decision of Mr. Justice Mookerjee upon which the Chief Justice did not express any opinion in the case of *Bhut Nath Naskar* v. *Surendra Nath Dutt* (1), which is based upon a technical interpretation of

(1) 13 C. W. N. 1025 (1909).

* *Sarat Chandra Roy Choudry* v. *Asiman Bibi*, 8 C. W. N. 601 (1904).

sec. 160 of the Bengal Tenancy Act can have nothing whatever to do with the question before us.

It may be argued that a person who takes the tenancy originally as a raiyat at fixed rates does not thereby acquire an occupancy right. But that does not imply that a man who has already obtained occupancy rights can by obtaining a grant of fixed rent lose that occupancy right that appears to us to be neither in accordance with equity or common sense or the wording of the law.

We must therefore hold that the Defendants were precisely in the position of those tenants who are mentioned in the proviso to sec. 37 and that not only are they protected but nothing in the law can be construed to entitle the purchaser to eject them or to enhance their rent. That is the law, and to argue that the purchaser loses a valuable right namely the right of enhancement which he would have in the case of ordinary occupancy rights is to misconstrue the whole effect of the section itself, which is in terms directed against enhancement. If the ruling of Mr. Justice Mitra is correct an occupancy raiyat in the ordinary sense of the word is also protected by that section and it is doubtful whether in that case the purchaser can enhance his rent, although the Bengal Tenancy Act itself provides for the enhancement of the rent of an ordinary occupancy raiyat. However this is not the question which we have to deal with here.

Another question which was argued was with regard to the Judge's view of the *khatian* of 1898 in which the Defendants are recorded as *kaimi modhya satyadhikari* or intermediate tenure-holders at fixed rent. It was faintly urged that the presumption arising from this record could not be rebutted by evidence of what happened before the record was made. It appears to us that the findings of the Judge as to what happened before the record was made proved conclusively that the record was wrong; for these men had been cultivating this land with their own hands for 30 years when they obtained the *pottah* describing them as *kaemi* raiyats. The area of the land was only 4 kanis and odd and there was no indication whatever that this holding was a tenure. It can only be a tenure if it is proved that it was demised for the purpose of setting cultivators upon it and for collecting rent, and not for the purpose of being cultivated by the raiyat or his family and servants. The facts of the case which extend up to 1895 and are not altered in any way by the *pottah* of that date except in respect of giving the Defendants fixed rent conclusively prove that at the time of the settlement they could not have been tenure-holders within the meaning of sec. 5 (*l*), Chap. III of the Bengal Tenancy Act.

The third contention was that we ought to have the *pottah* before us to construe it. As the Defendants have not chosen to appear in answer to this appeal it is suggested that we ought to give the Appellant further time to get this *pottah* produced. We have always understood that when a decree has been passed against a person who desires to appeal, it is for him to put forward all necessary materials for the purpose of getting the presumption which is against him on the lower Court's judgment set aside. He could easily have made a prayer in the petition of appeal that the Defendants be called upon to produce this *pottah*, or that the lower Court be directed to obtain it and forward it to this Court. We cannot either wait for it now or construe it. The finding however of the learned Judge and the arguments of the learned Vakil indicate quite sufficiently what were its contents and the arguments

which are based upon it with which we have already dealt.

As regards the Plaintiff's prayer for assessment of fair and equitable rent we cannot see how that can arise in a suit under sec. 37 of Act XI of 1859 since the very basis of the protection offered by that section is against any enhancement, and enhancement is really what the Plaintiff is seeking for. It is not within the scope of the suit; if it were, fair and equitable rent of an occupancy raiyat at fixed rates would obviously be the rent which had been fixed for his holding.

The result is that the appeal is dismissed, but without costs as the Respondents do not appear.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 3656 OF 1913.

MOOKERJEE, J. ROE, J. 1915, Heard, 20 and 21, May. Judgment, 21, May.	HARINATH CHAUDHURI, Defendant, Appellant, *v.* HARADAS ACHARYYA CHOUDHURI and others, Plaintiffs, Respondents.

Money paid under compulsion of legal process, suit to recover, if lies*—Bonâ fides *of party receiving payment—Attachment of debt ostensibly payable to other than judgment-debtor—Necessity of enquiry as to who is real creditor—Duty of Court to guard against its order prejudicing party not before the Court—Civil Procedure Code (Act V of 1908), Or. 21, r. 46 3).

A sued B for recovery of money and obtained an order for attachment before judgment. The property attached was a debt due ostensibly from C to D but the debt was attached on the allegation that B and not D was the real creditor and the Court issued a prohibitory order on C. A obtained an ex parte *decree in his suit against B and C was then called upon to pay into Court the money due from him ostensibly to D. C deposited the money in Court on an order being made that the money would be retained in Court till the adjudication of the question whether B or D was beneficially interested therein. No enquiry was made into this question and without notice to C or D the Court on the application of A paid out the money to him. D subsequently sued C and recovered judgment against him on the debt. C now sued A to recover the money which he had deposited in Court and which without notice to him or his creditor D had been withdrawn by A. Both the Courts below concurrently found that not B but D was the real creditor of C.*

Held—*That though the principle is that where money has been paid by the Plaintiff to the Defendant under compulsion of legal process, which is afterwards discovered not to have been due, the Plaintiff cannot recover it back in an action for money had and received, there must be* bonâ fides *on the part of the party who has got the benefit of his opponent's payments in order to bring this principle in force. If the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down above may not prevent the Defendant from recovering the money back.*

MARRIOT *v.* HAMPTON (1) *and* WARD *v.* WALLIS (4).

That in the present case the Defendant was able to appropriate the money by what constituted a grave abuse of the process of the Court and the principle laid down above had no application.

(1) 7 T. R. 269; 2 Smith's Leading Cases 420 (1797).

(4) [1900] 1 Q. B 675.

HARINATH CHAUDHURI *v.* HARADAS ACHARYYA CHOUDHURI.

That the money deposited in this case did not cease to be the money of the Plaintiff merely because he had brought it into Court on the faith of a conditional order which directed its retention in Court pending enquiry into the question raised as to who was the real creditor and the Court had full authority to compel the Defendant to bring back the money into Court to be repaid to the Plaintiff.

Or. 21, r. 46, cl. (3), contemplates a case where there is no dispute that if the suit results in a decree against the Defendant or there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor.

There being such a dispute in this case, it was incumbent on the Court to make an enquiry, and the conditional order was the proper order to make in this case.

The Court has inherent power to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings.

This was an appeal from a decision of Babu Annada Kumar Sen, Subordinate Judge, Mymensingh, dated 11th August 1913, confirming that of Moulvi Latfar Rahaman, Munsif, Mymensingh, dated the 17th July 1912.

The facts of the case material to this report will fully appear from the judgment.

Mr. A. Guha and *Babus Birendra Kumar Dey* and *Akhil Chandra Guha* for the Appellant.

Babus Joyti Prosad Sarbadhikari and *Prokash Ch. Mazumdar* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The problem which requires solution in this appeal may be concisely stated. On the 30th June 1909, A sued B for recovery of money. On the same day, A obtained an order for attachment before judgment under r. 5, of Or. 38, C. P. C. The property attached was a debt due ostensibly from C to D; but the debt was attached on the allegation that B and not D was the person beneficially interested in it. The result was that a prohibitory order was issued upon C. On the 13th August 1909 A obtained an *ex parte* decree in his suit against B. C was then called upon to pay into Court the money due from him ostensibly to D. On the 8th October, C applied to the Court and intimated that he was willing to bring the money into Court, provided he was absolved from liability to pay a second time to D, and provided also that interest ceased to run upon his debt from that date. The Court thereupon ordered that the money, if deposited, would be retained in Court till the adjudication of the question, whether B or D was beneficially interested therein. On the faith of this order, the money was brought into Court on the 13th December 1909. Thereafter, without notice to C or D, the Court, on the application of A, paid out the money to him. D who had no intimation of these proceedings, subsequently sued C and recovered judgment against him on the debt. C now sues A to recover the money, which he had deposited in Court and which without notice to him or to his creditor D, had been withdrawn by A. The Courts below have decreed the claim and A has appealed to this Court. The substantial question in controversy on the merits in this litigation consequently plainly, is, whether B or D was beneficially interested in the debt. The Courts below have concurrently answered this against A, and have found that B had no interest in the money, in other words, that not B but D was the real creditor of C.

This is a finding of fact which cannot be successfully challenged in second appeal; indeed no attempt has been made to assail it before us; but the question has been mooted, has C any cause of action against A? On behalf of A, it has been argued that there is no cause of action, *first*, because the money was recovered under compulsion of legal process, and cannot accordingly be recovered by any form of suit; and *secondly*, because by virtue of Or. 21, r. 46, of the Code of Civil Procedure, the money, as soon as deposited, ceased to be the money of the Plaintiff and that, consequently he is not entitled to recover it back. In our opinion there is no foundation for either of these contentions.

As regards the first ground, it is clear that the principle of the rule in *Marriott* v. *Hampton* (1) which has been the bulwark of the argument for the Appellant, is of no real assistance to his cause. The principle is that where money has been paid by the Plaintiff to the Defendant under compulsion of legal process, which is afterwards discovered not to have been due, the Plaintiff cannot recover it back in an action for money had and received. The foundation of this doctrine was thus stated by Lord Kenyon: "After a recovery by process of law, there must be an end of litigation; otherwise there would be no security for any person." To the same effect is the observation of Grose, J. "It would tend to encourage the greatest negligence, if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." Lawrence, J., added that if the case alluded to, that is, the decision of Lord Mansfield in *Moses* v. *Macferlan* (2) be law it would go the length of establishing this, that every species of evidence which was omitted by accident to be brought forward at the trial, might still be of avail in a new action to overrule the former judgment, which is too preposterous to be stated. The principle was again formulated by Patterson, J., in *Cadaval* v. *Collins* (3): "Money paid under compulsion of law cannot be recovered back as money had and received, and further, where there is *bonâ fide*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." We refer to this statement in order to emphasize the qualification to the general rule formulated in the following terms by Kennedy, J., in *Ward* v. *Wallis* (4). "There must be *bonâ fides* on the part of the party who has got the benefit of his opponent's payments in order to bring the principle laid down in that case [*Marriott* v. *Hampton* (1)] into force; if the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down in *Marriott* v. *Hampton* (1) may not prevent the Defendant from recovering the money back."

Let us examine the application of this principle to the circumstances of the present case. Here money was deposited by the Plaintiff C on the faith of an order which stated explicitly that the money would be retained in Court, pending the determination of the question, whether the money belonged to B, the then judgment-debtor of A, or to D the alleged creditor of the depositor C. That enquiry was never made; but the Court, without notice to the depositor and his alleged creditor,

(1) 7 T. R 269; 2 Smith's Leading Cases 420 (1797).
(2) 2 Burr. 1009 (1760).

(1) 7 T. R. 269; 2 Smith's Leading Cases 420 (1797).
(3) 4 A. & E. 858 at p. 866 (1836).
(4) [1900] 1 Q. B. 675.

paid out the money to the present Defendant, on his application, so that neither C nor D was allowed an opportunity to defend his rights. We need not hold that this conduct of A was in any way designedly fraudulent, but this much is plain that he was able to appropriate the money by what constituted a grave abuse of the process of the Court. The principle of decision in *Marriott* v. *Hampton* (1) has no application to these circumstances.

As regards the second ground, it is contended that under Or. 21, r. 46, the money, as soon as it was deposited, ceased to be the money of the depositor. Cl. (3) of r. 46 is in these terms: A debtor prohibited under cl. (1) of sub-r. (*1*) may pay the amount of his debt into Court and such payment shall discharge him as effectually as payment to the party entitled to receive the same. This clearly contemplates a case where there is no dispute that if the suit results in a decree against the Defendant, or if there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor. In the present case, the deposit was clearly conditional. The order of the Court makes it plain beyond all controversy that the deposit was made pending the adjudication of the question whether B or D was beneficially interested in the money. But it has been contended on behalf of the Appellant that this order was irregular, as the Code neither contemplates an enquiry, nor provides for the issue of notices upon parties affected by its order. This argument overlooks the elementary principle that no judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights. Our attention has been drawn in this connection to r. 5 of Or. 45 of the Rules of the Supreme Court in England. An examination of that Rule shows that there is no foundation whatever for the contention of the Appellant. There the rules expressly provide for an enquiry in the events which have happened here. R. 5 is in these terms: whenever in any proceedings to obtain an attachment of debts, it is suggested by the garnishee that the debt sought to be attached belongs to some third person or that any third person has a lien or charge upon it, the Court may order such third person to appear and state the nature and particulars of his claim upon such debt. R. 6 then provides that after the allegation of any third person under such order as in r. 5 mentioned and of any other persons who by the same or any subsequent order may be ordered to appear or in case of such third person not appearing when ordered, the Court may order execution to issue to levy the amount due from such garnishee. Consequently the Rules of the Supreme Court in England contemplates, not an *ex parte* order to the prejudice of third person who may be really interested in the debt due from the garnishee but an enquiry in the presence of all the persons interested. Our Code does not contain any specific rule of the type of rr. 5 and 6 of Or. 45 of the Rules of the Supreme Court in England. But the Court has inherent power to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings. In the case before us, the Court was competent, indeed, it was incumbent upon the Court to make a conditional order of this description and to provide that the money deposited was not paid to the decree-holder till adjudication of the question of title to that money. Reference may in this connection be usefully made to the instructive decision of

(1) 7 T. R. 269; 2 Smith's Leading Cases 420 (1797).

the Court of Appeal in *Roberts* v. *Death* (5). In that case, the garnishee who was ordered to bring the money into Court, contended that the money was due to the judgment-debtor, not in his personal capacity but in his capacity as a trustee. The question arose, whether the money, if deposited, should be paid without enquiry. Lords Justices Brett, Cotton and Lindley unanimously held that it would not be right to make the payment without an enquiry into the question, whether the money was trust-money or not, and they directed that the money should be brought into Court to abide the event of an enquiry. In our opinion, the money deposited in this case, did not cease to be the money of the Plaintiff, merely because he had brought into Court on the faith of a conditional order which directed its retention in Court pending enquiry into the question raised.

We feel no doubt whatever that the justice of the case lies entirely with the Respondent and that the Court has full authority to compel the Appellant to bring back the money into Court to be repaid to the Plaintiff. [*Mrinalini* v. *Abinas* (6)].

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 429 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 16, June.
Judgment, 17, June.

BRAHMADAT TEWARI, v. CHAUDAN BIBI.

Will—Due execution and attestation, proof of—Attesting witnesses, turned hostile—Court may find execution proved from other evidence—Proof that testator saw attesting witnesses sign, and latter saw testator sign, if necessary, where Will regular on its face—Presumption of due execution.

The mere fact that attesting witnesses to a Will have repudiated their signature does not invalidate the Will, if it can be proved by evidence of a reliable character that they have given false testimony.

When the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with; in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the Will.

It is not necessary under the law that affirmative evidence should be forthcoming that the testator did as a matter of fact see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. It is enough if the circumstances show that their relative position was such that they might have seen the execution and the attestation respectively.

Every presumption will be made in favour of due execution and attestation in the case of a Will regular on the face of it and apparently duly executed.

This was an appeal from a decision of H. Foster, Esq., District Judge, Saran, dated 1st October 1912.

The facts of the case will appear from the judgment.

(5) 8 Q. B. D. 130, 319 (1881).
(6) 11 C. L. J. 513 (1910).

BRAHMADAT TEWARI *v.* CHAUDAN BIBI.

Babu Harihar Prosad Singh for the Appellant.

Babu Nores Chandra Singh for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This appeal is directed against the grant of probate of a Will alleged to have been executed by one Ram Charan Tewari on the 19th March 1893. The Will was registered six days later. The testator died on the 10th August 1911. On the 3rd May 1912 the application for probate was made by his grand-daughter the sole surviving beneficiary under the Will. The caveator is a brother of the testator. There is no room for doubt on the evidence that the Will was executed by Ram Charan Tewari. The only substantial question in controversy is, whether it was duly attested. The document on the face of it purports to have been attested by thirteen witnesses inclusive of the scribe, of whom five signed their names as witnesses, and eight affixed to their signature, the words "on the admission of the executant." Six of the thirteen witnesses are proved to be dead, two have been examined and have proved hostile to the Petitioner; three others have not been examined on the allegation that they too were hostile; the whereabouts of the remaining two witnesses have not been traced. The two attesting witnesses who have been examined are constrained to admit that they signed the Will as witnesses. One of them, however, could not recollect whether he had seen the testator sign. The other stated that he had signed as an attesting witness at the request of a third person who assured him that the testator had left the Will in his custody and desired the witness to attest. This statement is remarkable, as the witness did not affix to his signature, as seven other witnesses did, a note that he had signed on receiving an acknowledgment of execution by the testator. In this state of the evidence, it has been argued by the caveator that as the testimony of the attesting witnesses who have been examined, does not establish full compliance with the statutory requirements, probate should not be granted. In our opinion, this contention cannot prevail, as there is ample reliable evidence on the record to show that the Will was duly executed and attested. Brij Behary Tewari who was present at the time of the execution of the Will, though he did not sign as an attesting witness, states in his examination-in-chief that when the Will was signed by the testator, Mahabir Tewari, Balmukund Tewari, Sheo Shankar Upadhya and Ramlal Upadhya were present there, that the witnesses and the testator signed, that the witnesses signed in the presence of the testator and in the presence of each other, and that the testator's signature was made in his presence. Two of these attesting witnesses namely, Balmukund Tewari and Ramlal Upadhya are proved to be dead; the other two namely, Mahabir Tewari and Sheo Shankar Upadhya have been examined, and, as already stated, have deposed practically in favour of the objector. This, however, does not compel the Court to pronounce against the Will. It was ruled by this Court in the case of *Nubo Kishore Doss* v. *Joy Doorga Dossee* (1) that the mere fact that attesting witnesses to a Will have repudiated their signature does not invalidate the Will, if it can be proved by evidence of a reliable character that they have given false testimony. To the same effect is the decision of the Judicial Committee in *Cooper* v. *Bockett* (2). The principle is well settled that when the

(1) 22 W. R. 189 (1874).
(2) 4 Moo. P. C. 419 (1846).

evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with, in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the Will. [*Young* v. *Richard* (3) and *Burgoyne* v. *Showler* (4).] In the case before us, there is no reason why the testimony of Brij Behary Tewari should not be accepted in its entirety. That evidence shows that Balmukund and Ram Lal were present when the Will was signed by the testator and that they signed in his presence and in the presence of each other. This is confirmed by the fact that against the signatures of Balmukund and Ramlal, there is no note that they had signed on receiving an acknowledgment of execution from the testator; and the same remark applies to Mahabir and Sheo Shankar, both of whom are stated by Brij Behary to have been present when the Will was executed, which is consistent with the fact that their signatures appear as those of attesting witnesses, without any note or qualification as in the case of some of the other witnesses. This is sufficient to show that the requirements of sec. 50 of the Indian Succession Act, which has been made applicable to the Wills of Hindus by sec. 2 of the Hindu Wills Act, were substantially complied with. Under that section—we refer to so much of it only, as is necessary for our present purpose—the first requirement is that the testator shall sign the document; the second is that his signature shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will; the third is that the Will shall be attested by two or more persons, each of whom must have seen the testator sign, and each of the witnesses shall sign the Will in the presence of the testator; but it shall not be necessary that more than one witness be present at the same time. In the present case, there is no question as to the first two requirements; the signature of the testator, which has been proved by Brij Behary, appears eight times on the document which is composed of sheets posted in succession and made into a roll. But as regards the third requirements, it is urged that Brij Behary does not say that the witnesses saw the testator sign and that the testator saw the witnesses sign. It is not necessary, however, that affirmative evidence should be forthcoming that the testator did as a matter of fact see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. It is enough if the circumstances show that their relative position was such that they might have seen the execution and the attestation respectively, or as Walde, J., said *in re Trimnell* (5), the true test is, whether the testator might have seen, not whether he did see, the witnesses sign their names [*Newton* v. *Clarke* (6).] In cases of this description, as was pointed out by this Court in *Sibo Sundari Debi* v. *Hemangini Debi* (7) on the authority of *Wright* v. *Sanderson* (8), every presumption will be made in favour of due execution and attestation in the case of

(3) 2 Curt. 371 (1839).
(4) 1 Rob. 5 (1844).
(5) 11 Jur. N. S. 248 (1865).
(6) 2 Curt. 320 (1839).
(7) 4 C. W. N. 204 (1899).
(8) L. R. 9 Pro. D 149 (1884)

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a Will, regular on the face of it and apparently duly executed [*Lloyd* v. *Roberts* (9), *Harris* v. *Knight* (10) and *re Peverett* (11).] As Foy, L. J., observed in *Wright* v. *Sanderson* (12), the Court of Probate has long been accustomed, rightly and wisely, to give great weight to the presumption of due execution arising from the regularity *ex facie* of the testamentary paper produced, where no suspicion of fraud has occurred.

In our opinion, the evidence in this case establishes beyond reasonable doubt that the Will was duly attested, and as we have already said, we feel no doubt whatsoever that it is a genuine instrument.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at five gold mohurs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

L. P. APP No. 18 OF 1914.

JENKINS, C. J. WOODROFFE, J. 1915, Heard, 7 and 8, April and 3, May. Judgment, 3, May.	SONAI CHUTIA, Defendant, Appellant, *v.* SONARAM CHUTIA, Plaintiff, Respondent.

Trans'er of Property Act (IV of 1882), sec. 54—Trans'er of immoveable property of less than Rs. 100 in value to mortgagee with possession on failure to pay off mortgage—Oral trans'er—Delivery of possession, necessity of—Formal delivery.

Where immoveable property of less than Rs. 100 in value was first mortgaged to A with possession, and then on mortgagor's failure to pay up the mortgage amount, the latter on 5th March 1906 orally sold the property to A, and at the same time formally delivered possession by pointing out boundaries, by endorsing on the back of the mortgage bond the fact of the sale and by handing it over to A; and the mortgagor later on, on 6th June 1906, sold the property to B by a registered deed.

Held—*That every thing that could be done to deliver possession to give effect to the sale of 5th March 1906 was done, and the requirements of sec. 54 of the Transfer of Property Act having thus been satisfied, title passed to A and B's suit to recover the property from A must fail.*

SIBENDRAPADA BANERJEE *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (1) *distinguished.*

This was an appeal under sec. 15 of the Letters Patent preferred on the 19th February 1914, against the decree of Mullick, J. dated the 21st January 1914, made in Appeal from Appellate Decree No. 2820 of 1911, which had been preferred on the 20th November 1914, against a decree of A. Playfair, Esq., Subordinate Judge of Zilla Sibsagar, dated 13th June 1911, affirming a decree of Babu Benudhar Rajkhowa, Munsif of Gola Ghat, dated 31st August 1910.

The material facts will appear from the judgment of Mullick, J., which was as follows :—

MULLICK, J.—One Dataram took lease of some land from Government. By a mortgage-deed, dated 21st June 1904, he mortgaged the land to the Defendant with a condition that, if within two years the principal sum was not paid, he would sell the land to the Defendant. On the 5th March 1906, he made an endorsement on the mortgage to the following effect; "As I have not been able to pay you the money

(9) 12 Moo. P. C 158 (1858).
(10) 15 P. D. 170 (179) (1890).
(11) [1902] Probate 205.
(12) 9 P. D. 149 (163) (1884).

(1) I. L. R. 34 Cal. 207 (1907).

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I make over the *jamai potta* to you. You have your name registered." On the 6th of June 1906, Dataram, however, sold his interest in the land to the Plaintiff. The Plaintiff now sues for declaration of title and possession on the ground that the transfer to the Defendant being by an unregistered deed it cannot prevail against his purchase which was by a registered deed.

Both the Munsif and the Subordinate Judge have dismissed the suit and the Plaintiff now prefers this Second Appeal.

On behalf of the Plaintiff it is urged that, if the unregistered endorsement is a deed of sale, it cannot pass any valid title as against him. On behalf of the Defendant it is urged that it is not a deed of sale, that it should be disregarded and that there was, in fact, an oral sale accompanied by delivery of the property. But in my opinion the Subordinate Judge intends to find as a fact that there was no oral sale of the property and that the Defendant's title is based on a transfer by the endorsement of the 5th March 1906. If there had been no such transfer in writing the property being under Rs. 100 in value, the Defendant would have been at liberty to prove a sale by mere delivery of possession. But in view of the finding that the transfer was effected not by delivery of possession but by the written document, the decree of the Subordinate Judge cannot be supported.

Upon the findings, there is no case for remanding the suit to the lower Appellate Court.

The Plaintiff is entitled to succeed in this appeal and to have the suit decreed as prayed for. The appeal is, therefore decreed with costs.

Mr. N. C. Burdoloi for the Appellant.

Mr. G. Sircar and *Babu Probodh Ch. Roy* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal from a judgment of Mr. Justice Mullick. He has reversed the decree of the lower Appellate Court which had confirmed the decree of the Munsif. It appears to us that the determination of the lower Courts did substantial justice between the parties. And although there may be some difficulty in supporting the reasons by which they arrive at that conclusion the record furnishes sufficient foundation for a decision in favour of the Defendant. It is true that the Defendant was a mortgagee and in possession. And no doubt in view of that fact we must have regard to what was decided in the case of *Sibendrapada Banerjee* v. *Secretary of State for India in Council* (1). But we have the additional fact in this case that it is in evidence that on the occasion of the subsequent oral sale there was a delivery of possession, the boundaries were pointed out, formal possession was deliverd and a mortgage document was endorsed and handed over to the Defendant. Everything therefore was done that could be done to deliver possession. Under the circumstances we ought to hold that there was a delivery of possession. It is said that there is no finding of the lower Appellate Court of this delivery of possession. It is because in the view that it took it did not consider it necessary. Now, we in Second Appeal have powers to consider evidence and to determine any issue that might have been left undetermined by the lower Appellate Court. We consider that the evidence on the record justifies a finding of delivery of possession sufficient for the purpose of sec. 54 of the Transfer of Property Act. We therefore restore the

(1) I. L. R. 34 Cal. 207 (1907).

decree of the lower Appellate Court. Each party will bear his own costs in this Court.

Appeal allowed.

[CRIMINAL REVISIONAL JURISDICTION]

REV. No. 1159 OF 1915.

GREAVES, J.
WALMSLEY, J.
1915,
28, October

ABDUL ALI and ors., Petitioners,
v.
KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 106—Findings necessary to justify an order for bond for keeping the peace on a conviction for unlawful assembly—Indian Penal Code (Act XLV of 1860), sec. 143.

The Petitioners were convicted under sec. 143, I. P. C., and bound down under sec. 106, Cr. P. C., to keep the peace.

Held—*That the findings did not sufficiently and clearly show that the acts for which the accused were convicted under sec. 143, I. P. C., necessarily involved a breach of the peace or any evident intention of committing the same and the order under sec. 106 should be set aside.*

This was a Rule granted on the 3rd September 1915 against the order of W. A. Cosgrave, Esq., Additional District Magistrate of Sylhet, dated 5th July 1915, convicting the Petitioners under sec. 143, I. P. C., and sentencing them to various terms of imprisonment, an appeal from which order was dismissed by H. A. Street, Esq., Sessions Judge of Sylhet on the 28th July 1915.

The judgment of the Sessions Judge which states the facts of the case was, so far as is necessary for this report, as follows :—

"This is an appeal against an order of the Additional District Magistrate convicting the 14 Petitioners under sec. 143, I. P. C., and sentencing them to various terms of imprisonment. The prosecution case is to the effect that Afruz Bekht an influential zemindar, but possibly less influential than he alleges, bought at auction sale in 1912 certain land which previously belonged to his enemies Sonai and Monai Mea. He duly obtained possession and inducted his tenant Syamar Bap who has been in possession since. Last year Afruz Bekht was bound down under sec. 107 and the accused party took the opportunity to come armed and drive Syamar Bap from the land. This happened on the 23rd March last. One Jafar Mondal came and informed Afruz who directed his men not to fight and they left the place, taking refuge in the house of one Alfu. The details have been more fully set forth by the Magistrate. Afruz Bekht sent a letter to the police station which reached the Sub-Inspector the same evening. It contains a general allegation that his tenant has been ousted, but gives no details and is obviously not intended as a first information. No occurrence in the way of a fight actually took place and this letter has all the appearance of being *bonâ fide* though I shall have to question one statement it contains. On the next day accused Salim filed an *ejahar* to the effect that Afruz Bekht's men had attacked him on his land, that a gun had been fired by Afruz's brother and several persons on both sides wounded. The Police therefore took up the matter and in the result have sent up these accused.

(Here the Sessions Judge discussed the evidence on the record.)

"I accordingly hold that the Appellants (except Sabaz) formed with others an unlawful assembly with the common object set forth in the charge and that they were rightly convicted.

"I have been asked to reduce the sen-

tences but the view of the Magistrate is that very serious consequences might well have resulted and that the local conditions are such that some serverity is necessary. I am not prepared to overrule that view.

"Appellant Sabaz is acquitted. The appeals of the remaining Appellants are dismissed and their convictions and the sentences passed under sec. 143 are confirmed. They will surrender to their bail."

The material findings of the Magistrate are referred to in the judgment of the High Court.

Mr. A. Rasul and *Babu Hemendra K. Das* for the Petitioners.

Mr. Orr for the Crown.

The Judgment of the Court was as follows :—

The accused in this case were convicted under sec. 143, I. P. C., and bound down under sec. 106, Cr. P. C. It has been urged before us that the order under sec. 106, Cr. P. C., is without jurisdiction as there was no finding of any likelihood of a breach of the peace being committed or of any evident intention of committing acts which would involve a breach of the peace. The Appellate Court came to no finding upon this point. All that is said in the judgment of the Appellate Court is that the Appellants formed with others an unlawful assembly with the common object set forth in the charge. In the lower Court the findings are as follows :—"The common object of this unlawful assembly was by means of criminal force or show of criminal force to take possession of the plot of land cultivated by Syam Bup." There is a further finding to this effect : "There can be no doubt that had not Afruz Bekht Chowdhry directed Syam Bup and his other tenants not to resist the accused but to remain quietly in Alphu Moral's *bari*, there might have been a serious riot as Afruz Bekht is, according to the evidence on the record, the leading zemindar in Aurangpur and must have many men under his control. Obviously the accused persons thought that they had their enemy at their mercy as if on account of having been bound down under sec. 107, Cr. P. C., he decided not to resist their attacks they could do what they liked in seizing land by force, while if he did resist their armed attack by sending a similar body of men and a riot ensued, they would be able to get him mulcted of the amount of Rs. 5,000." Various decisions have been quoted before us, but it seems to us that the law is succinctly and accurately laid down in *Jib Lal Gir* v. *Jogmohan Gir* (1) where it is said that "being a member of an unlawful assembly does not necessarily involve a breach of the peace. It does however involve an apprehension that a breach of the peace may result. Nor does a conviction of an offence under sec. 143 of being a member of an unlawful assembly necessarily amount to a conviction of "taking unlawful measures with the evident intention of committing a breach of the peace. In order to bring the acts of the accused within either of these terms it is necessary that the Magistrate should expressly find that the acts of the persons convicted amounted to this or at all events that the evidence is so clear that without such an express finding a superior Court, such as a Court of Revision, should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same." We have already referred to the findings in this case and they do not seem to us to sufficiently and clearly show that the acts for which the accused were convicted under sec. 143 necessarily involve a breach

(1) I. L. R. 26 Cal. 576 (1899).

of the peace or any evident intention of committing the same.

The Rule is therefore made absolute and the order under sec. 106, Cr. P. C., set aside.

Rule made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1168 OF 1915.

GREAVES, J. WALMSLEY, J. 1915, 4, November.		SITAL PROSHAD, Petitioner, *v.* THE KING-EMPEROR,

Criminal Procedure Code (Act V of 1898), sec. 108 (b—Bond for keeping the peace—Findings necessary to justify an order under section—Distinction between sec. 108 (b), Cr. P. C., and sec. 153A, I. P. C.

Although to constitute an offence under sec. 153A, I. P. C., there must clearly be an intention to promote feelings of enmity or hatred, different considerations arise with regard to the provisions of sec. 108 (b), Cr. P. C. In order to justify an order under sec. 108 (b), Cr. P. C., one has only got to find that there are words used in the leaflet or matter complained of which are likely to promote feelings of enmity or hatred; and once one has got these words present there is no necessity for finding intention such as would be necessary if the person was placed under his trial under sec. 153A, I. P. C.

This was a Rule granted on the 8th September 1915 against an order of J. Johnston, Esq., District Magistrate of Monghyr, dated 8th July 1915, directing Petitioner under sec. 108, Cr. P. C., to execute a bond of Rs. 2,000 with two sureties of Rs. 1,000 each to keep the peace for one year

The Petitioner had been called upon to give security under sec. 108, Cr. P. C., for having circulated a leaflet called "Apna Sanatan Dharma Pahchano" containing passages calculated to create ill-feeling between Hindus and Mahomedans and having thereby attempted to promote hatred and enmity between the two classes. On evidence the Judge found the contents of the leaflet, of which the Petitioner was proved to be author and publisher, one of a nature punishable under sec. 153A, I. P. C.

Babus Dasarathi Sanyal, Siva Nandan Roy and *Rajendra Prosad* for the Petitioner.

Mr. S. Ahmed for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner in this case has been bound down under sec. 108 (*b*), Cr. P. C. We granted a Rule calling on the District Magistrate to show cause why the order should not be set aside on the ground that upon the true construction and interpretation of the leaflet as a whole the Court below ought to have held that it does not contain any matter the dissemination of which is punishable under sec. 153A, I. P. C., which necessitates there being an intention to promote feelings of enmity or hatred. On behalf of the Petitioner it was contended that even if the matter or some of the matter contained in the leaflet was likely to promote feelings of enmity or hatred, there could be no order made under sec. 108, unless the Court was satisfied that there was an intention in using the words of the leaflet to promote or attempt to promote feelings of enmity or hatred; and we were referred to *Joy Chandra Sarkar* v. *Emperor* (1), as an authority that for a conviction under sec. 153A there must be a deliberate attempt to excite class against class and an intention to create enmity. We were also

(1) I. L. R. 38 Cal. 214 at p. 225 (1910).

referred to a case of *Jaswant Rai* v. *K. K. Athavale* (2), which lays down that to constitute an offence under sec. 153A there must be an intention to promote feelings of enmity and hatred. We were further referred to two English cases *Sullivan's* case (3) and *Regina* v. *Burns* (4), cases under the English Common Law, which were cited before us as authorities for the proposition that to constitute an offence under sec. 153A which is said to be founded upon the principles of the English Common Law, there must be intention. The only case to which we were referred which is an actual decision under sec. 108 (*b*), Cr. P. C. is a case of *U. Dhamaloka* alias *Colvin* (5). It is a case decided in the Lower Burma Chief Court by a single Judge and he without ambiguity lays down the proposition that to justify an order under sec. 108 (*b*) there must be an actual intention to promote or attempt to promote feelings of enmity or hatred. Our view of the section is at variance with this decision. We think that although to constitute an offence under sec. 153A, I. P. C., there must clearly be intention, different considerations arise with regard to the provisions of sec. 108 (*b*), Cr. P. C. It is true that the words of the section are "any matter the publication of which is punishable under sec. 153A, I. P. C." But in our view in order to justify an order under sec. 108 (*b*), one has only got to find that there are words used in the leaflet or matter complained of which are likely to promote feelings of enmity or hatred; and once one has got those words present there is no necessity for finding intention as would be necessary if the person was placed under his trial under sec. 153A. If this were not so there would be no necessity for sec. 108, Cr. P. C. as proceedings would be taken under sec. 153A, I. P. C. The result is that we have simply got to look to the actual words of the leaflet to see if there are words which in our opinion are likely to promote feelings of enmity or hatred. The leaflet as a whole is designed to call backsliders from the true Hindu faith to a sense of their misdeeds. If the words of the leaflet had been confined to this there would have been nothing in respect of which the Petitioner before us could have been bound down under sec. 108, Cr. P. C. But it seems to us that when we read the leaflet we find that there are passages which go far beyond the object above-mentioned if that had been the only object. For instance, there was no necessity to refer as the pamphlet does, to members of the Mahomedan faith as beef-eaters and destroyers of the Vedas and the Shastras. The passage which specially seems to us unnecessary for the alleged purpose of the pamphlet is as follows: "Is it proper to observe the festivals and the religious observances of a religion on the basis of which thousands of our temples have been pulled down and the images of our gods and goddesses have been burnt for heating *hamams* for providing hot baths, many places of pilgrimage have been destroyed for the construction of mosques (and mosques built on the sites) crores of beneficial cows have been killed and crores of ignorant widows or orphans and the helpless are deprived of (degraded from) their religion by misleading and enticement." These facts may be true historically or not and in the history of any country or of any community or religion there are passages which are best left un-

(2) 10 Punjab Records of 1907 at p. 28; 5 Cr. L. J. at p. 489 (1907).
(3) 11 Cox. 44 (1868).
(4) 16 Cox. 355 (1886).
(5) 12 Cr. L. J. at p. 248 (1911).

THE

Calcutta Weekly Notes.

Vol. XX] MONDAY, JANUARY 10, 1916. [No 7.

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Paper books—Arranging Exhibits chronologically.

His Lordship the Chief Justice in the course of hearing Appeals from the Original Side, with the concurrence of their Lordships Woodroffe and Mookerjee, JJ., adjourned the further hearing of an appeal which had been part heard so that the contents of the paper book might be better arranged. His Lordship further intimated that it would be a great convenience to the Bench as well as to the Bar and would save a good deal of public time if the papers in the paper book were arranged chronologically. This will certainly be an improvement upon the practice so far obtaining on the Original Side, *viz.*, separating the documents of the Appellants from those of the Respondents. His Lordship also intimated that the carrying out of those directions should not touch the pockets of the clients.

Delegation of Statutory powers.

Re Nagappa Thevan and another, I. L. R. 38 Mad. 602 is an important decision. Under the Epidemic Diseases Act, the Local Government which has been authorised for the purpose by the Governor-General in Council can take measures, can empower any person to take measures and can prescribe regulations to be observed by the public or by any person or class of persons to put down plague or any other epidemic. By virtue of the powers vested in it by the Governor-General in Council the Madras Government has framed a number of regulations to carry out the purposes of the Act. Rule 104 of these regulations is as follows: "The Collector may from time to time assign to Plague Officers and Assistant Plague Officers jurisdiction over specified local areas and confer on the latter officers such powers as he may deem fit." In the case in question a particular town in the District of Coimbatore in the Madras Presidency became badly infected with plague and the Sub-Deputy Collector who was the Plague Officer in exercise of the powers delegated to him by the Collector by a general order passed under the aforesaid r. 104 of the Madras Government Regulations directed the immediate evacuation of a portion of the town and almost all the houses were accordingly evacuated but it was found that the accused kept his toddy shop open. The accused was tried and convicted of disobeying a duly promulgated order of a public servant under sec. 18 (2), I. P. C. The question which the High Court had to consider was whether the order disobeyed was a lawful order under the Epidemic Diseases Act of 1897 and it was held that it was not. In setting aside the conviction the High Court held that the aforesaid r. 104 is *ultra vires* of the Local Government. The Government itself can give powers under the Act to an officer or officers to take measures but it cannot give powers under the Act to any person so as to enable the latter to give the said powers to others unless such powers by their very nature can be exercised only by agents. The power to order evacuation of houses is not a power of such a character that from its nature it can be conveniently exercised only through appointing agents to exercise that power by delegation as each occasion arises without any further reference to the principal on any particular occasion.

Murder of intestate by son—right to share in estate.

Since the abolition of forfeiture for felony it has been settled that where a person is criminally responsible for the death, *i.e.*, of the felonious slaying of another, whether the crime be murder or manslaughter, he cannot take anything under the will of the deceased. But there is no such incapacity or disqualification when the person guilty of the act of slaying the deceased was innocent of any crime as where the deceased was killed accidentally or by misadventure or his death was held to be a case of justifiable homicide. *In re Houghton*, (1915) 2 Ch. 173 was a proceeding to determine the right of Houghton to share in the estate of his father whom it was alleged he had murdered. In a Coroner's inquest it had been found that Houghton had murdered both his father and brother. On indictment for the murder of the brother conviction followed but the accused was found to be insane when he committed the act and ordered to be detained as a criminal lunatic. Thereupon an indictment for the murder of the father was not proceeded with. Joyce, J., held that Houghton was not in any way disqualified from sharing in the estate of his father who died intestate.

CRIMINAL CONSPIRACY.

CRIMES COMMITTED IF MAY BE PROSECUTED AS CONSPIRACY TO COMMIT THEM.

Rule of Reg. v. *Boulton* (12 Cox C. C. p. 87).

We have seen in our previous article (see *ante* p. xvii) that Bhashyam Ayyanger, J., held that if an offence is alleged to be committed in pursuance of a conspiracy, the accused should be charged either with the offence committed or for its abetment in the alternative and not cumulatively (I. L. R. 21 Mad., pp. 416-417). The Calcutta High Court has also in a recent case expressed an opinion that when a crime is committed in pursuance of a conspiracy, persons participating in the conspiracy are strictly speaking abettors (19 C. W. N., p. 706).

As the legitimate scope of sec. 120A, I. P. C., is not yet properly appreciated in India, we propose to show in the present article whether where an offence is alleged to have been committed in pursuance of a conspiracy, it would be legitimate to try the accused under sec. 120A read with the section relating to the substantive offence under the Indian Penal Code or under the latter read with sec. 109 [sec. 107, cl. (2), and sec. 108, expl. 5, I. P. C.].

The proper course seems to us to be that those who have committed the offence should be charged under the substantive section relating to the offence. But those who are alleged to have abetted the offence by conspiracy should be charged for the abetment of the offence by conspiracy as indicated above.

Let us now see if it is permissible, when a substantive offence is alleged to have been committed by conspiracy, for the Crown not to prosecute the accused for the substantive offence but only for a *conspiracy to commit the offence*, *i.e.*, under sec. 120A, I. P. C., read with the section relating to that offence. This form of indictment is being introduced in India since the introduction of the English Common Law offence of criminal conspiracy into the Indian Penal Code by Act VIII of 1913, in utter disregard of the fact that the practice has been severely condemned by English Judges of eminence.

This form of indictment was resorted to in England in some cases where the police felt that a charge of substantive offence would fail for absence of sufficient evidence but thought that a charge of conspiracy might succeed by offering what would be weak evidence of the commission of an offence but might be sufficient as evidence of conduct and the like to establish evidence of concert and association for the commission of an offence.

The impropriety of such a course was forcibly pointed out both at the Bar and by Lord Chief Justice Cockburn from the Bench in *R.* v. *Boulton* (12 Cox C. C. 87). Sarjt. Parry urged on behalf of the accused "that the only evidence of conspiracy was the commission of the crime; that this was insufficient (for which reason the charge had been abandoned), and that the Crown was trying indirectly to get a conviction for conspiracy to commit the crime, by insufficient or unreliable evidence of the commission of the crime." (12 Cox C. C. at p. 92.)

Lord Chief Justice Cockburn in charging the jury observed "We are trying the defendants for conspiring to commit a felonious crime, and the proof of it, if it amounts to anything, amounts to proof of the actual commission of the crime. Now I must say that this is not a course which commends itself to my approval. I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of the crime, it is not the proper course to charge the parties with conspir-

ing to commit it; for the course operates, it is manifest, unfairly and unjustly against the parties accused." (12 Cox C. C. at p. 93.)

Lord Chief Justice Cockburn then points out how the defence of the accused persons may be very seriously prejudiced by the adoption of this course. His Lordship says :—

"The prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others and deprives defendant of the advantage of calling their co-defendants as witnesses." (*Ibid.*, p. 93.)

The rule has been accepted by the leading English text-book writers as a sound rule of Criminal Law.

In India also Mr. John D. Mayne in his Commentary on the Indian Penal Code in Art. 250 (Third Edition, p. 475) relying on this rule observes that "it is an evasion of the law to twist a primary into a secondary offence, merely for the purpose of introducing a different jurisdiction or a lower scale of punishment. Accordingly in the case of *The Queen* v. *Boulton and others*, where the evidence, if believed, established the systematic commission of unnatural offences, while the Crown had limited the indictment so as only to charge as a misdemeanour, Cockburn, C. J., directed the jury to acquit."

We have seen that this is not the only ground on which Cockburn, L. C. J., condemned the procedure adopted in that case. What Mr. Mayne says is also a legitimate inference from His Lordship's charge to the jury. This further objection to the course which has been so pointedly indicated by Mr. Mayne is all the more objectionable in India where a serious substantive crime may be triable by a jury whereas a conspiracy to commit the same would not. This would mean the deprival of the accused of the right of a jury trial.

Let us next see whether the rule of *R.* v. *Boulton* has been followed by the Judges in India. Mookerjee, J., in *Pulin Behari Das* v. *King-Emperor* evidently in answer to counsel's argument observed that "it does not lay down any inflexible rule of law" that when there is not sufficient evidence to bring home a charge of substantive offence against an accused person, a charge of conspiracy cannot be maintained (see 16 C. W. N. at p. 1146). But there His Lordship surely meant that if a series of substantive offences, acts and conduct are offered as evidence to show that a conspiracy existed for waging war against the King (sec. 121A, I. P. C.), if some of the offences are not brought home to the accused other evidence may be sufficient to bring home the charge of conspiracy to him. This is quite true and does not in any way affect the "rule of law" laid down by Cockburn, L. C. J., that *where the proof intended to be submitted to the jury is proof of actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it.* In *Pulin's* case the charge was "conspiracy to wage war against the King." It was quite competent to the prosecution to show that "dacoity" was one of the means. So Mookerjee, J.'s observation in no way goes to limit the generality of the rule in *R.* v. *Boulton*.

That this is so is evident from a later judgment in which his Lordship has referred to the rule in *R.* v. *Boulton* in quite unequivocal terms. We find that Mookerjee, J., in his recent judgment in the Rajabazar Bomb Case refers to the rule of *R.* v. *Boulton* as a *well-settled principle* (see *Amrita Lal Hazra* v. *King-Emperor*, 19 C. W. N. 702). His Lordship says "that when evidence at the disposal of the prosecution is insufficient to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for conspiracy the proof whereof really rests on the establishment of that very crime." His Lordship cites in support of this proposition *Emperor* v. *Nanigopal* (15 C. W. N. 593 at 606) where Jenkins, C. J., also condemned such a course. The expression "inexpedient" is that of Jenkins, C. J., and "even though it may be lawful" is practically the same as that of Cockburn, L. C. J., in *R.* v. *Boulton* and of Lord Cranworth in *R.* v. *Selsbey and others* (5 Cox C. C., p. 197). Jenkins, C. J., used the expression "inexpedient" in the sense that such a course increases the length of a trial and is to be condemned on that ground no less than on the grounds so forcibly stated by Cockburn, C. J., and quoted by us in an earlier part of this article.

When the practice has been condemned by eminent Judges and text-book writers both in England and in India, the public prosecutors here should take note of it for saving both waste of public time and money as also serious prejudice to accused persons.

THE MAXIM: NO PRESUMPTION UPON A PRESUMPTION.

Authorities on the law of evidence generally agree with the remark of a recent text-writer that the term "presumption" is, in the law, "entirely superfluous" and "principally used, at the present time, on account of its convenient obscurity." See 2 Chamberlayne, Modern Law of Evidence, § 1026; 4 Wigmore, Evidence, § 2491; J. B. Thayer, "Presumptions and the Law of Evidence," 3 Harv. L. Rev. 141, 166. This censure applies both to what are called "presumptions of law" and what are called "presumptions of fact." J. B. Thayer, *supra*, at p. 166. "In dealing with the subject of evidence it is expedient to avoid the use of these terms, presumptions of law and presumptions of fact, for they do not help the discussion, and they are worse than useless, from their ambiguity." The former is simply a cloak to cover various rules of substantive law. See J. B. Thayer, *supra*, at p. 148; Best, Evidence, 11 ed., § 304. "Presumptions of law are in reality rules of law and a part of the law itself." *Doane* v. *Glenn*, 1 Colo. 495, 501. For instance, the courts really created a rule of property that adverse possession for twenty years bars the disseisee when they said that a lost grant would be "presumed" as a matter of law after that period. The latter is an imposing term usually signifying that the jury has been logical and reasonable in drawing certain inferences from proven facts. See Best, Evidence, § 304; Chamberlayne, Evidence, § 1027. "A presumption of fact is an inference which a reasonable man would draw from certain facts which have been proved to him. Its basis is in logic; its source is in probability." *Liverpool*, etc., *Ins. Co.* v. *Southern Pacific Co.*, 125 Cal. 434, 58 Pac. 55. If there be obscurity due to failure to analyze and see in just what sense the word is used when used singly, it is doubly delusive when encountered in the common maxim, "there shall be no presumption upon a presumption." This doctrine, though capable of other interpretations, is limited in the books to the meaning that an inference, sometimes called a "presumption of fact," may not be based upon another inference, but must be drawn from some fact "established in direct evidence, as if it were the very fact in issue." Starkie, Evidence, pt. I, p. 80, quoted in *United States* v. *Ross*, 92 U. S. 281, 284; 2 Chamberlayne, Evidence, § 1029; 2 Wharton, Evidence, 2 ed., § 1226. The rule in this form has been vigorously attacked by Dean Wigmore; 1 Wigmore, Evidence, § 41; but it nevertheless crops up with frequent recurrence, sometimes with unfortunate results. *Globe Accident Ins. Co.* v. *Gerisch*, 163 Ill. 625, 45 N. E. 563. Usually the decisions appear correct in result; some may be explained on the general ground that there was not sufficient evidence to support a verdict; *Douglass* v. *Mitchell*, 35 Pa. St. 440; *Shoeman* v. *Temple Safety Deposit Vaults*, 189 Ill. App. 316; in others the primary facts upon which the structure of the jury's reasoning was built were not clearly established; *Bycynski* v. *Illinois Steel Co.*, 115 Ill. App. 326; in still others, the inferences asked were unreasonable; *Lamb* v. *Union Ry. Co.*, 195 N. Y. 260, 88 N. E. 371; *Phila. City Pass Ry. Co.* v. *Henrice*, 92 Pa. St 431; *Manning* v. *John Hancock Mut. L. Ins. Co.*, 100 U. S. 693; *Thayer* v. *Smoky Hollow Coal Co.*, 121 Ia. 121, 96 N. W. 718; *United States* v. *Ross*, 92 U. S. 281; but in all the maxim did nothing but give a confused and unsatisfactroy explanation of a correct result.

A recent case in which the maxim was invoked shows its usual application. *Atchison, T. & S. F. Ry. Co.* v. *De Sedillo*, 219 Fed. 686. In this case, it was necessary, in order to charge the railroad with the violation of a duty of due care, to prove that the deceased was struck at a certain crossing. His body was found on the track five hundred feet below the crossing. A foot severed from the body was found caught in a frog at an intermediate point. Footprints were found at the crossing, and two marks, such as might have been made by a body dragged along by a train, extended from the crossing to the point near where the body was found. The jury was asked to infer that the footprints were those of deceased, and from this and the marks along the track to infer that he was struck at the crossing and dragged along to the point where his body was found. A verdict for the plaintiff was set aside because founded on "a presumption upon a presumption." If the result was correct, it was simply on the ground that the plaintiff's case was too weak and conjectural to go to the jury. But had there been evidence from which the jury might reasonably have inferred that the footprints at the crossing were those of the deceased, it would seem on principle that, coupling that inference with the other facts of the case, the jury might again reasonably have inferred that the deceased was struck at the crossing, and so on *ad infinitum*.

In general, it is only where the court feels

that the evidence presented is insufficient to support a verdict that it bothers to forbid inference upon inference. Manifestly, in any case of circumstantial evidence, the ultimate conclusion from the facts is arrived at through a series of inferences. See 1 Wigmore, Evidence, § 41. Thus, a jury may infer from handwriting peculiarities that defendant wrote a threatening letter, and from this fact infer that it was he who murdered deceased. This logical process occurs every day, under the very noses of courts which proclaim that there may be no presumption upon a presumption. The true rule is that if the primary fact is sufficiently established to be the basis for a reasonable inference, such inference may be drawn and used in connection with other facts, or even alone, as the foundation for a fresh inference. See Best, Presumptions of Law and Fact, p. 247, "The existence of the principal or any intermediary evidentiary fact may be inferred from another, which is only the probable consequence of a third." If each inference is reasonable, the verdict, which is the final inference, cannot fail to be reasonable, and hence unimpeachable. This sounder rule is sometimes stated as an exception to the maxim that there shall be no presumption on a presumption; *Hinshaw* v. *State*, 147 Ind. 334, 363, 47 N. E. 157, 166. "This process of tallying and confirming each circumstance by the other does not infringe the general rule that one inference cannot be based on another. There is an important exception to that rule, however. A fact in the nature of an inference may itself be taken as the basis of a new inference, whether intermediate or final, provided the first inference has the required basis of a proved fact"; but it is apparent that the exception, rightly understood, eats up the rule. Like numerous other impressive legal phrases, which serve but to obscure, see Judge Smith, "The Use of Maxims in Jurisprudence," 9 Harv. L. Rev. 13, the maxim may profitably be discarded.—*Harvard Law Review.*

CURRENT INDIAN CASES.

(CIVIL.)

(Full Bench Cases.)

Limitation Act, Art. 132.

GAYA DIN *v.* JHUMMAN LAL, I. L. R. 37 All. 400.

A mortgage deed executed on the 16th July 1890 provided that the mortgagors should pay the principal amount in ten yearly instalments and that the interest should be paid monthly. It was further provided that in case of default of payment of interest in any month or of the principal by the stipulated period or if no payment was made in a year the mortgagee would be competent to realise the entire amount with interest in a lump sum through Court by suit. If the mortgagee in order to get interest did not bring a suit in default of any instalment and the mortgagors were unable to pay the money the interest should continue up to the stipulated period for ten years and after it up to the date of realisation. No payment was made either for principal or interest up to the institution of the suit on the 12th June 1902.

Held per Richards, C. J., Tudbal, J. (Banerji, J., dissenting) that Art. 132 of the Limitation Act deals with "suits to enforce payment of money charged upon immoveable property and the period of limitation prescribed is twelve years and time begins to run from the date when the money sued for "becomes due."

Possession by co-sharer.

LAHASO KUER *v.* MAHABIR TIWARI, I. L. R. 37 All. 412.

Where one co-sharer is for many years in exclusive possession of a particular plot and makes constructions thereon the presumption is that he is so in possession with the consent of the co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished.

(CRIMINAL.)

Indian Penal Code, sec. 337.

EMPEROR *v.* GULLAM HYDER PUNJABI, I. L. R. 39 Bom. 523.

The accused who was a *Hakim* by profession performed an operation on one of the eyes of the complainant with an ordinary pair of scissors and a needle and without taking the most ordinary precautions. The result was that the complainant partially lost the sight of the affected eye. The accused was convicted under sec. 338, I. P. C.

Held—When a *Hakim* gives out that he is a skilled operator and charges considerable fees the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the Criminal Law.

On the facts of the case the High Court altered the conviction under sec. 338 to one under sec. 337, I. P. C.

Merchant Shipping Act (57 and 58 Vic. c. 60).

Emperor *v.* A Goodhew, I. L. R. 39 Bom. 558.

The petitioner signed the usual articles of agreement with the Captain of the steamship "*Arcadia*" for a term of one year's service. In addition to the stereotyped form certain clauses were added under which *inter alia* the petitioner agreed to accept a transfer from that to any other of the P. and O. Company's steamship. The "*Arcadia*" was sold by the company and the petitioner was ordered by the Marine Superintendent of the company to transfer to the Salseth. This order the applicant disobeyed.

Held—That having regard to sec. 114 (3) of the Merchant Shipping Act and to the fact that the terms of the agreement were initiated by an officer of the Board of Trade they were *intra vires*.

That the order of the Marine Superintendent was a lawful order which the petitioner was bound to obey.

Correspondence.

To the Editor, "Calcutta Weekly Notes."

Sir,—Permit me through your column to draw attention of the authorities to the fact that in transferring Munsifs from one place to another due consideration is not always paid to the judicial work of the place from which the officer is transferred. One recent instance will be sufficient for the purpose. Babu Srish Chandra Chowdhury was first grade Munsif here at Chandpur exercising the special jurisdiction of trying suits up to the value of Rs. 2,000. He also exercised Small Cause Court powers in suits up to the value of Rs. 250. He has been suddenly transferred to Krishnaghar. The gentleman transferred in his place is a second grade officer and as such cannot have those special powers and there is no other first grade officer in the station. So there is no officer here who is competent to try the pending suits or receive plaints and execution petitions of the value between one thousand and two thousand rupees. Many difficulties will arise in conducting the special jurisdiction suits, execution and miscellaneous cases as there is no officer here competent to pass any order in those cases. Nothing but anomaly and confusion can be the result. Such difficulties were experienced on some previous occasions also.

Yours faithfully,
Hara Dayal Nag,
Pleader, Chandpur.

Chandpur,
The 4th January 1916.

The late Sir Henry Cotton, K.C. I.E.

To the Editor, "Calcutta Weekly Notes."

Sir,—While thanking your correspondent "Vakil" for drawing public attention to the omission made by newspapers in their obituary notices regarding the connection of the late Sir Henry Cotton with the Calcutta High Court, I beg to contradict the statement made by your correspondent regarding Sir Henry's connection with the Presidency Small Cause Court. Sir Henry was never a Judge of this Court. He was Judge of the Sealdah Small Cause Court from whence he was translated to the Bengal Secretariat. The only Civilian who sat on the Bench of the Presidency Court of Small Causes was the late Mr. T. D. Beighton.

Yours faithfully,
A Layman.

Calcutta, 3rd January 1916.

Reviews.

Indian Companies Act. *By S. Kasturi Rangachariar, B.A., B.L. Published by the Law Printing House, Madras. 1915.*

This is a carefully compiled edition of the Indian Companies Act (VII of 1913) as amended by Act XI of 1914. The subject has been exhaustively dealt with. Under each section is to be found the case-law bearing on it with a brief note giving prominence to the points of importance arising therefrom. The sections themselves have been carefully analysed and the principles underlying them have been stated in, as far as possible, the language of judgments cited as authorities for the propositions laid down. In annotating the sections the compiler has not only made a free use of all Indian Reports but has also largely drawn from the English Reports as the provisions of the Indian Companies Act are mainly derived from those of the English Act. The many important changes inaugurated by the new Act are also noted and the reasons therefor stated. Another feature of the book is that the bare texts of both the Indian Act of 1913 and

the English Companies (Consolidation) Act of 1908 have been printed at the beginning for purposes of reference and comparison. The volume ends with two appendices, one containing the rules made under the Act by the Government of India and the Local Governments and the other incorporating eight minor Acts relating to Societies and Corporations analogous to Companies, *e.g.*, the Societies Registration Act, the Presidency Banks Act, the Bankers Books Evidence Act, the Religious Societies Act, the Co-operative Societies Act, etc., which last have also been annotated with the case-law thereon. The book, we have no doubt, will prove most useful both to merchants and to lawyers who have to deal with company law. The get-up of the volume is attractive.

SANJIVA ROW'S ALL-INDIA DIGEST (Criminal), 1836-1915. Second Edition. Vol. I. *Published by the Law Printing House, Madras. 1915.*

In the present edition the compilers have included cases down to the end of the year 1915. With regard to the matter contained in the previous edition also, the book appears to have undergone a careful revision. The get-up of the book is excellent.

GHOSH'S DIARIES FOR 1916. *Demy 8vo. series: Price Re. 1. Pocket series: Prices from 4 as. to 8 as. Proprietor, J. N. Ghosh, Krishnaghur (Bengal).*

The above diaries which are already well-known to the public, while maintaining the useful features of their predecessors mark a distinct improvement on them in the matter of get-up. The diaries contain a large body of information useful both to lawyers and the lay public and the different sizes are designed to suit all tastes and requirements.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

VISCOUNT HALDANE.
LORD PARMOOR.
LORD WRENBURY.
MR. AMEER ALI.
1915,
25, November.

MUSSUMMAT PARBATI, Appellant,
v.
KANAHAYA LAL, Respondent.

Privy Council—Appeal not admitted by High Court for Appellant's failure to furnish security —Special leave, application for—Indulgence—Leave on usual terms.

This was an application for special leave to appeal. The Petitioner sued to recover possession of properties from the Defendant, who pleaded that he had been taken in adoption by the Petitioner's deceased husband.

The Subordinate Judge allowed the claim, but it was reversed by the High Court on appeal. The Petitioner then obtained from the High Court the usual certificate to appeal to His Majesty in Council, but she failed to deposit the required security within the time prescribed by the High Court. That Court therefore refused to admit her appeal.

Hence this petition.

Mr. Bhugwandin Dubé for the Petitioner submitted that it was a fit case for their Lordships' indulgence.

The petition was granted on the usual terms as to security, etc.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for the Petitioner.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before HOLMWOOD and MULLICK, JJ. APPEAL FROM APPELLATE DECREE NO. 2994 OF 1913. KARTICK CHANDRA DAS, Defendant, Appellant *v.* SATYA SREE GHOSAL AND ORS., Plaintiffs, Respondents. 16th December 1915.

Remand—Appellate Court, if and when to re-hear the whole case.

This was an appeal after remand from the judgment and decree of the Subordinate Judge of the 24-Parganas who agreeing with the Court of first instance decreed the Plaintiff's suit for ejectment of the Defendant. The Defendant claimed a permanent right in the land which was situated in Kidderpore, a Suburb of Calcutta. He alleged that he had acquired such a right by long possession beyond the memory of man at a fixed rent and that his predecessors had erected permanent structures on the land. In the first appeal from the Munsif's judgment which was heard by another Subordinate Judge the Plaintiff's suit was dismissed. The Plaintiff appealed to the High Court and the appeal was

heard by Jenkins, C. J. and N. R. Chatterjea, J., who remanded the case reversing the decree of the lower Appellate Court and sending back the appeal for re-hearing in the light of the remarks they had made.

Held, that in strict law a remand made by an Appellate Court without retaining the appeal in its own file necessarily reopened the whole case, and the Court of Appeal to which the case was remanded was bound to hear the appeal upon the judgment of the Court of first instance and on nothing else. Whenever it is intended to limit the scope of appeals to certain specific question remanded, it is absolutely essential that the High Court should lay down clearly without any possibility of mistake that it did intend to do so.

Hence the whole appeal was opened to the learned Subordinate Judge for decision.

Babu Sib Chunder Palit for the Appellant.

Sir Rash Behary Ghose, *Babus Mohini Mohon Chatterjee* and *Sarat Chander Sen* for the Respondents.

A. T. M. *Appeal dismissed.*

Civil Appellate Jurisdiction. Before N. R. Chatterjea and Newbould, JJ. Appeal from Appellate Decree No. 1472 of 1914. CHANDRADAYA SEN, Defendant No 2, Appellant *v.* BHAGABAN CHANDRA SEN and ors. (Plaintiffs) and GIRISH CHANDRA DHAR CHOWDHURY and anr. (Defendants Nos. 1 and 3), Respondents. Heard 15th December. Judgment 22nd December 1915.

Appeal, maintainability of—Contribution suit for—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41—Indian Contract Act (IX of 1872), sec. 69—"Bound by law to pay"—"Person interested in the payment of money"—Purchaser, liability of.

The Plaintiff and Defendant No. 1 were co-owners of a *taluk*. The share of the Defendant No 1 in the *taluk* was purchased by the Defendant No. 2 in execution of a mortgage decree in 1908. Prior to the purchase of the Defendant No. 2, the landlord of the *taluk* had obtained a decree for arrears of rent of the *taluk*, and after the purchase by Defendant No. 2, put up the *taluk* to sale in execution of the rent decree. When the Plaintiff deposited the entire amount due to the landlord and saved the *taluk*. He then brought this suit for contribution. There was an alternative case, *viz.*, if the Plaintiff was held liable to contribute, then, a decree for proportionate amounts might be passed against the Defendants.

Held, that as the suit was, upon the findings, one for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer it was exempted from the cognizance of Small Cause Court under Art. 41 of the Second Schedule of Act IX of 1887.

That the Defendant No. 2 was a person who was "bound by law to pay" within the meaning of sec. 69 of the Indian Contract Act.

Mothooranath v. *Kristo Kumar* (I. L. R. 4 Cal. 369) followed.

If a person was "bound by law to pay" by reason of the liability attached to the land, the Defendant No. 2 came within the purview of sec. 69 of the Contract Act, although his liability was not a double liability like that of the Plaintiff.

That the Plaintiff was a person interested in the payment of money within the meaning of that section (sec. 69).

"Rent is, by operation of law, the first charge on a tenure and a person, who purchases the same at an execution sale, must, in the absence of anything to denote the contrary, be taken to purchase it charged with the rent which is due in respect of it at the time of its purchase and there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due at the time of purchase."

Maharani Dasi v. *Harendra Lal Roy* (1 C. W. N. 458) followed.

Jogmaya Dasi v. *Girindra Nath Mukerji* (4 C. W. N. 590) and *Gobinda Chandra Chakrabarty* v. *Basanta Kumar Chakrabarty* (3 C. W. N. 384) distinguished.

Hence the Defendant No. 2 was liable only to the extent of the share purchased by him.

Babus Sarat Chandra Roy Chowdhury and *Sasadhar Roy* for the Appellant.

Babus Birendra Chandra Das and *Upendra Kumar Roy* for the Respondent.

A. T. M. *Appeal dismissed.*

recalled. It seems to us therefore that in this and other passages of the pamphlet there are words which are likely to promote feelings of enmity or hatred between Hindus and members of the Mahomedan religion. Having regard to this we consider that the order made by the District Judge of Monghyr binding down the Petitioner was rightly made.

The Rule is therefore discharged.

Rule discharged.

[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

VISCOUNT HALDANE.
LORD PARMOOR.
LORD WRENBURY.
SIR JOHN EDGE.
MR. AMEER ALI.
1915,
Heard, 21, 25, 26, October and 1, November.
Judgment, 16, November.

M. R. M. A. SUBRAMANIAN CHETTIAR, Appellant,
v.
RAJAH RAJESWARA DORAI, Respondent.

Trust-deed—Voluntary settlement to pay off debts—Trustee, mortgage by—Validity—Trustee acting improperly and unreasonably in execution of trust—Compromise based on such alienation, if valid—Compromise by guardian* ad litem *of minor without Court's sanction—Civil Procedure Code (Act XIV of 1882), sec. 462.

Where R, a zemindar who was heavily involved in debt, executed a deed of voluntary settlement, settling all his zemindary and certain other property—subject to the payment of specified debts which he then owed and to certain allowances to members of the family including himself directed to be made and to the several trusts, provisos and declarations therein contained—on his minor son RR, and appointed V as trustee thereof, and the allowances were made payable after the specified debts and the interest on and principle of such other debts and sums of money as should be incurred or become payable by the trustee for the purpose of paying off all or any of the said debts and sums of money; and the trustee finding that the income in his hand was not sufficient to meet the charges on the trust-estate and in order to save the estate arranged with certain financiers for raising a large sum on the security of the estate at a moderate rate of interest to pay off the debts, but the latter having required that R should become a party to the deed and that the allowances specified in the deed should be expressly postponed to their security, the trustee agreed to give a second mortgage of four lacs of rupees to R on the security of a suitable portion of the estate, in order, as he alleged, to obtain the assent of R and other persons entitled to the payment of allowances; and, in a suit by RR, in which the validity of this agreement to mortgage was challenged as beyond the power of the trustee, the latter urged that in the circumstances it was reasonable and prudent on his part to agree to give the mortgage:

Held—*That the trustee had not exercised his power (if he had it), properly and reasonably in the interest of the estate.*

That it was not established that the consent of the allowance-holders was required to enable the trustee to postpone their rights to the security of the financiers or that the latter would have pressed their requisition if the legal position had been explained to them and that regard for the position of R and his family and unwillingness on the part of the trustee to incur their ill-will did not justify the placing of a burden of four lacs on the trust-estate.

A compromise was entered into by the trustee with a creditor of R in a suit to declare the settlement invalid brought by such creditor against the trustee and RR, then a minor, by which the trustee executed mortgages not with a view

to imposing a new charge on the trust-estate but on the basis of utilising the charge already promised to R :

Held—*That the compromise being based on the invalid agreement with R was also invalid, and the mortgages effected in pursuance of the compromise were equally invalid.*

That the compromise was also invalid as not complying with the requirements of sec. 462 of the Civil Procedure Code of 1882, the trustee who had been appointed guardian ad litem *of RR having entered into the compromise without the sanction of the Court.*

MANOHAR LAL *v.* JADU NATH SINGH (1) *and* GANESHA ROW *v.* TULJARAM ROW (2) *referred to.*

These were consolidated appea's from the Madras High Court, (Sir Arnold White, C. J., and Miller, J.), whose Judgment is reported in I. L. R. 32 Mad., p. 490. The facts are fully stated in their Lordships' judgment, and that of the High Court. The father of the present Raja of Ramnad was heavily indebted. He executed a voluntary Settlement of the Ramnad Zemindari in 1895, by which he appointed a Trustee and created certain trusts. The material clauses of the Settlement were, in substance, as follows :—

Clause 7 provided that the Dewan Trustee should hold the premises thereby assured as owner thereof, but upon trust and subject as therein aforesaid, provided that notwithstanding anything therein contained, an assign for value in execution of those trusts should hold the estate or interest purporting to be conveyed or assigned to him, in the premises thereby assured free and discharged of the trusts, provisos, directions and declarations therein contained, except as otherwise expressly provided in such assignment.

Clause 9 appointed a Co-adjutor for the purpose of advising and counselling the Dewan Trustee in connection with the trusts.

Clause 12 required the permission in writing of the Co-adjutor to any agreement between the Dewan Trustee and any creditor and to the giving by the Dewan Trustee to any creditor of any security on the premises thereby assured.

Clause 17 required the like permission of the Co-adjutor to any settlement or compromise by the Dewan Trustee of suits or proceedings.

Clause 23 provided as follows :—

"And it is hereby further declared that by with and out of the rents income and profits of the premises hereby assured and by with and out of such other monies as shall from time to time come to the hands custody or control of the Trustee under or by virtue of or in execution of the trusts hereby created the Trustee.

* * * *

"In the fifth place shall apply such part or parts thereof as may be required in payment and discharge of the interest on and principal of the several debts and sums of money mentioned in the said Third Schedule and of the interest on and principal of such other debts and sums of money as shall be incurred or become payable by the Trustee for the purpose of paying off all or any of the said debts and sums of money mentioned in the said Third Schedule or otherwise for the purposes of the trusts hereby created.

* * * *

"In the sixth place shall apply such part or parts thereof as may be required

(1) L. R. 33 I. A. 128 : s. c. 10 C. W. N. 898 (1906).

(2) L. R. 40 I. A. 182 : s. c. 17 C. W. N. 765 (1913).

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in payment to the several persons mentioned in the Second Schedule hereto during their respective lives of the several monthly sums set opposite to their respective names and to each male or female child that may hereafter be born to the settlor at the rate of hundred rupees and seventy rupees respectively per mensem during his or her life. . . . .

* * * *

Clause 24 provided as follows :—

"Provided always and it is hereby decreed that anything herein contained notwithstanding the Trustee shall not be bound to make the several payments hereinbefore mentioned in the order in which the same are so mentioned but that the Trustee shall make such several payments as and when the same shall be required."

Clause 26 provided, shortly, that the Dewan Trustee should hold the trust-estate and the income thereof in trust for the Respondent until he should attain the age of 21 years and upon his attaining that age should convey and assign the same to him absolutely, but subject to the several payments thereinbefore directed to be made and to the several trusts, provisos and declarations therein contained respectively, as should then be subsisting payable unsatisfied and capable of taking effect.

The Appellant, who was a money-lender, lent the deceased Raja large sums of money both before and after the Settlement. In 1897 the Trustee negotiated a loan in England, which was finally completed in 1899. In 1898 the Trustee executed an agreement whereby he undertook to give a second mortgage upon the trust-estate for 4 lakhs of rupees in favour of the deceased Raja. In 1897 the Appellant and his father instituted a suit against the Trustee and the beneficiaries under the Settlement, for a declaration that the Settlement was invalid, and that the settled properties were liable for the satisfaction of the Raja's debts. The Trustee compromised that suit upon certain terms, and the suit was withdrawn. The effect of the compromise was that the Trustee undertook to pay the debts due to the Appellant, from the trust-estate, and subsequently executed two mortgages in favour of the Appellant in consideration of those debts.

The Appellant now brought two suits to recover moneys due to him. The minor Raja of Ramnad also brought a suit against the Appellant and the Trustee for a declaration that the said compromise and the mortgages executed by the Trustee were invalid. The Subordinate Judge held that the compromise was voidable for want of sanction by the Court, under s. 462, C. P. C., 1882, and further that the Trustee had acted in breach of the trust.

On appeal the High Court concurred with the Subordinate Judge in finding that the compromise, as well as the mortgages, were not binding on the minor Raja. Hence these appeals.

Messrs. P. O. Lawrence, K. C., L. DeGruyther, K. C., and *Kyffin*, for the Appellant submitted that the decisions of the Courts below were erroneous. *Firstly*, —the Trustee had power to execute the agreement in favour of the deceased Raja to pay him 4 lakhs. The evidence showed that the English lenders insisted upon the allowances of the Raja and the other allowance holders under the Settlement being postponed to the yearly payment on account of the proposed loan. The Raja's consent to the loan, although not essential, was nevertheless insisted upon. The English loan would probably have fallen through had the Trustee not ob-

tained the Raja's consent. It was a prudent act on the part of the Trustee to buy off the Raja's consent, and that of other allowance holders, in order to successfully raise the loan. The opinions given by Sir Bhashyam Iyengar and Mr. J. D. Mayne were questionable. Under the Settlement the allowance holders had a charge on the Estate, which the Raja by his voluntary deed could not postpone. In any case, the consent of the Raja and the other allowance holders, if not essential, was highly desirable from a business point of view. The Trustee acted honestly for the protection and benefit of the trust-property. The Trustee had wide powers under the Settlement, as well as under the law. Secs. 35 and 43, Indian Trusts Act, 1882.

The execution of the agreement, as well as the compromise of 1899, were reasonable and proper acts done to protect the trust-property. Reference was made to *Forshaw* v. *Higginson* (3), *A.-G.* v. *The Mayor of Norwich* (4).

Secondly, the execution of the agreement was not a breach of trust. The Courts do not expect a higher standard of good faith from a Trustee than what an ordinary prudent man would adopt under the circumstances. *Eaton* v. *Buchanan* (5).

Thirdly, the Trustee was entitled to compromise the action brought by the Appellant to set aside the Settlement, which was voidable under sec. 43 of the Indian Trusts Act, 1882. He was bound to defend the action under secs. 13, and 43, cl. (c), empowered him to compromise a claim. In fact, it has been held that a Trustee was guilty of breach of trust for not compromising. *Tanqueray* v. *Bowles* (6) and *Freeman* v. *Pope* (7), referred to. The Appellant's suit might have completely failed. The compromise was a *bonâ fide* attempt to preserve the Settlement. The case of *Graham* v. *Cashin* (8), and the case therein cited did not apply.

Fourthly, the burden lay on the Respondent to prove that the terms on which the Trustee compromised constituted a breach of trust, and he had failed to discharge it. Even assuming that the Trustee's agreement with the Raja was a breach of trust, there was nothing to show that the Appellant had such notice as to constitute him a party or privy to the breach of trust. *Hire Purchase Furnishing Company* v. *Richens* (9).

Fifthly, the sanction of the Court to the compromise was unnecessary. It was true that the Trustee was appointed, in the Appellant's action, guardian *ad litem* of the minor Raja. But the compromise was not made on behalf of the minor, and therefore sec. 462 of the C. P. C., had no application. The compromise was made by the Trustee as such, and the suit was withdrawn without any formal order of compromise. The Trustee was competent to compromise the action without consulting the minor at all. The case of *Ganesha Row* v. *Tuljaram Row* (2), was distinguishable. In that case the minor had independent rights in the joint family, which was affected by his guardian's compromise. Here, the Trustee alone represented the whole Estate under the Settlement, and

(3) 8 DeG. M. and G. 827 (1857).
(4) 2 M. and C. 406 (1837).
(5) [1911] A. C. 253, 268

(2) L. R. 40 I. A. 132 : s. c. 17 C. W. N. 765 (1913).
(6) 14 Eq. 151-156 (1872).
(7) 5 Ch. App. 538 (1870).
(8) 1 Ir. Rep. 404 (1901).
(9) 20 Q. B. D. 387 (1887).

he alone was competent to defend the suit and to compromise it. In any event, the compromise could only be set aside on restoring the parties to their original position.

Sir Robert Finlay, K. C. (with him *Mr. Kenworthy Brown*) for the Respondent submitted that the findings of the Courts below in so far as they were inferences from facts were concurrent. Both Courts had held that the Trustee was unduly prejudiced by a desire to help the deceased Raja; that he was not acting in the best interests of the trust; and that he was unduly anxious to help and to please the deceased Raja at the expense of the trust. The Appellant did not venture to give evidence in the case. He could have shewn on what grounds the Trustee was made to pay the post-Settlement debt of the Raja. There was no evidence to shew that the Raja would not have executed the mortgage in favour of the English lenders, and consented to postpone his allowance without some consideration. In fact, there was considered opinion to the effect that the Trustee could do all that was necessary to take the loan in England, without the consent of the Raja and the other annuitants. The agreement to pay 4 lakhs to the Raja was clearly an improvident act of the Trustee.

Further, the compromise was bad for want of compliance with sec. 462, C. P. C. The section provides in terms that no guardian shall enter into any compromise on behalf of a minor with reference to the suit. Reliance was placed on *Manohar Lal* v. *Jadu Nath Singh* (1), and *Ganesha Row* v. *Tuljaram Row* (2).

[Their Lordships intimated to the learned counsel that they did not wish to hear him any further, and reserved judgment.]

(1) L. R. 33 I. A. 123; s. c. 10 C. W. N. 898 (1906).

(2) L. R. 40 I. A. 182; s. c. 17 C. W. N. 765 (1913).

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARMOOR.—These are consolidated appeals from three judgments of the High Court of Judicature at Madras. The appeal which has been argued before their Lordships is one in which M. R. M. A. Subramanian Chettiar is Appellant, and Rajah Rajeswara Dorai is Respondent. It is unnecessary to refer further to the other two appeals since it is admitted that the decision in those cases depends on the decision given in the case which has been argued.

The question involved in the appeal is the validity of an agreement of compromise executed on the 16th day of January 1899, and of two mortgages dated respectively the 6th July 1899 and 13th July 1899. The validity of these documents is largely dependent on the consideration whether the trustee under a voluntary settlement of 12th July 1895, had power to give a mortgage bond for 4 lakhs of rupees on the security of a suitable portion of the Ramnad estate to the then Rajah of Ramnad.

The father of the Appellant lent considerable sums to the Respondent's father, who at all material times was the Rajah of Ramnad. On the 12th July 1895 the Rajah owed his creditors sums of money amounting to 20 lakhs of rupees, including a sum of Rs. 1,30,000, which he owed to the Appellant's father. At that date the Rajah executed a deed of voluntary settlement settling all his Ramnad Zemindary and certain other property, subject to the payment of the debts which he then owed and to certain allowances to members of the family including the Rajah himself therein directed to be made

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and to the several trusts, provisos, and declarations therein contained, on the present Respondent, who was a minor. The Rajah appointed as trustee Venkata Rangier, and as co-adjutor P. Chentsal Rao, and it was provided that the trustee should not without the permission in writing of the co-adjutor enter into any agreement with the creditors or mortgage or sell any part of the trust premises. Subsequent to the execution of the voluntary deed, the Rajah borrowed further sums from the Appellant's father giving as security certain jewels and furniture and his allowance under the deed of settlement.

The sums due to the creditors had been borrowed at a high rate of interest, and the income in the hands of the trustee was not sufficient to meet the charges on the trust-estate. To save the estate, it became necessary to borrow a large sum of money at a moderate rate of interest, and negotiations were entered into between the trustee, the co-adjutor, and certain financiers in England. On the 18th June 1897 a preliminary agreement was made between the trustee, Charles Augustus Verner, and Ogilvie, Gillanders & Co., to raise for payment of the debts existing at the date of the settlement of the 12th July 1895, the sum of 160,000*l*., and the equivalent in sterling of the Government revenue for a quarter of one year, to be secured by a trust-deed vesting the Ramnad Zemindary freed from all incumbrances in trustees for debenture holders. This arrangement was not completed until the 13th of June 1899, on which date the trustee, with the privity and consent of the co-adjutor and the Rajah, executed a mortgage of the whole trust-estate for the sum of 175,000*l*., repayable by instalments with interest at the rate of 5 per cent. The validity of this deed is not in question. Before its execution there were prolonged negotiations between the trustee and the intending lenders. Their Lordships recognise the difficulties which confronted the trustee and it was clearly of the first importance to obtain a large loan at a moderate rate of interest in order to pay off debts carrying compound interest at the rate of 12 per cent.

In the course of the negotiations for the English loan the intending lenders required that the Rajah should become a party to the deed, and that the allowances specified in the voluntary deed should be expressly postponed to their security. It is contended on behalf of the Appellant that in order to obtain the assent of the Rajah, and the consent of the persons entitled to the payment of allowances, it became necessary, and was reasonable and prudent on the part of the trustee, to agree to give a mortgage for 4 lakhs of rupees to the Rajah on the security of a suitable portion of the Ramnad estate, such security being subsequent to the mortgage given for securing the repayment of the English loan. This proposal is contained in a letter from the trustee to the Rajah on 25th April 1898, and on the same day the Rajah wrote to the agents of the intending lenders informing them that in the event of their advancing to the trustee a loan on the agreed conditions he would agree that the lenders, or their nominees, should have a first charge upon the Ramand Zemindary, and that no part of the marginally-noted allowance payable to him under the voluntary settlement should be paid in any year until all charges, that might be payable to the lenders under the present mortgage, had been paid in full, and that he undertook to execute in favour of the lenders or their nominees such documents as in their

opinion might be necessary for carrying out the arrangements. The High Court of Madras have held that assuming—without deciding—it to be within the power of the trustee to create such a charge on the trust-estate, the power was not exercised properly and reasonably and in the interest of the estate. Their Lordships concur in the conclusions of the High Court. There is no satisfactory evidence that the Rajah would not have executed the English mortgage deed and consented to postpone his allowance without some payment or consideration. The Counsel for the Appellant was pressed in his argument before their Lordships to refer them to the evidence in support of his proposition that the Rajah would not have assented to sign the deed and postpone his allowance without receiving payment or consideration. Their Lordships were not referred to any such evidence and the Counsel for the Appellant relied on a general statement that the Rajah was a difficult person for the trustee to influence. Apart from any payment or consideration it was in the interest of the Rajah that the intending loan should be satisfactorily arranged and, in the absence of evidence, there is no room for a presumption that he would not sign the deed, or would refuse to postpone his allowance, without some payment or consideration. On the other hand, the documents to which their Lordships have been referred do not support the contention put forward on behalf of the Appellant.

The preliminary agreement for the loan was signed on 18th June 1897. On the 22nd September 1897, the co-adjutor, P. Chentsal Rao, without whose assent the trustee had not the power to arrange the English loan, sent a telegram to Messrs. Lovelock and Lewes, Chartered Accountants, acting on behalf of the lenders, that :—"the Rajah consented to sign mortgage-deed and Rs. 66,000 or possibly Rs. 76,000 of the allowances can be postponed, letter follows." A further telegram was sent on the 28th September 1897 explaining that the Rajah was willing to give a charge upon the Zemindary free of the payment of allowances of Rs. 66,000 and possibly Rs. 76,000, and that this is what the co-adjutor meant by postponement. These telegrams were followed by a letter of 29th September 1897 in which the later telegram was confirmed, and the co-adjutor again states, that the Rajah is quite willing to do what Messrs. Lovelock and Lewes propose, namely, to give a charge on the Zemindary free from the payment of Rs. 66,000 or possibly Rs. 76,000, out of the allowances of Rs. 1,30,000, referred to in the trust-deed. The position taken up by the intending lenders on the question of the allowances is explained in a letter of 25th November 1897 which was brought to the notice of the trustee, and to which the trustee refers in a letter of 24th December 1897. It is stated that the intending lenders are prepared to proceed with the negotiations for the loan provided that all the allowances in favour of the Rajah and the members of his family are postponed to the security to be given to the debenture holders, both as regards the current payment required for the service of the loan and also in the event of the security having to be enforced. The consent of six members of the Rajah's family was not obtained to the postponement of the allowances, but the consent of the other allowance holders was accepted as sufficient after the intending lenders had obtained an opinion from Mr. Mayne that such consent was not required having regard to the terms of the trust-deed.

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The material factor is that the letter written by the Rajah on 25th April 1898, after receiving the promise of a payment or consideration of Rs. 4,00,000 secured by mortgage-bond on a suitable portion of the Ramnad estate, does not give any undertaking beyond that contained in the telegrams and letter of September 1897. Under these circumstances their Lordships are of opinion that the Appellant has failed to prove the first step which is necessary to justify the placing of a charge of Rs. 4,00,000 on the trust-estate.

In the second place the Appellant has failed to establish that the consent of the allowance holders was required to enable the trustee to postpone their rights to the security of the debenture holders, or that the intending lenders would have pressed their objection if the legal position had been explained to them. This point was not argued at any length before their Lordships, though it was evidently a main point in the argument in the High Court. The relevant paragraphs of the voluntary settlement are 7, 23, and 24. In paragraph 23 the settlement sets out in the sixth place a trust to make payment of the allowances specified in the second schedule, but these allowances are placed for the purpose of payment after (in the fifth place) the specified debts and the interest on and principal of such other debts and sums of money as shall be incurred or become payable by the trustee for the purpose of paying off all or any of the said debts and sums of money, although under paragraph 24 the trustee is not bound to make the payments in the order mentioned in the deed. Paragraph 7 provides that notwithstanding anything contained in the voluntary settlement, an assign for value in execution of those trusts should hold the estate or interest purporting to be conveyed or assigned to him, in the premises thereby assigned free and discharged of the trusts, provisos, directions, and declarations therein contained, except as otherwise expressly provided in such assignment. The joint effect of secs. 7 and 23 is that the trustee had power to place the loan security for the payment of the specified debts in priority to the allowance payments and that the assign for value would hold the estate or interest conveyed or assigned to him assured free and discharged of the trusts contained in the voluntary settlement except as otherwise expressly provided.

Sec. 24, which provides that the trustee shall make the several payments under the voluntary settlement as and when the same shall be required, cannot be construed to curtail the discretion given to the trustee in paragraph 23. It is material to observe that the trustee in a telegram to the co-adjutor on 18th March 1898, said that he and the co-adjutor must point out to the London people that under the trust-deed they are empowered to attend to the service of interest prior to payment of allowances. A similar opinion was expressed by Sir V. Bhasbyam Iyengar on 30th June 1898, and by Mr. Mayne on 20th September 1898. The Counsel for the Appellant justified the action of the trustee in giving consideration for the consent of the Rajah to postponement, although such consent was not legally required, on two grounds. In the first place he said that, apart from questions of strict right, the intending lenders insisted on the postponement of the specified allowances. The answer is that there is no evidence that the intending lenders would not have altered their attitude if the true legal position had been insisted on throughout the negotiations. They did alter it so far as regards six of the allowance holders, after obtaining the opinion of Mr. Mayne. In the

second place it was said that although the trustee might have had the power to postpone the payment of allowances, he was justified in his action out of regard to the position of the Rajah and his family, and his unwillingness to incur the ill-will of the Rajah and of the other allowance holders, which he might have incurred if he had used his power without their consent. Their Lordships cannot accept this explanation as justifying the trustee in placing a burden of Rs. 4,00,000 on the trust-estate, or come to any other conclusion than that the trustee was not acting properly and reasonably and in the interest of the trust-estate when he undertook to give the mortgage bond to that amount in favour of the Rajah.

The next question is whether the agreement of compromise of 16th January 1899, and the two mortgages of the 8th and 16th July 1899, can be supported if the promise to give the mortgage bond of Rs. 4,00,000, on the security of the trust-estate is invalid as not being within the powers of the trustee. The recitals of the compromise deed recite the agreement with the Rajah to give a mortgage bond for Rs. 4,00,000, on the trust-estate, thus giving the Appellant full notice. Moreover the compromise deed is based, not on imposing a new charge on the trust-estate, but on utilising the charge, already promised to the Rajah. The deed carries out this proposal by providing for the payment of certain sums to the Appellant so soon as the English loan is obtained, and by giving as security a third mortgage on the trust-estate, a first mortgage being executed to secure the English loan, and a second to secure the loan of Rs. 1,00,000 due to another creditor. In other words the compromise deed assumes the validity of the agreement with the Rajah and there is no evidence that the trustee or the co-adjutor had any intention, apart from the agreement with the Rajah, to place an additional charge in favour of the Appellant on the trust-estate.

The mortgage of the 6th July 1899, was executed in pursuance of the provision contained in the deed of compromise. The amount thereby secured was Rs. 4,73,143, with further interest thereon less the sum of Rs. 50,000 which the trustee agreed to pay in one week. Towards this sum the trustee paid to the Appellant Rs. 20,000, and secured the balance by a mortgage on crops on the 13th July 1899. This is the second mortgage to which this appeal relates. On the second mortgage the Appellant has received certain payments from the trustee and has been ordered to repay the sums to the credit of the trust-estate. It is impossible that these mortgages can be regarded as valid and binding upon the properties therein comprised if the deed of compromise is not valid, and their Lordships concur in the conclusion of the High Court both as to the validity of the deed of compromise and of the two mortgages and as to the amount of the repayment ordered to be made by the Appellant to the credit of the trust-estate.

If on other grounds the deed of compromise could be supported, it is invalid in not complying with the condition imposed by sec. 462 of the Code of Civil Procedure applicable when the compromise was made. One of the parties to the suit, the Rajah's son the first Respondent, was a minor, and the trustee of the voluntary settlement was appointed his guardian *ad litem*. Sec. 462 of the Code of Civil Procedure enacts "that no next friend or guardian for the suit shall, without the Order of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which

M. R. M. A. SUBRAMANIAN CHETTIAR *v.* RAJAH RAJESWARA DORAI.

he acts as next friend or guardian." In the present case the leave of the Court was not obtained, and in the absence of such leave the compromise cannot be supported. Their Lordships regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of a minor. It clearly applies to the compromise in question in the present appeal. It may be well to quote the language used by Lord Macnaghten in *Manohar Lal* v. *Jadu Nath Singh* (1) :—

"It is not sufficient that the terms of a compromise are before the Court There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained"

Reference may also be made to the more recent case of *Ganesha Row* v. *Tulsaram Row* (2).

In the opinion of their Lordships these appeals fail and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor: *Mr. Douglas Grant* for the Appellant.

Solicitors: *Messrs. Chapman-Walker* and *Shephard* for the Respondent.

B. D. *Appeal dismissed with costs.*

(1) L. R. 33 I. A. 128: s. c. 10 C. W. N. 898 (1906).
(2) L. R. 40 I. A. 132: s. c. 17 C. W. N. 765 (1913).

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 18 OF 1914.

JENKINS, C. J.
MOOKERJEE, J.
HOLMWOOD, J.
1915,
Heard, 8, 9 and 12, July.
Judgment, 19, August.

UPENDRA NATH BOSE,
Defendant, Appellant,
v.
BINDESRI PROSAD,
Plaintiff, Respondent.

Letters Patent, cl. 15—Appeal from judgment of Judge of High Court affirming that of lower Court and dissented from by his colleague—Appeal Court, if bound by findings on which differing Judges agreed—"Judgment" meaning of—Hindu Law—Alienation by limited owner—Propriety, test of—"Legal necessity" if only test—Consent of reversioner—Attestation of deed followed by subsequent ratification—Retrospective operation—Compromise and family arrangement, compromise by limited owner—Bona fides of claim—Admission in compromise of futility of claim, if negatives bona fides—Conveyancing device not intended to express true state of executant's mind, effect if to be given to—Compromise which affirms previous executed registered lease, if requires registration.

Where a Bench of two Judges of the High Court having differed as to the disposal of an appeal, the judgment of the lower Court was confirmed, on a further appeal under cl. 15 of the Letters Patent,

Held—*That the Appeal Court was not precluded from reviewing points on which the two Judges were agreed though due regard would be paid to the concurrent findings of the two Judges and of the trial Court.*

"Judgment" in cl. 15 of the Letters Patent means the "sentence of law pronounced by the Court" upon the matter contained in the record and not the statement of the grounds thereof.

NANDEEPUT MAHTA *v.* URQUHART (1) *commented on.*

The test to be applied in determining the

(1) 13 W. R. 209 (1870).

validity of an alienation by a limited owner is whether the purpose for which the alienation was made was in the circumstances of the case proper and legitimate, and the existence of "legal necessity" in the narrow sense of actual pressure on the estate or the danger to be averted is not the only test.

Held—*That in this case a permanent* mokurari *lease granted by the daughter of a deceased Hindu of some properties belonging to his estate in settlement of a* bonâ fide *dispute was binding on the reversioner.*

KHUNNI LAL *v.* GOBIND KRISHNA NARAIN (7) *applied.*

Where it appeared that the permanent lease was not only attested by the reversioner but that he later on set up the lease in answer to a suit of the grantee claiming the entire estate by survivorship as the undivided coparcener of the last male owner and ultimately joined in a compromise by which the Plaintiff in the suit admitted that he had no title to the estate and the reversioner affirmed the mokurari potta :

Held—*That if there was doubt as to the efficacy of consent as evidenced by the attestation, there was no question as to his subsequent ratification of the lease which operated retrospectively.*

That the compromise was not inadmissible in evidence for want of registration as it did not purport to convey, release or otherwise deal with immovable property.

Per MOOKERJEE, J.—*It only recorded the approval of the transaction by the reversionary heir and (per* CURIAM) *afforded cogent evidence of its propriety.*

COLLECTOR OF MASULIPATAM *v.* CAVALY VENKATA NARRAINAPAH (4), SHAMSUNDAR *v.* ACHHAN KOER (17) *and* BEJOY GOPAL MUKERJEE *v.* GIRINDRANATH (5) *referred to.*

That the recitals in the mokurari potta *depreciatory of the grantee's claim should not be regarded as a correct description of his mind, being only a conveyancing device expressive of his abandonment of the claim for a consideration.*

HANOOMAN PROSAD *v.* BABOOEE MONERAJ KOOERI (18) *and* LAL ACHAL RAM *v.* RAJA KAZIM HOSSAIN (19) *referred to.*

Authorities dealing with the validity of compromises in settlement of disputed claims and of family arrangements with reference to the question of consideration examined by MOOKERJEE, J.

Per MOOKERJEE, J.—*A qualified owner like a Hindu widow, daughter, or mother is not bound at her peril to pursue a litigation in respect of the estate in her hands unremittingly to the ultimate Court of Appeal.*

This was an appeal preferred under sec. 15 of the Letters Patent on the 9th September 1914 against the decree of Mullick, J., (Stephen, J., dissenting), dated the 20th of August 1914, affirming in Appeal from Original Decree No. 477 of 1910, the decree passed by Babu Sashi Bhusan Sen, Subordinate Judge of Zilla Gaya, dated 30th June 1910.

The material facts of the case will appear from the judgments of his Lordship the Chief Justice and of Mookerjee, J.

The suit out of which the appeal arose was brought by the Respondent to set aside a *mokurari* lease granted to a relation one Uma Shankar the predecessor-in-

(4) 8 M. I. A. 529 at p. 551 (1861).

(5) I. L. R. 41 Cal. 793, 805 : s. c. 18 C. W. N. 678 (1914).

(7) L. R. 38 I. A. 87 : s. c. I L. R. 33 All. 356 ; 15 C. W. N. 545 (1911).

(17) L. R. 25 I. A. 163 : s. c. I. L. R. 25 All. 71 ; 2 C. W. N. 729 (1898).

(18) 6 M. I. A. 393 (1856).

(19) L. R. 32 I. A. 183 : s. c. I. L. R. 27 All. 271 ; 9 C. W. N. 477 (1904).

interest of the Appellant by the Respondent's mother Lochan Koer in respect of certain properties which formed part of the estate left by Lochan's father Jaikaran. The suit had been decreed by Babu Sashi Bhusan Sen, Subordinate Judge of Gaya, by his judgment, dated the 30th June 1910. On appeal, Stephen and Mullick, JJ., before whom the case came on for hearing in the first instance differed in opinion. The learned Judges agreed in holding that there was no legal necessity for the alienation and that the Plaintiff by merely attesting the *potta* could not be taken to have consented to it. They however differed as to the effect of a petition filed by the Plaintiff in a suit subsequently brought by the grantee of the lease for recovery of the properties in the possession of the Plaintiff's mother on the ground that they had vested in him on Jaikaran's death by survivorship. The suit had ended in a compromise whereby the Plaintiff in that suit withdrew his claims to the estate and the mother of the Defendant affirmed the lease in suit. The Plaintiff by his said petition declared "that he neither has nor shall ever have either directly or indirectly any claim and dispute with the Plaintiff, the Plaintiff and his heirs shall all along continue in possession and enjoyment of the *mokurari* properties." Stephen, J., was of opinion that this covenant by the Plaintiff made at a time when he was *sui juris* was, independently of any question of estoppel, a bar to the suit, and that it did not require registration. Mullick, J., on the other hand held that the petition (described throughout as the compromise petition) purported to effect a release of the Plaintiff's chance of succession and was therefore wholly void *Sumsuddin Goolam Husein* v. *Abdul Husain Kalmuddin* (56); that it was also without consideration, and that it was inadmissible for want of registration, *firstly*, because the matter dealt with in it did not form the subject matter of the suit, *secondly*, that the compromise petition did not appear to have been embodied in the decree.

In the result the judgment of the Subordinate Judge was affirmed.

The two dissentient judgments were as follows :—

STEPHEN, J.—The Plaintiff in this case, who is the same as the Plaintiff in the suit under appeal in R. A. No. 372, sues to have a *mokurari* lease granted by Mussammat Lochan Koer on the 29th August 1893 of an eight annas share in Mouzas Pertappore, Chergerya, Ralshi and Gajhanda, declared not to be binding on him: and also for possession and mesne profits. The suit has been decreed in the lower Court with mesne profits. The following facts are admitted. The Plaintiff is the son of Lochan Koer, the wife of Deonath, the daughter of Jaikaran, the son of Mahadeo. The Defendants are the assignees of Uma Shankar, the son of Gouri Baijnath, the son of Dayanath, the son of Mahadeo. As stated in Appeal No. 372 of 1910, Lochan died on the 5th May 1906, her predecessors having died before her, and Gouri Baijnath died in 1883 in similar circumstances.

On the 15th May 1893, Uma Shankar sued Lochan for the possession of certain property, the suit being No. 62 of 1893. On the 20th August, Lochan executed the *mokurari* in suit in order to settle Uma Shankar's claim, the Plaintiff being an attesting witness to the document, and on the 13th November in the same year the suit was accordingly dismissed. On the 6th August 1894, Uma again sued Lochan with whom he joined the Plaintiff in a

(56) I. L. R. 31 Bom. 165 (1906)

suit numbered 193 of 1894. This suit was dismissed on a compromise on the 18th February 1895, on petitions by Uma Shankar, Lochan and the Plaintiff.

The two main questions to be decided are whether the *mokurari* is binding as an alienation or otherwise on the Plaintiff; and whether the Plaintiff can be allowed to deny its binding force as far as he is concerned. To decide the first point we must first consider the contents of the *mokurari potta*, and the circumstances under which it was made: and the latter is more conveniently considered first. In 1893 Lochan seems to have considered herself to be entitled to the enjoyment of a Hindu widow's estate in Jaikaran's property, and to have been in possession of it since Jasoda's death in 1873. Her possession was fortified by a succession certificate granted in 1874, which all the parties concerned seem to have regarded to some extent as a document of title. But it must be observed that both Gouri Baijnath and his son Uma Shankar had opposed the grant of that certificate to her, as the former had opposed a similar grant to Jasoda. Uma Shankar brought his suit No. 62 of 1893 on the 11th May joining two other Defendants strangers to Lochan. The cause of action was that he and his father were members of a Mitakshara family, and that the latter for the purpose of supplying the requisites of a life of debauchery, alienated some of the family property which came into the hands of the Defendants, who received it by a series of transfers that did not in fact affect his interest. The suit was valued at Rs. 400. It was not suggested that there was any connection between the property in suit and the estate of Jaikaran. The *potta* of the 28th August was admittedly given with the object of getting rid of this suit though possibly with other objects as well. It commences by reciting that Deonath Rai and Jaikaran were separate in mess and business; it then describes Lochan's succession to Jaikaran's property, and her wish to help Uma Shankar. It specifically states that in the suit he has no point in his favour, and has no interest in the estate of Jaikaran; and then there follows grant of a *mokurari* with a nominal payment of Re. 1 reserved to the grantor. A question has been raised as to whether in terms the *potta* affects to transfer more than Lochan's limited interest. I hold that it does, as the *mokurari* is twice described as perpetual and descendible to children, generation after generation, and purports to bind her heirs, by which the heirs of Jaikaran may reasonably be supposed to be indicated. The *potta* is signed by Lochan, and her signature is attested by the Plaintiff.

The materials on which we can form any opinion as to whether or not this document was executed for necessity are very scanty. The value of the property affected is assessed in this suit at Rs. 10,000; otherwise we seem to have no evidence on the subject. Uma Shankar's cause of action would, as the Judge says, have been very difficult to prove but Uma Shankar valued his claim at only Rs. 400, which goes to show that the execution of the deed could have been avoided. The *kabuliyat* corresponding to the *potta* attributes the making of the grant to natural love and affection more explicitly than does the *potta*. My chief ground however for disbelieving in the necessity of this grant is to be found in Uma Shankar's subsequent conduct. He had admitted in the *kabuliyat* that he had no right in respect of Jaikaran's estate and had undertaken to bring no more unfounded suits, and had accepted a *potta* with corresponding statements. Yet in August 1894 we find him bringing his suit

No. 193-194 against Lochan and the Plaintiff, founded on the assertion that Jaikaran held his property jointly with Gouri Baijnath, his father, and claiming property held by Lochan by reason of a breach of a previous settlement made on that basis. In the next February this suit was dismissed on the terms that the Defendants should pay their own costs, the Plaintiff making a complete acknowledgment that his suit was groundless and hopeless, and admitting that the two branches of the family were separate. The obvious bad faith of this second suit makes it impossible to suppose that the first suit was brought in good faith. Lochan may have found it convenient to give the *mokurari* to quiet a false claim, but I know of no reason for saying that it was legally necessary that she should, and there is every reason for saying it was not.

I hold therefore that the *potta* in suit was not executed for necessity.

I also hold that it was not validated by the attestation of the Plaintiff. In the first place attestation is not necessarily the same as consent. In the second, the bad faith of Uma Shankar goes some way to rebut the presumption of the consent of a reversioner, and when that reversioner is a very young man, and the attestation is the only indication of consent, it may be held to be rebutted. I have doubts as to whether the Plaintiff was an adult at the time of this deed. The facts as relating to his minority set out in Appeal No. 372 do not indicate majority here even to the extent they did there; on the other hand it is for the Plaintiff to prove infancy, and it is perhaps the safest course to follow the lower Court in holding that he has not done so. In view of the other holdings however this is immaterial.

I must next consider the question whether the Plaintiff can be allowed to deny the binding force of his mother's alienation, assuming that he was of age on the 10th February 1895, the date of his petition in Uma Shankar's second suit. On that day his mother confirmed the *potta* of the 20th August 1893, in a petition which is part of the same transaction as that in which the Plaintiff's petition is made. In that petition the Plaintiff recites his mother's grant and "declares that he neither has nor shall ever have either directly or indirectly any claim and dispute with the Plaintiff (*i.e.*, Uma Shankar), the Plaintiff and his heirs shall all along continue in possession and enjoyment of the *mokurari* properties." It is argued on behalf of the Defendant that this is a covenant to maintain the validity of his mother's grant, and it may be observed that it refers to a grant made to Uma Shankar and his heirs "all along." I cannot see how this argument is to be resisted. The petition was made by a person *sui juris*, there is no suggestion of any fraud, concealment or undue influence. The Plaintiff was, we may suppose, ignorant of business, and did not understand what he was doing. But he had plenty of legal advisers, he was acting with his parents, and it is impossible to say that he acted without consideration. It follows that the Plaintiff has bound himself not to do what he is doing in bringing this suit and that consequently he cannot be allowed to succeed. This is so independently of any question of what is usually known as estoppel: and the case is merely that the Plaintiff is doing something which he has bound himself not to do, and which consequently he cannot be allowed to do.

This practically decided the appeal in favour of the Appellant-Defendants. But one more point raised on behalf of the Plaintiff must be noticed, this is that as the decree in No. 193-194 is not registered

under the Indian Registration Act of 1877, the alienation by Lochan is not proved. This; however, overlooks the real nature of the Defendant's case as I conceive it, which rests on Lochan's grant of 1893 which was registered: the existence of that grant has been recognised by the decision in both suits: but the alienation exists independently of the decrees. I do not, therefore, think it necessary that we should consider the numerous authorities as to the necessity for registering judgments to which we have been referred. It may perhaps be said that the Plaintiff's personal covenant is embodied in the decree, and is at least expressed nowhere else. But then a covenant to recognise as valid in whole an alienation which is valid in part, does not seem to fall under the provisions of sec. 17 of the Act.

In the view I take of the case, it is unnecessary that I should consider the points that have been raised as to limitation, and the question whether the existence of a family settlement makes any difference to what would otherwise be an alienation.

I consider therefore that the appeal should be allowed. My learned brother, however, is of the contrary opinion. The decree of the lower Court is therefore confirmed; and the appeal is dismissed with costs.

MULLICK, J.—I regret that I cannot agree with the decision of my learned brother. As he has so fully dealt with the facts of the case it will not be necessary for me to re-state them and I accept his findings of fact. The evidence in the present case as to age does not materially differ from that in the other two cases and for the reasons given by him I agree with my learned brother that the Plaintiff was *sui juris* on the 20th of August 1893.

If then the Plaintiff was of age on that date, the next question that arises is what was the effect of his attestation of the *mokurari potta* executed by his mother Lochan Koer. Attestation is some evidence of consent but having regard to the circumstances and the relations existing between the Plaintiff and his parents I agree with my learned brother that it is not sufficient evidence either to prove legal necessity or that that the transaction was a fair one. Any presumption that arises from such attestation has been sufficiently rebutted. The learned Subordinate Judge has shown that Uma Shankar's suit No. 62 of 1893, the withdrawal of which was the chief consideration of the *mokurari potta*, was not a *bonâ fide* suit; that Uma Shankar knew that he had no case; and that there was neither legal necessity nor good consideration. I agree with these findings, I further agree with him that the suit was barred by limitation. It is in my opinion established that Jaseda Koer was in possession of Jaikaran's estate from 1865, the year of Jaikaran's death, to the 26th December 1873, the date of her own death, and that Lochan Koer succeeded her and remained in uninterrupted possession till the date of the suit of 1893. Now Uma Shankar's father Gouri Baijnath died in 1885 and if limitation began to run against Gouri Baijnath, Uma Shankar's minority at the time of Jasoda's death would be no answer. But Uma Shankar attempts to overcome this difficulty by saying that Gouri Baijnath was in possession from the 26th to the 27th December 1873 on which day he executed a deed of release in Uma Shankar's favour, that he Uma Shankar remained in possession till sometime in 1874 when while still a minor he was dispossessed by Lochan Koer, and that he is therefore entitled to the benefit of the period of his minority. But there is no satifactory evidence whatsoever to support the story of Gouri Baij-

nath's possession for a period of 24 hours and the suit of 1893 was clearly barred. In these circumstances I agree with the learned Subordinate Judge that the *mokurari potta* of August 1893 was a wholly inoperative document and that it is no bar to the plaintiff's suit.

The next question is what is the effect of the compromise petition filed by the Plaintiff in Uma Shankar's suit No. 193 of 1894, on the 10th February 1895. In my opinion it is not a covenant which binds the Plaintiff. The Plaintiff though he had attained majority was a reversioner effecting a release of his chance of succession, and such a transaction was wholly void. Nor does the principle of equitable assignments apply. In the case of *Sumsuddin Goolam Husein* v. *Abdul Husain Kalmuddin* (56), the learned Judges refused to apply this principle in circumstances very similar to those now before us and they seem further to have held that apart from the release the reversion was not bound by her covenant. In this connection it is to be observed that there is a material difference between the petition of compromise in this case which is a release and the *ekrarnamas* in appeals Nos. 372 and 448 which are mere covenants and which we have held to be binding upon the Plaintiff. A further objection to the release is that it was wholly without consideration. An examination of the merits of suit No. 193 of 1894 makes this quite clear. That suit was lodged by Uma Shankar for the following reliefs.

1. To obtain a declaration of his half anna share in the estate of Jaikaran on the ground that his grandfather Deonath was joint in food and property with Jaikaran and that although Gouri Baijnath, his father, had alienated his share of that property, Uma Shankar's half share had not been affected.

2. For possession of certain properties enumerated in schedule B of the plaint in that suit, which are wholly unconnected with the villages covered by the *mokurari potta* now under consideration.

Now the Subordinate Judge has found on Uma Shankar's own admission and upon other satisfactory evidence that Deonath and Jaikaran were separte in food and property and that Uma Shankar's claim was an unscrupulous attempt to blackmail Lochan Koer. It is established beyond doubt that Uma Shankar knew that he had not got a *bonâ fide* claim, and that this fact was also known to the Plaintiff and his mother. If that was the case then it is impossible to hold that the purchase of peace was a good consideration for the covenant. For the same reason any argument based upon a compromise by way of family arrangement must necessarily fail.

If again it is urged that the consideration for the compromise was love and affection on the part of the Plaintiff towards Uma Shankar then the reply is, *firstly*, that a document executed for such consideration must be registered, and as the compromise was not registered it cannot be admitted in evidence, and *secondly*, that upon the facts it is manifest that love and affection were out of the question and the withdrawal of a dishonest suit was the only consideration for the transaction.

If then the compromise is neither binding upon nor evidence against the Plaintiff, the next question that arises is as to the effect of the decree made upon that compromise on the 18th February 1895. It has been urged that the decree operates as *res judicata*. The reply to this is that the property now in suit was not the subject matter of suit No. 193 and that there-

(56) I. L. R. 31 Bom 165 (1906).

fore the decree cannot operate as *res judicata* in respect of that property. Moreover the Plaintiff had then no interest in the property which was the subject matter of that suit and any decree passed in it could not bind his chance of reversion.

It is next urged that apart from *res judicata* the decree is evidence of a covenant which binds the Plaintiff. In order to deal with the objection it is necessary to examine the decree. The decree sets out in full the petitions of Uma Shankar, Lochan Koer, and Bindeshri Prosad and then runs as follows: "This case coming on for final disposal on the 18th February, 1895 before Mr. H. Holmwood, District Judge of Gaya, in the presence of Anup Narain, pleader for Plaintiff and Babu Upendra Chandra Mitra, pleader for Defendant No. 1, and Moulvi Varsat Hosain, pleader for Defendant No. 2, it is ordered and decreed that this suit be dismissed without costs in the terms of the compromise petition." In my opinion the decree is inadmissible for want of registration so far as it affects the property which was not the subject matter of the suit in which it was made. There has been some difference of opinion upon the question of law involved, but I think the ruling of his Court in *Gurdeo Singh* v. *Chandrika Singh* (1), is binding upon us. But even if it be held that the compromise petition is embodied in the decree, which from the form of the decree and the reliefs granted by it does not appear to be the case, and that it is therefore admissible in evidence without registration, still it must operate either as a release or an agreement. If the former, it is void as a transfer of a chance of succession and if the latter, it is void for want of consideration.

There is next the question of limitation. Can the Plaintiff succeed till he sets aside the compromise decree and as he has not done so within three years of the decree is his suit barred? The reply to this is that it is not necessary for the Plaintiff to set aside the compromise. In the first place, the decree was one of dismissal and made no order for relief against him. In the second place, the property now in suit was not covered by the decree and in the third place, the decree was not registered. The Plaintiff is suing as a reversioner and article 141, Schedule I of Limitation Act governs his case. Under that article his suit is fully within time. Finally there remains the ground of estoppel. Upon the facts it is not clear how any case of estoppel can arise. Uma Shankar was fully aware that there was no legal necessity either for the execution of the *mokurari potta* of 1893 or of the compromise petition of 1895. By his own unqualified admission he was not acting honestly and in good faith. In these circumstances he cannot take advantage of the provision of sec. 115 of the Evidence Act. The result is that disagreeing with my learned brother I would dismiss the appeal with costs.

[The Defendant then preferred this appeal under sec. 15 of the Letters Patent.]

Sir Rash Behary Ghosh and *Babu Baranashibasi Mookerjee* for the Appellant.

Dr. Sarat Chandra Basak and *Babu Chandra Sekhar Prosad Singh* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

JENKINS, C. J.—Jaikaran Lal, a Hindu governed by the Mitakshara school of law died in 1865, leaving him surviving his widow Musstt. Jasoda Koer and his daughter Musstt. Lochan Koer. Musstt. Lochan Koer was married to Deonath Sahai and the Plaintiff, Bindesri Prosad,

is the sole surviving male issue of the marriage.

Bindesri instituted this suit on the 14th April 1909, against Upendra Nath Bose and others and he seeks a declaration that he is the sole reversionary heir of Jaikaran Lal and on the death of his grandmother Musstt. Jasoda Koer and Musstt. Lochan Koer he became entitled to the present possession of the entire estate left by his maternal grandfather.

He seeks the further declaration that the *mokurari* lease granted by Musstt. Lochan Koer to Uma Shankar Prosad under *pottah* and *kabuliyat*, dated the 20th August 1893 in respect of 8 annas share in Mouzas Pertappore Chergerwa, Rokhsi and Gajhanda appertaining to mahal Kother Touzi No. 3142, District Gaya is not binding on the inheritance of the Plaintiff and is null and void and inoperative as against him. Finally he prays for possession and mesne profits.

The suit No. 100 of 1909 was heard by the second Subordinate Judge of Gaya together with suits of a similar nature and the procedure adopted by the learned Judge has occasioned a certain amount of confusion as to the evidence. But happily we have been freed from this by the mode in which the appeal has been presented by the learned Vakils who have conducted the case before us for they have limited themselves in their respective arguments to the materials to be found in the paper books of this appeal so I need make no further reference to this aspect of the case. The Subordinate Judge decided in the Plaintiff's favour.

Upendra Nath Bose preferred an appeal to the High Court and this was heard by Stephen and Mullick, JJ. They differed in opinion and so the appeal of the Subordinate Judge was confirmed. From this judgment of confirmation this present appeal to the High Court under cl. 15 of the Letters Patent has been preferred. It was contended at the outset for the Respondent that though the learned Judges Stephen and Mullick, JJ., differed in opinion as to the disposal of the case there were isolated points in the case on which they were agreed. As to these it was argued there was no appeal. But this rests on a misconception of the scope of cl. 15 of the Letters Patent. The appeal sanctioned is not from any point, but from the judgment and the meaning of the word judgment lends no support to the Respondent's contention. The Letters Patent were framed in England and from the scheme and the language of the Letters Patent as also from the Secretary of State's accompanying despatch it is apparent that the word is used in the sense of "a sentence of the law pronounced by Court" and not of the reasons which have led to that pronouncement. What was said in *Nandeeput Mahtu* v. *Urquhart* (1) lends support to the Respondent's contention, but I cannot find that it has ever been followed, and Sir Richard Couch's view in *Heeranath Kooer* v. *Burm Narayan Singh* (2) is hardly in accord with it. In my opinion we must be guided by the words of cl. 15 and they do not support the Respondent's contention. At the same time, I think that we ought to have regard to the rule which their Lordships of the Privy Council ordinarily observe of declining to interfere with concurrent findings of fact by two Courts.

I will now proceed to deal with the appeal on the merits. The *pottah* and *kabuliyat* of the 20th August 1893 which the Plaintiff impugns have a history which has to be understood before the true relations of the parties can be understood and it goes back to the death of Jaikaran Lal

(1) 18 W. R. 209 (1870)
(2) 17 W. R. 331 at p. 335 (1872).

in 1865. I have said he left a widow and daughter, he also was survived by a nephew, Gouri Baijnath, his deceased brother's son.

The position of the family will be apparent from the following tabular statement :—

MAHADEV DUTT.

Dyanath Ray.	1st wife Tore Jaikaran Lal
Gouri Baijnath Persad.	2nd wife Musstt. Jasoda Koer.
Uma Shankar Pershad.	Deonath Sahai-Musstt. Lochan Koer.
	Bindesri (Plaintiff).

After Jaikaran Lal's death two applications were made for a certificate under Act XXVII of 1860 to collect debts due to his estate.

One was preferred by Musstt. Jasoda Koer who claimed to be his heiress on the ground that he was separate in estate. The other was preferred by Gouri Baijnath on the allegation that he and his uncle were joint. In the Court of 1st instance Gouri Baijnath suceeded. On appeal this order was reversed and the certificate was granted to the widow, Musstt. Jasoda Koer. The judgment of the High Court, which was pronounced on the 4th August 1866 is *Jasoda Koonwer* v. *Gouri Baijnath* (3). This was not conclusive of the rights of the parties and so on the 10th of September 1866, Gouri commenced a suit against the widow to establish his right as the surviving member of a joint family.

A review too was sought of the High Court's decision. An amicable settlement however was proposed which after securing considerable benefits to Musstt. Jasoda during her life provided that properties representing one-third of the entire immovable property claimed by Musstt. Jasoda and her daughter should be given by Gouri Baijnath to the daughter to be taken possession of by her after the death of Musstt. Jasoda the encumbrances created in the life-time of Jaikaran Lal being paid off by Gouri Baijnath, that after the death of Musstt. Jasoda, Gouri Baijnath should be entitled to take possession of all the immovable properties except those given to Lochan and that all pending cases were to be withdrawn. Musstt. Lochan Koer was added as a party to the suit, petitions of compromise were filed, and the suit was decided in accordance with this family arrangement. On the 26th December 1873 Musstt. Jasoda Koer died. According to the allegations made in the plaint in suit No. 193 of 1894, Gouri Baijnath took possession of the properties except those which were to go to Musstt. Lochan and on the 27th December 1873, he made a gift of them to his son Uma Shankar the Plaintiff in suit No. 193 of 1894. Again on Musstt. Jasoda's death there was a contest as to the grant of a succession certificate. The decision was in Musstt. Lochan's favour and this was upheld by the High Court on the 15th May 1874.

Gouri Baijnath died on the 9th of August 1883.

In 1893 suit No. 62 of 1893 was instituted by Uma Shankar against Musstt. Lochan for a certain family tenement and it was his case that he was ready to institute another suit for the establishment of his title to and recovery of possession of the properties claimed by Musstt. Lochan as the estate of Jaikaran Lal. But there was a compromise on the 2nd August 1893, between Uma Shankar on the one side and Musstt Lochan Koer and Bindesri, the present Plaintiff on the other. The terms were that suit No. 62 of 1893 was to be withdrawn and the contemplated suit abandoned, and that Musstt. Lochan Koer should grant Uma Shankar a permanent *mokurari* of 8 annas of Mouza Pertabpore and other properties specified on a rental

(3) 6 W. R. 139 (1866).

of Re. 1 over and above the Government Revenue and Road and Public Work Cess. There were other terms which need not now be specified. On the 20th August 1893 the *mokurari potta* was executed by Musstt. Lochan Koer and attested by Bindesri. Uma Shankar however on the allegation that the compromise had not been carried out commenced suit No. 193 of 1894 against Musstt. Lochan Koer and Bindesri Prosad for the recovery of the properties claimed by Musstt. Lochan Koer as the estate of Jaikaran Lal. The claim was resisted and Bindesri in his written statement para. 41 contended that the Plaintiff had no right to bring the suit contrary to the compromise in the *mokurari potta* and *kabuliyat* in respect of 8 annas of Mauza Pertappore that the said compromise could not be set aside by the Court and that whatever rights the Plaintiffs Uma Shankar had under two earlier instruments became extinct and extinguished by virtue of the compromise.

This suit was compromised on the 18th February 1895. Evidently Musstt. Lochan's advisers were determined that this compromise must finally end this family litigation and so a petition was presented by Uma Shankar in which he admitted all the infirmities of his claim and stated that he had proposed and the Defendants had accepted as a compromise that the *mokurari*, dated 20th August 1893 of 8 annas of Mauza Pertappore, etc., should stand good. He accordingly prayed for the dismissal of the suit on those terms. Petitions were also presented by Musstt. Lochan Koer and Bindesri. In conformity with these petitions the suit was dismissed in the terms of the compromise on the 18th February 1895. There is in my opinion, no foundation for the contention that this decree is inadmissible for want of registration. The compromise does not purport to convey release or otherwise deal with immovable property.

On May 5th 1906 Musstt. Lochan Koer died. On the 14th May 1909, the present suit was instituted against several Defendants of whom Upendra Nath Bose alone has contested the Plaintiff's claim before us. He is a purchaser of the property.

The following issues were framed by the trial Judge :—

1. Is the *mokurari* lease, dated 20th August 1893, executed by Lochan in favour of Uma Shankar binding upon the Plaintiff? Was it executed for any legal necessity?

2. Is the Plaintiff estopped from claiming *seer* possession of the properties in suit?

3. Was the Plaintiff minor at the time the *mokurari* lease was executed and the petition of compromise, dated the 10th February was filed in suit No. 193 of 1894 in the Court of the District Judge, Gaya?

4. To what amount of mesne profits if any, is the Plaintiff entitled?

5. Are the auction sale, dated 21st November 1901 at which the Defendants Nos. 1 and 2 purchased the property in suit and the *dar-mokurari* lease, dated 2nd December 1908 granted by Defendants Nos. 1 and 2 to Defendants Nos. 3 and 4 binding on the Plaintiff?

6. Is the suit barred by limitation?

On the question of minority the Subordinate Judge and both the Judges of the Division Bench are against the Plaintiff and I think this concurrent finding of fact should not be disturbed. I will therefore deal with the case on the footing that the Plaintiff was a major at the two dates indicated.

The position then is this that the *mokurari* lease was executed by Musstt. Lochan and attested by Bindesri who was then a

major, while Deonath Sahai, presumably Bindesri's father also had a hand in the affair for it was at his request that one of the witnesses attested Musstt. Lochan's execution of the document. I agree with the Judges of the Division Bench that the *mokurari lease* on its true construction purports to be perpetual and descendible. Why then should it not be binding on Bindesri? The form of the issues suggests that this must be answered by reference to the doctrine of legal necessity, and this idea is prominent in the judgments both of the Subordinate Judge and of the Judges of the Division Bench. But in the circumstances of this case, this is not the test to be applied. Musstt. Lochan, it is true had, only a daughter's interest, and so her power of disposition was limited by the law regulating such disposition. The doctrine of legal necessity would appear to be but a particular phase of that law, and the more universal test is, whether the purpose for which the alienation is made is proper in the circumstances of the case. There is, I think, sanction for this view to be found in the leading case of *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (4) where it was said of a Hindu widow that "for religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband or on their failure the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper." Similar citations might be multiplied, but I will suffice to quote the words of Lord Fulton who in delivering the opinion of the Privy Council said "It has always been a feature of Hindu Law as administered by this Board to attach great wieght to the sanction by expectant reversioners of an alienation as affording evidence that the alienation was under circumstances which render it lawful and valid [*Bejoy Gopal Mukerjee* v. *Girindranath* (5).] If Bindesri consented, we have the consent of an expectant reversioner who has actually succeeded to the property on the determination of the particular interest.

There is therefore every reason for applying this test of the propriety of the transaction. But then the question is, did Bindesri consent? He certainly attested the *mokurari* of the 20th August 1893, but this would not conclusively establish his consent, for it can be shown that his signature was there for some other purpose than that of giving consent. Bindesri has given evidence in the case. In examination-in-chief the case he made was minority and that has not been believed. His cross-examination does not throw any further light on the point. The Subordinate Judge held that the attestation did not prove consent to alienation. Mullick, J., was of opinion that any presumption of consent that might arise from the attestation had been rebutted. He does not however explain how it was rebutted unless he means to rely on the view he expresses

(4) 8 M. I. A. 523 at p. 551 (1861).

(5) I L. R. 41 Cal. 793, 805 : s. c. 18 C. W. N. 673 (1914).

that the suit No. 62 of 1893 was not a *bonâ fide* suit.

Stephen, J., also held that attestation did not validate the transaction because it was not necessarily the same as consent and the presumption of consent was rebutted by Uma Shankar's bad faith. But the attestation does not stand alone. It is followed first by Bindesri's resistance to Uma Shankar's claim in suit No. 193 of 1894 on the ground set forth in para. 41 of Bindesri's written statement in which he insists on the compromise referred to in the *mokurari potta* and *kabuliyat* as an answer to the claim and avers that Uma Shankar's rights became extinct and extinguished by virtue of that compromise. Nor do matters rest there, for Bindesri is party not only to the suit No. 193 of 1894, but also to the compromise in that suit which affirmed the *mokurari potta*. All this should, in my opinion, be accepted as establishing that the lease was legitimate, and certainly one that it would be wrong to declare invalid at the instance of the present Petitioners. For even if there be a doubt as to the fact or efficacy of the consent as evidenced by the attestation, there can be no question as to the subsequent consent, and "*omnis ratihabitio retrotrahitur et mandato priori acquiparatur*" [*Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (6).] Much has been said about the lack of good faith in the earlier suits, but I am not sure that I fully understand what was meant. It surely can hardly be said that the suit of the 10th of September 1866 was brought in bad faith merely because in the certificate proceedings Gouri Baijnath had failed and especially when it is borne in mind that the Court of 1st instance was in Gouri's favour and that the High Court decision was in some measure based on admissions made only for the purpose of those proceedings. The compromise of that gave a fresh starting point. It may or may not have been open to successful attack, but having regard to the circumstances it was one to which the principle enunciated in *Khunni Lal* v. *Gobind Krishna Narain* (7) (to cite one case out of many) was applicable, and I fail to see how it can give rise to any inference that the suit was not brought in good faith. Moreover there is always a danger of referring a knowledge of principles now known to a time anterior to their establishment, and though *Appovier's* case (8) has made obvious to us that there can be a partition of interest without a division by metes and bounds, this had not been conclusively determined on the 11th of September 1866. So it is quite possible that when the suit of 1866 was commenced, the Petitioner may have thought not only that the facts but also the law was on his side inasmuch as there had been at that time no division by metes and bounds. Is there then any reason for thinking that there was a lack of good faith in Uma Shankar's suit No. 62 of 1893 and his expressed determination to sue for recovery of properties claimed by Musstt. Lochan Koer as the estate of Jaikaran Lal? In approaching this question, it must be borne in mind that Uma Shankar could rest his claim on the compromise which terminated the litigation of 1866, and that was a compromise in support of which, as I have already said, it was possible to invoke the principle applied in *Khunni Lal* v. *Gobind Krishna Narain* (7).

It is true that the *mokurari* of the 28th of August 1893 in which suit No. 62 of 1893 terminated, contains expressions depreciatory of Uma Shankar's claim, but

(6) L. R. 35 I. A. 1 : s. c I. L. R. 30 All 1 ; 12 C. W. N. 74 (1907).

(7 L. R 38 I. A 87 : s. c I. L R. 33 All, 356 ; 15 C. W N 545 (1911).

(8) 11 M. I A. 75 (1866).

they must not be taken too seriously. This form of exaggeration is not an unfamiliar conveyancing device in the mofussil: it takes the place of a release, and is balanced by the benefit secured. It is the price of the benefit. And what is true of the contents of this *mokurari potta* is as true of the still more depreciatory confessions which preface or accompany the compromise in the suit No. 193 of 1894. It is as much a part of the mofussil conveyancer's art as the beaver hat or pipe of wine was of the special pleader in times gone by, and perhaps hardly deserves to be taken more seriously as a statement of actual fact. It is intended to furnish a useful controversial weapon of defence for the future rather than to be a correct description of anyone's mind apart from the transaction in which it is found

I therefore hold on a consideration of all the circumstances that Bindesri is not entitled to impugn the *mokurari potta* and that it is binding on him. It follows that in my opinion the appeal should be allowed and the suit dismissed with costs throughout.

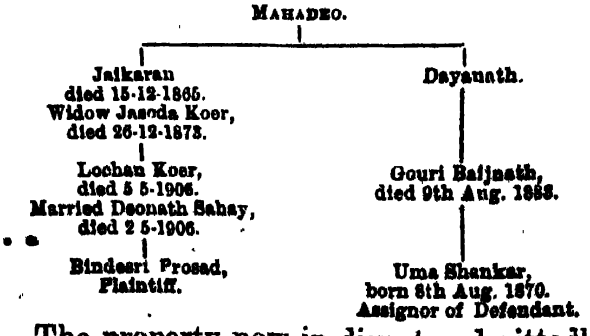
MOOKERJEE, J.—This is an appeal by the second Defendant in a suit commenced by the Plaintiff-Respondent for recovery of possession of land on declaration that an alienation by way of permanent lease, made by his mother on the 20th August 1893, is not binding upon the estate in his hands as the representative of his maternal grandfather. The suit was decreed by the trial Court. Upon appeal to this Court Stephen, J., was of opinion that the decree of the Subordinate Judge should be reversed and the suit dismissed. Mullick, J., was of opinion, on the other hand, that the decree of the Primary Court should be affirmed. Consequently, that decree was confirmed under sub-sec. 2 of sec. 98 of the Civil Procedure Code, 1908. The second Defendant who has thus been defeated in both the Courts below, has preferred this appeal under cl. 15 of the Letters Patent.

A preliminary point has been raised as to the scope of the questions open for examination in the present appeal. The Respondent has argued, on the strength of a dictum of Norman, C. J., in *Nandeeput* v *Urquhart* (1), that under cl. 15 of the Letters Patent, an appeal lies only in respect of that part of the judgment upon which the two Judges differ and that where both the Judges composing the Division Bench agree in their finding on a certain point, the Court of Appeal has no power to question that finding. Norman, C. J., attributes this view to Peacock, C. J., and refers to the decision in *Hazara Begum* v. *Khaja Hossain Ali* (9). The judgment of Peacock, C. J., however, does not lend any support to the conclusion of Norman, C. J. Peacock, C. J., merely ruled that where the contention before a Division Bench has reference to a single point only, when on the Judges differ, it is not open to the parties in an appeal under cl. 15 of the Letters Patent, to raise before the Appellate Court other points not raised before the Division Bench. We have, on the other hand, the opinion of Couch, C. J., clearly indicated in *Heeranath Koer* v. *Bum Narain Singh* (2) that the point on which the Judges of the Division Bench have agreed is open for consideration in the appeal under the Letters Patent, though it was added that "on a question of fact, we think we ought to be guided by the rule of the Privy Council where there have been the decisions of two Courts to the same effect." Indeed, it is reasonably clear from the terms of cl. 15 of the Letters Patent that the appeal is allowed, not

(1) 13 W. R. 309 (312) (1870).
(2) 17 W. R. 316 at p. 325 (1872).
(9) 12 W. R. 466 (1869).

against what is called judgment under the Code of Civil Procedure, but against what corresponds to a decree or an order. That clause allows as appeal from the judgment not being a sentence or order passed or made in any criminal trial. The term "judgment" here means not the statement given by the Judge of the grounds of his decree or order, but the sentence of the law pronounced by the Court upon the matter contained in the record (Co. Litt. 39a, 168a; 3 Blackstone's Commentaries, 395). A judgment, then, is the decision or sentence of the Law given by a Court of Justice as the result of proceedings instituted therein for the redress of an injury, or, as has been quaintly expressed, judgment is the determination and result of law. This is clear from para. 23 of the despatch from Sir Charles Wood which accompanied the first Letters Patent. The appeal must, consequently, be deemed to have been preferred against the decree and all the points necessary to be investigated for the determination of the question of the correctness of that decree, are open for consideration, although the Court as a Court of Appeal would be slow to take, upon a question of fact, a view contrary to the concurrent opinion of the trial Judge and of the two Judges of the Division Bench.

The following genealogical table will serve to elucidate the relative situation of the parties in the different stages of this protracted controversy between them :—



The property now in dispute admittedly belonged to Jaikaran. On his death it passed to his widow Jasoda Koer, and, on the death of the latter, it devolved on Lochan Koer. On the 20th August 1893, Lochan Koer granted a permanent lease of the property to Uma Shankar. The deed was witnessed by her son Bindesri Prosad and also by a pleader, Babu Suryya Kumar, who attested at the request of her husband Babu Deonath Sahai. Lochan Koer died on the 5th May 1906. On the 14th May 1906, Bindesri Prosad instituted the present suit for recovery of possession of the villages upon declaration that the lease was not binding upon the estate of his maternal grandfather, which, upon the death of his mother had devolved upon him as reversionery heir. The second Defendant, who had purchased the leasehold interest in execution of a mortgage decree against Uma Shankar, resisted the claim on the ground that the lease was for a lawful purpose, that its propriety was unquestionable though made by a Hindu female heir with a qualified power of alienation, and that it was operative against the inheritance in the hands of the reversionary heir. For the determination of the question thus raised, the circumstances antecedent to the grant of the lease must be carefully scrutinised, and for this purpose, the narrative of events requires to be carried back to the point of time when Jaikaran died on the 15th December 1865.

Immediately on the death of Jaikaran disputes broke out in the family, as to whether Jaikaran had died joint with or separate from Deonath. Jasoda Koer, the widow of the deceased, and Gouri Baijnath his nephew, applied on the 8th and 9th January 1866 respectively for a certificate under Act XXVII of 1860 for the collection of debts due to the deceased. On the 7th April 1866, the District Judge of Gaya, dismissed the application of the widow and

granted a certificate to the nephew, who also obtained an order for possession in his favour under Act XIX of 1841. The widow appealed to this Court, and on the 4th August 1866, obtained a reversal of the order of the District Judge adverse to her. The elaborate judgment of this Court pronounced on that occasion [*Jasoda Koonwer* v. *Gouri Baijnath* (3)] affords convincing proof that there was a substantial matter in controversy between the parties. This need not cause any surprise, if we remember that what constitutes partition of joint properties held by an undivided Mitakshara family, was at that time a matter of doubt and uncertainty, which was settled by the now classical judgment of Lord Westbury in *Appovier* v. *Rama Subba* (8), pronounced on the 17th November 1866, and by still later decisions of the Judicial Committee in *Raja Suranevi* v. *Venkama* (10), *Doorga Persad* v. *Kundun* (11), *Ram Persad* v. *Lakpati* (12), *Balkissen* v. *Ram Narain* (13) and *Parbutty* v. *Nannilal* (14). The nephew thus defeated could hardly be expected to remain satisfied with the result of the preliminary skirmish and as might have been anticipated instituted a regular suit against Jasoda Koer for recovery of possession of the estate of Jaikaran on the 10th September 1866 on the allegation of title by survivorship. What might thus have proved a protracted litigation, ruinous to the family, was brought to a speedy termination by the intervention of friends, relatives and legal advisers of the parties. Terms of settlement were arranged, and in order that they might be operative after the death of Jasoda Koer, Lochan Koer was added as a party Defendant to the suit and it was indeed her father-in-law Raghubar Dayal, who took a prominent part in the settlement of the dispute. It is not necessary for our present purpose to set out in detail the terms of the settlement or to examine how far they were reasonable. Their general effect was that Jasoda Koer would get possession of all the movable and immovable properties, while Gouri Baijnath was to receive an annuity of Rs. 4,000 a year. Immovable properties which yielded a net profit of Rs. 10,000 a year and represented one-third of the estate, were to vest absolutely in Lochan Koer, free of encumbrances, but subject to the life interest of Jasoda Koer; the remainder of the estate would devolve upon Gouri Baijnath upon the death of Jasoda Koer. On the 11th December 1866 mutual deeds were executed with a view to give effect to this family arrangement, and petitions of compromise were presented to the Court; a decree by consent of parties was ultimately made on the 25th March 1867. There are indications on the record that the terms of this compromise were carried out by both the parties, at least for some years. But on the death of Jasoda Koer on the 26th December 1873, disputes broke out again between the two branches of the family and on the 5th January 1874, Lochan Koer applied for a certificate under Act XXVII of 1860 for the collection of debts of the estate of her father. The application was opposed by Gouri Baijnath, but was granted on the 12th February 1874, by the District Judge and his order was confirmed on appeal to this Court on the 15th May 1874. *Gouri Baijnath* v. *Lochan Koer* (15). The result was that Lochan Koer retained possession of

(3) 6 W. R. 139 (1866).
(8) 11 M. I. A. 75 (1866).
(10) 13 M. I. A. 113 (1869).
(11) L. R. 1 I. A. 55 : s. c. 13 B. L. R. 235 (1873).
(12) L. R. 30 I. A. 1 : s. c. I. L. R. 30 Cal. 231 ; 7 C. W. N. 162 (1902).
(13) L. R. 30 I. A. 139 : s. c. I. L. R. 30 Cal. 738 ; 7 C. W. N. 578 (1903).
(14) L. R. 36 I. A. 71 : s. c. I. L. R. 31 All. 412 ; 13 C. W. N. 933 (1909).
(15) 22 W. R. 102 (1874).

the estate of her father contrary to the terms of the family settlement of 1867. Gouri Banath, who is said by his son to have thereafter led a life of depravity and extravagance, died on the 9th August 1883, leaving as his sole heir an infant son, Uma Shankar, at that time a boy of thirteen years. In 1893, Uma Shankar, after attainment of his majority, instituted a suit against Lochan Koer for recovery of a house which had been sold in execution of a decree against his father and had been purchased by her in the name of one Mir Enayet Hussain. Uma Shankar also threatened at the same time to institute another suit against Lochan Koer for recovery of the estate of Jaikaran on the basis of the family settlement of 1867. Proposals for compromise were set on foot; and it was during the pendency of the suit for recovery of the house, that Lochan Koer on the 20th August 1893 granted to Uma Shankar, the perpetual lease now in controversy and the lease and its counterpart state explicitly that as a consideration for the grant of the lease, the lessee undertook to withdraw the suit already instituted and to refrain from the institution of groundless suits. On the 13th November 1893 Uma Shankar withdrew from the suit for recovery of the house which was accordingly dismissed. The compromise however was of very brief duration, for, on the 6th August 1894, Uma Shankar instituted a suit against Lochan Koer and her son Bindesri Prosad for recovery of possession of the estate of Jaikaran. Lochan Koer and Bindesri Prosad filed separate written statements on the 9th and 10th September 1894, in which they repudiated the settlement of 1867, and relied on the perpetual lease as a complete extinction of the prior rights of Uma Shankar. This suit also was amicably settled, and on the 18th February 1895, it was dismissed in the terms of the petitions of compromise filed by Uma Shankar, Lochan Koer and Bindesri Prosad. Uma Shankar relinquished all his claims to the estate of Jaikaran, and Bindesri declared that he neither had nor would ever put forth, directly or indirectly, any claim to the properties included in the perpetual lease granted by his mother to Uma Shankar. This assurance proved as illusory as similar promises by other members of the family on previous occasions. Lochan Koer died on the 5th May 1906, and Bindesri Prosad, on the 14th May 1909 instituted the present suit for declaration that the perpetual lease was not operative after the death of his mother and did not bind the estate of his maternal grandfather which had devolved upon him as reversionery heir. From the facts narrated, it would appear at first sight that no claim could be more hopeless than an endeavour by a person to challenge a deed, created in settlement of a family dispute, attested by the claimant at the time of execution, and solemnly affirmed by him subsequently in a Court of Justice. The trial Court, however, held that the Plaintiff was entitled to succeed, as the deed, executed as it was by a Hindu daughter in possession of the estate of her father, could be supported only on proof of legal necessity. That decree has been affirmed by this Court. The Judges of the Division Bench were agreed that there was no legal necessity for the lease, but they differed upon the question, whether the act of the Plaintiff in the suit of 1894 disentitled him to all relief. Upon the best consideration, I have been able to give to the case, I have been driven to the conclusion that the course this litigation has taken has resulted in a failure of justice and that the relative rights of the parties have not been examined from the true standpoint.

The test in cases of this description, where a deed by a limited owner with qualified power of alienation is called in question, is whether the purpose for which the alienation was made was proper or legitimate. This is clear from the judgment of Turner, L. J., in *Collector of Mauslipatam* v. *Caraly Venkata* (4) "it is admitted on all hands that if there be collateral heirs of the husband, the widow cannot of her own will alien the property, except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so, if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given, the purpose for which the alienation is made must be proper." Whether the particular purpose is proper or not must depend on the circumstances of the case; but it is plain that necessity is only one of the tests of propriety. This is clear from the observation of Sir James Colvile in *Rajlukhee* v. *Gokool Chandra* (16), that the concurrence of the members of the family suffices to raise a presumption that the transaction was a fair one and justified by Hindu Law, of Lord Davey in *Shamsundar* v. *Achhan Koer* (17) that the concurrence of the kindred raises a presumption that the transaction was a fair one or one justified by Hindu Law and of Lord Moulton in *Bijoy Gopal* v. *Girindranath* (5) that the sanction by expectant reversioners of an alienation of property by a Hindu woman affords evidence that the alienation was made under circumstances which rendered it lawful and valid. The same result would be attained, if the expression "legal necessity" had not had impressed upon it a narrow sense and had not become generally associated with cases where there is actual pressure on the estate or danger thereto to be averted. Tested in the light of the broad principle that the validity of the transaction impeached depends upon the answer to the question whether it was proper, fair and justified by Hindu Law, what is the position of the parties here? The lease was granted in settlement of a long-standing feud which had harassed the members of the family for more than one generation and seemed at the time ready to be revived on every possible occasion. It is unquestionable that the litigations of 1866 and 1867 had their origin in substantial disputes between the two branches of the family and it is equally undeniable that the settlement of 1867 was perfectly *bonâ fide*. In 1873, on the death of Jasoda Koer, the dispute was revived, and the former settlement, which had been accepted by Lochan Koer, was repudiated by her. Her cousin, Gouri Baijnath, had, consequently, *primâ facie*, a good ground of complaint against her, and it is not a matter for surprise that his son Uma Shankar should in 1893, have endeavoured to assert his rights under the settlement of 1867. Can it then be reasonably maintained that

(4) 8 M. I. A. 529 at p 550 1861).
(16) 13 M. I. A. 209 (1869

5) I. L. R. 41 Cal. 793, 805 : s. c 18 C. W. N. 673 (1914).
(17) L. R. 25 I. A. 138 : s. c I. L. R. 21 All 71 ; 2 C. W. N 729 (1898).

a perpetual lease, granted to secure compromise of such a dispute, lacks that element of fairness and propriety, which is essential for its justification as an operation by a limited owner under the Hindu Law? A desperate attempt has been made by the Plaintiff to establish that no substantial dispute existed between the two branches of the family at any stage, that the claim of Gouri Baijnath and his son was wholly unfounded, and that there was no real controversy either in 1867 or in 1893 which stood in need of settlement for the benefit and protection of the estate of Jaikaran. In support of this view, reference has been made to recitals by Uma Shankar, that he had no shadow of a claim to the estate of Jaikaran. No real weight, in my opinion, should be attached to statements of this description. We may usefully call to mind the familiar words of Knight Bruce, L. J., in *Hanooman Prosad* v. *Babooee Munraj Kooeri* (18), that the deeds and contracts of the people of this country must be liberally construed; the form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. To the same effect is the observation of Lord Macnaghten in *Lal Achal Ram* v. *Raja Kazim Hossain* (19) where the draftsman had introduced in the recitals an obviously untrue statement, probably under the notion that it might impart some additional solemnity to the instrument. These exhibitions of the art of the conveyancer whether medieval or modern, cannot be permitted to mislead the Court. If Lochan Koer and her advisers had taken seriously the allegation that Uma Shankar had not the vestige of a claim to the estate of her father, it is inconceivable that she should have parted with a valuable property in his favour. We know, from the antecedent history of the family, that there had been serious disputes between the parties, and whatever recitals might have been inserted in the deeds, whatever price Uma Shankar might have paid in the way of untrue conciliatory admissions with a view to secure the compromise, the fact is incontrovertible that there was a substantial dispute between the parties which was settled by the grant of the lease. A settlement of a disputed or doubtful claim, effected in this manner, is clearly a valid and binding arrangement which the parties thereto are not permitted to deny, ignore or resile from, on principles explained by the Judicial Committee in a long series of cases: *Rajender Narain* v. *Bijoygobind* (20), *Hetnarain* v. *Modenarain* (21), *Gajapathi Radhika* v. *Gajapathi Harikrishna* (22), *Mantapha* v. *Basvant* (23), *Greender Chunder* v. *Trailokhyanath* (24) and *Muhammad Imam Ali* v. *Husain Khan* (25). As Lord Kingsdown said in *Trigge* v. *Lavallee* (26) a compromise is an agreement to put an end to disputes and to terminate or avoid litigation, and in such cases, the consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right but the abandonment of a claim. To the same effect is the statement of Turner, L. J., in *Lucy's* case (27) that it

(18) 6 M. I. A. 393 (1856).
(19) L. R. 32 I. A. 113: s. c. I. L. R. 27 All. 271; 9 C. W. N. 477 (1904).
(20) 2 M. I. A. 181 (249) (1839).
(21) 7 M. I. A. 311 (1859).
(22) 13 M. I. A. 497 (512); 6 B. L. R. 202 (1870).
(23) 14 M. I. A. 24 (36) (1871).
(24) L. R. 21 I. A. 35: s. c. I. L. R. 20 Cal. 373 (1892).
(25) L. R. 25 I. A. 161: s. c. I. L. R. 26 Ca 81; 2 C. W. N. 737 (1898).
(26) 15 Moo. P. C. 270 (292) (1862).
(27) 4 DeG. M. & G. 356 (1853).

is sufficient if the parties *bonâ fide* consider that there is a question to be decided between them, for otherwise no compromise will be good if it ultimately turned out that there was no doubt upon the point which was made the subject of compromise [*Callisher* v. *Bischoffshein* (28) approved in *Miles* v. *Newzealand A. E. Co.* (29), *Helen Dasi* v. *Durga Das* (30), *Barabhadra* v. *Kalpataru* (31) and *Satya Kumar* v. *Satyahripal* (32)]. It may further be pointed out, as explained in *Williams* v. *Williams* (33), that a family arrangement may be upheld, although there are no rights actually in dispute at the time of making it, and Courts would not be disposed to scan with much nicety the quantum of consideration: this principle is applicable not merely to cases where arrangements are made between the members of a family for the preservation of its peace, but also to cases where arrangements are made between them for the preservation of its property [*Persse* v. *Persse* (34).] We are not now concerned with the question, when and how a family arrangement may be set aside on the ground of mistake, inequality of position, undue influence, coercion, fraud or other similar ground, for no such vitiating factor is alleged or proved in this case; consequently, the decision in *Gordon* v. *Gordon* (35), and other cases of the same class [*Lawton* v. *Campion* (36), *Bentley* v. *Mackay* (37), *Moxon* v. *Payne* (38), *Fane* v. *Fane* (39)], on which much stress was laid by the Respondents, have no application. There is no room for doubt that, to use the language of Lord Westbury in *Dyson* v. *Evans* (40), there was here an honest settlement of an existing dispute, which, if not manifestly *ultra vires* of the parties, is one that a Court of Justice ought to respect and ought not to permit to be questioned. The question thus arises, whether the validity of the family settlement is affected by the circumstance that the grantor of the lease was a limited owner in possession with qualified powers of alienation. The answer must be in the negative in view of the decision of the Judicial Committee in *Khunni Lal* v. *Gobinda Krishna* (7). There a Hindu became a convert to Islam. His son, who was a Hindu, predeceased him. On his death, there was litigation, as to the succession, between his son's daughters and his daughter's son. The parties compromised the dispute and took the estate in certain shares. The daughter's son then attacked the compromise in a suit; it was ruled that the compromise was in the nature of a family settlement and was operative. As Lord Moulton said in *Hiran Bibi* v. *Sohan Bibi* (41), a compromise of this character is, in no sense of the word, an alienation by a limited owner of the family property but is a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent and by way of compromise, admitted by the other parties [*Tarini Charan* v. *Watson* (42),

(28) L. R. 5 Q. B 449 (1870).
(29) 32 Ch. Div. 266 (1886).
(30) 4 C. L. J. 323 (1906).
(31) 1 C. L. J 388 (405) (1905).
(32) 10 C. L. J. 503 (1909).
(33) L. R. 2 Ch. App. 294 (1867).
(34) 7 Cl. and Fin. 279 (1840).
(35) 3 Swan. 400; 19 R. R. 230 (1821).
(36) 18 Beav. 87 (1854).
(37) 31 Beav. 143; on appeal 4 DeG. F. and J. 278 (1862).
(38) L. R. 4 Ch. App. 661 (1873).
(39) L. R. 20 Eq. 694 (1875).
(40) L. R. 5 H. L. 606 (618) (1872).
(41) 18 C. W. N. 929 (1914).
(42) 12 W. R. 416; 3 B. L. R. 437 (1869).
(7) L. R. 38 I. A. 38: s.c. I. L. R. 33 All 356; 15 C. W. N. 545 (1911).

Mohendranath v. *Shamsunnessa* (43), *Gur Nanan* v. *Jaynarain* (44), *Biharilal* v. *Daud Hossain* (45), *Subhamonal* v. *Arudaya* (46) and *Bhagaraja* v. *Addepalli* (47).] The view cannot be defended on principle that a qualified owner, like a Hindu widow, daughter or mother is bound at her peril to pursue a litigation in respect of the estate in her hands, unremittingly to the ultimate Court of Appeal, and that she cannot *bonâ fide* effect a settlement of the matter in controversy, even though such compromise be in the best interests of the estate. There is thus no room for reasonable doubt that the permanent lease granted by Lochan Koer was binding upon the inheritance.

We are fortified in this view by the significant circumstance that it met with the approval of the then next reversioner, who was no other than the present Plaintiff. Reference may in this connection be made to the observations of Turner, L. J., in *Collector of Masulipatam* v. *Kavali Venkata* (4), of Sir James Colvile in *Rajlakshmi* v. *Gokul Chandra* (16) and of Lord Davey in *Sham Sundar* v. *Achan Koer* (17), which will all be found quoted in the judgments of the Full Bench in *Debi Prosad* v. *Golap Bhagat* (48) to show that the concurrence of the reversioner raises a presumption that the alienation is made for a proper purpose. (See also the observations of Lord Moulton in *Bijoygopal* v. *Girindranath* (5) and of Sir Andrew Scoble in *Bajrangi* v. *Manokarnika* (5). Reliance need not be placed on the circumstance that the Plaintiff attested the document for, as pointed out by the Judicial Committee in *Rajlakshmi* v. *Gokoolchandra* (16) and *Harikissen* v. *Kasiprosad* (49), mere attestation of a deed does not necessarily import consent to an alienation effected thereby nor even a knowledge of the contents thereof. But, in the present case, we have something more substantial and less equivocal embodied in the petition of the Plaintiff, dated the 10th February 1895, which was incorporated in the decree of the 18th February 1895. We have also his deliberate assertion in his written statement in that suit. The maxim here applies that a subsequent ratification has a retrospective effect and is equivalent to a prior command : *omnis ratihabitio retrotrahitur et mandato priori aequiparatur.* [Co. Litt. 207 a *Flackner* v. *U. S. Bank* (50).] A futile effort has been made to escape from this position by the argument that the Plaintiff was at the time an infant, that his petition was in essence a transfer of a *spes successiones* by a reversioner and consequently inoperative in law [*Sham Sundar* v. *Acchan Kunwar* (17), *Brindaban* v. *Sureshwar* (51), *Muthuveerum* v. *Vythilinga* (52) and that in any event, the petition was inadmissible because it was not registered [*Pranal Anni* v. *Lakshmi*

(4) 8 M. I. A. 529 at p. 551 (1861).
(16) 13 M. I. A. 209 (1869).
(17) L. R. 25 I. A. 183 : s. c. I. L. R. 25 All. 71 ; 2 C. W. N. 729 (1898).
(43) 19 C. W. N. 1230 : s. c. 21 C. L. J. 157 (1914).
(44) I. L. R. 34 All. 385 (1912).
(45) I. L. R. 35 All. 240 (1913).
(46) I. L. R. 30 Mad. 3 (1906).
(47) I. L. R. 35 Mad. 560 (1911).
(48) I. L. R. 40 Cal. 721 : s. c. 17 C. W. N. 701 (1913).
(5) I. L. R. 41 Cal. 793 (805) : s. c. 18 C. W. N. 673 (1914).
(6) L. R. 35 I. A. 1 : s. c. I. L. R. 30 All. 1 ; 12 C. W. N. 74 (1907).
(16) 13 M. I. A. 209 (1869).
(17) L. R. 25 I. A. 183 : s. c. I. L. R. 25 All. 71 ; 2 C. W. N. 729 (1898).
(49) L. R. 42 I. A. 64 : s. c. 19 C. W. N. 370 (1914).
(50) 8 Wheaton 363.
(51) 10 C. L. J. 283 (287) (1909).
(52) I. L. R. 32 Mad. 206 (1908).

UPENDRA NATH BOSE *v.* BINDESRI PROSAD.

Anni (53), *Bindesri* v. *Gungasaran* (54) and *Mallik Sahèl* v. *Mallikarjuna* (55).] This contention is entirely baseless; the plea of minority has been rejected as untrue by all the Judges and the petition does not, either in form or in substance, effect a transfer of an interest in immovable property, vested or contingent, present or future; but it does record the approval of the transaction by the reversionery heir and thus affords cogent evidence of its propriety. From every possible point of view, consequently, the lease proves unassailable.

The result is that in concurrence with the Chief Justice I hold that this appeal must be allowed and the suit dismissed with costs in all the Courts.

HOLMWOOD, J.—It is unnecessary for me to add anything to the judgments just delivered with which I am in full agreement.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE No. 2826 OF 1912.

WOODROFFE, J. COXE, J. 1914, 11, August.	SADHU CHARAN DUTTA, Defendant, Appellant, *v.* HARANATH DUTTA and others, Plaintiffs, Respondents.

Partition suit—Preliminary decree, appeal preferred against, after final decree passed, if lies.

Where a preliminary decree for partition passed by a Munsif was affirmed by the Subordinate Judge, and a second appeal therefrom was not filed until after the first Court had passed the final decree for partition, and no appeal was preferred against this latter decree:

Held- *That the preliminary decree having been affirmed by the final decree and the final decree itself not being the subject of any appeal, no second appeal lay against the preliminary decree.*

KHIRODAMOYI DASI *v.* ADHAR CHANDRA GHOSE (1) *followed.*

RAM NATH SINGH *v.* BASANTA NARAIN SINGH (2) *distinguished.*

This was an appeal from a decision of Babu Ashutosh Ghose, Officiating Subordinate Judge, 2nd Court, of Zilla Dacca, dated the 14th of May 1912, affirming the decree of Babu Nitai Charan Ghosh, Munsif, 1st Court at Munsigunge, dated the 19th May 1911.

The Respondents brought a suit for partition in which the Munsif passed a preliminary decree in their favour on 19th May 1911. On appeal the Subordinate Judge by his judgment, dated the 14th May 1912, affirmed this decree and directed a commissioner to be appointed to effect partition "according to the shares as fixed by the lower Court." On 30th July 1912, a final decree based upon a report of the Commissioner appointed by the Munsif was in the absence of objection of either side passed by the Munsif. The present second appeal against the preliminary decree was not filed until the 3rd September 1912. A preliminary objection was taken that the second appeal was not maintainable.

Babus Gunada Ch. Sen and *Surendra N. Das-Gupta* for the Appellant.

Dr. Sarat Ch Basak and *Babu Bepin Ch. Bose* for the Respondent.

(53) I. L. R. 26 I. A. 101: s. c. I. L. R. 22 Mad. 508; 3 C. W. N. 385 (1899)
(54) L. R. 25 I. A. 9: s. c. I. L. R. 25 All. 171; 2 C. W. N. 129 (1897).
(55) 19 Bom. L. R. 1142 (1918).

(1) 18 C. L. J. 331 (1913).
(2) 17 C. W. N. 868 (1913).

SADHU CHARAN DUTTA *v.* HARANATH DUTTA.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—It is quite clear in this case that no appeal lies and the preliminary objection must succeed.

This is an appeal against a preliminary decree for partition. Now, before the filing of the second appeal, a final decree was passed and there has been no appeal filed against the final decree. What is the result? The result is that the preliminary decree which was passed has been affirmed by the final decree and the final decree is itself not made the subject of appeal.

The case cited to us [*Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (1) is in point and the case of *Ram Nath Singh* v. *Basanta Narain Singh* (2) does not assist the Appellant, because it is pointed out there that at the time when the Appellant preferred his appeal, no final decree had been passed. In this case however a final decree had been passed and this is the material difference between the two cases.

The appeal therefore must be dismissed with costs.

COXE, J.—I agree.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 1154 OF 1914.

MOOKERJEE, J.
NEWBOULD, J.
1915,
30, April.

GANGAHARI CHAKRAVARTI, Plaintiff, Petitioner,
v.
NABIN CHANDRA BANIKYA and anr., Defendants, Opposite Party.

Limitation Act (IX of 1908), Sch. I, Arts. 49, 115, 145—Gold deposited with goldsmith to be made into ornaments—Suit to recover—Limitation.

Where the allegation was that nearly 11 years ago the Plaintiff had made over a tola of gold to Defendant to be made into ornaments, but no time was fixed and the latter put him off from time to time until being pressed by Plaintiff on 24th March 1914, he promised to make and deliver the ornaments within 15 days, but failed to do so,

Held—*That Art. 145 of Sch. I to the Limitation Act applied to a suit for recovery of the gold deposited.*

Art. 145 applies even when the property is not recoverable in specie and does not cease to be applicable merely because the Defendant refuses to return the property. Such refusal does not bring into operation Art. 48 or 49.

Even if Art. 49 applied limitation would begin running from 8th April 1914 before which there was no refusal.

If Art. 115 applied limitation would run from the same date, when the contract was broken.

This was a Rule granted on the 17th November 1914 against the judgment of Babu D. N. Sen-Gupta, Munsif of Bajitpur, exercising the powers of a Small Cause Court Judge, dated the 7th September 1914.

The facts of the case will appear from the judgment.

Babu Gopal Chandra Das for the Petitioners.

M. A. K. Fazlal Huq and *Babu Jotindra Mohan Chowdry* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The question for decision in this Rule is, whether the suit is barred by limitation. The case for the Plaintiff is that about eleven years ago he made over to the Defendants, goldsmiths by profession, gold

(1) 18 C. L. J. 321 (1912).
(2) 17 C. W. N. 868 (1913).

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REPORTS (*See* Index).

The Right Hon'ble Sir Lawrence Jenkins, K.C.I.E., P.C.

We are glad to find that Sir Lawrence Jenkins, K.C.I.E., the late Chief Justice of the Calcutta High Court, has been sworn in as a Privy Councillor so that he may sit on the Judicial Committee of the Privy Council. This will surely go to strengthen the Board of the Judicial Committee of the Privy Council. Sir Lawrence made his mark on the Bench from the very time he joined the Calcutta High Court as a Puisne Judge. His subsequent appointments as the Chief Justice of the Bombay High Court, Member of the Council of the Secretary of State for India and as the Chief Justice of the Calcutta High Court added to his reputation and the esteem in which he has been held in this country. He is an erudite and sound lawyer. Being a very acute lawyer he showed a tendency at times to be somewhat technical. But he was always keen on doing justice and his judgments are held in great respect throughout India.

Anticipatory breach of contract—Damages.

The judgment of the Appellate Court in the case of *Bilasiram Thakursidas* v. *E. A. Gutbay* which is reported in our columns this week may give rise to difficulties in the assessment of damages in some cases where a suit is brought for damages for anticipatory breach of a contract. In this case the contract was for the delivery of a certain quantity of Java sugar by shipments during certain months and the seller on or about the last day limited for the delivery of the 1st month's instalment of the sugar declared his intention of not performing his part of the contract in its entirety and the purchaser treated the seller's declaration of his intention not to perform his part of the contract as an immediate breach thereof. The buyer then filed his action before the due dates of the remaining instalments had transpired claiming damages on the following basis: (1) as to the 1st month's instalment on the basis of the difference between the contract price and the market price on the last day for the delivery of such instalment, (2) as to the 2nd month's instalment on the basis of the difference between the contract price and the price at which the purchaser actually obtained a similar contract to cover that instalment, and (3) as to the remaining instalments, of which the due dates for delivery had not yet transpired at the time of the filing of the action, on the basis of the difference between the contract price and the market price on the day of the breach for a similar contract for the delivery of the remaining instalments.

In the Court of first instance damages were awarded to the Plaintiff on the basis claimed. Against this judgment the defendant appealed and the question before the Appellate Court was whether the plaintiff was entitled to the damages claimed as awarded to him. At the time of the trial of the action the due dates of the several instalments of sugar had already transpired, and the Appellate Court held that the damages should have been assessed on a different basis, *viz.*, on the basis of the difference between the contract price and the market price with regard to each of the several instalments on their several due dates for delivery but the Court dismissed the appeal on the ground that if damages were assessed on that basis the appellant's object in the appeal would be frustrated inasmuch as in view of the evidence of a rising market the damages would amount to much more than what was awarded to the plaintiff.

The principle enunciated by the Appellate Court has the support of a number of decisions, notably the case of *Brown* v. *Muller*, (1872) L. R., 7 Ex. 319 and of *Roper* v. *Johnson*, (1873) L. R., 8 C. P. 167. But in these cases the action was brought after the due dates of the several instalments for delivery had already transpired, and damages were assessed on the principle enunciated above. Since the plaintiff is not obliged to wait for the several due dates for the performance of his contract to transpire before bringing his action for anticipatory breach [see *Hochter* v. *De La Tour* (1853) 2 E. and B. 678] but may bring his action at once, as was in fact done in the present case, it is conceivable that cases may occur where the due dates for the performance of the several parts of a contract may remain unexpired at the time of the hearing of the suit and also of the appeal, if any. How then is the principle above enunciated to be applied to such cases? It is to be observed that in the case of *Roper* v. *Johnson* (*supra*) this principle of assessing damages is modified to this extent, *viz.*, that if the defendant shows that the plaintiff could have minimised his damages by obtaining in the market a similar contract to the one that was broken then the damages would be decreased accordingly. In the present case at the time of bringing his action it was obviously not available to the plaintiff to apply the principle enunciated above for assessing his damages and presumably to obviate all question as to the possibility of minimising of damages as indicated in *Roper* v. *Johnson*, he brought his action on the basis of what according to him was, rightly or wrongly, the market price on the day of the breach for a similar contract to the one that had been broken. We apprehend that the principle enunciated above is always difficult of application to cases where at the trial the due dates of the several instalments under the contract remain unexpired and evidently in this case the suit was so framed to obviate such difficulties.

Right of a person invalidly adopted to maintenance in the adoptive family.

The question whether the adoptee's connection with the adoptive family is severed and his original status in the family of his birth restored by the declaration of the invalidity of his adoption is beset with considerable difficulty. The Bombay High Court had recently occasion to consider this question (*Dalpat Singji* v. *Rai Singji*, I. L. R. 39 Bom. 528). In this case it was found that the widow adopted a son without any authority and their Lordships Heaton and Shah, JJ., held that a boy whose adoption is found to be invalid has no right to be maintained out of the estate of the adoptive family; there was neither text nor precedent in support of it. The mere fact that ceremonies were properly performed and the widow thought that she had authority to adopt would not affect the question. In *Lukshmappa* v. *Ramava*, 12 Bom. H. C. R. 364, Sir Michael Westropp, C. J., observed as follows: "An invalid adoption works nothing. It leaves the alleged adoptee precisely in the same position which he occupied before the ceremony, no matter how formally it may have been celebrated." In *Ayyava* v. *Niladatchi*, 1 Mad. H. C. R. 45, the Madras High Court held that a Hindu whose adoption is invalid is entitled to maintenance in the adoptive family. In a later case *Bawani* v. *Imbabay*, 1 Mad. H. C. R. 363, however the same High Court took a contrary view and held that a person adopted by an unauthorised widow and whose adoption was therefore invalid was not entitled to maintenance. The Court also expressed an opinion that the natural rights of a person invalidly adopted remain unaffected by the invalid adoption. In *Eshan Kishore* v. *Harish Chunder*, 21 W. R. 381 the Calcutta High Court held that if the adoption of a person be invalid he would lose his right of inheritance from his natural parents.

As observed by Sastri Golap Chandra Sarkar in his treatise on the Hindu Law of adoption, the principles of equity and justice require that these questions should not be considered from a merely theoretical point of view but should be dealt with in such a manner as is beneficial to the adopted son who is an innocent party to a transaction that affects him more than any other person. In the case of an adoption by a widow if the widow lived long after the adoption the validity of which is impugned by the reversioner after her death, when by the lapse of time the adopted son's right of inheritance from his natural parents may be barred by limitation, it would be useless to declare that his natural rights are unaffected by his invalid adoption; and it would be a great hardship on him if he be not entitled to even the right to maintenance in the adoptive family.

The conclusion arrived at by Sastri Golap Chandra is as follows:—The equitable rule to

follow seems to be that if there be delay on the part of those that are interested in challenging the validity of an adoption the person adopted should be entitled to maintenance in the adoptive family in all cases irrespective of the ground on which the adoption may be invalid. And in addition to that right he should be declared entitled to his natural rights in the family of his birth.

Pay and prospects of interpreters.

We have received a letter pointing out to us that Babu Trailakhya Nath Goswami who recently retired from the post of Interpreter on the Original Side of the High Court was not a B.A. as was erroneously put down by us. We regret that we cannot see our way to publish the letter in full as it seems to digress into matters which have no bearing on the question of improvement in the staff of interpreters. But we quite agree with the writer that the pay and prospects of the interpreters as they were in the past should be restored when public funds would permit it. The letter concludes thus: In the old days, the initial salary of an Interpreter was Rs. 400 a month. Now it is Rs. 150 only, and it took 23 long years for the successor to Babu Trailakhya Nath Goswami to rise to the grade of Rs. 400. The writer pertinently asks "Is it possible to have a Shyama Charan or Beni Madhab on this scale of pay?"

Reviews.

PRESIDENCY TOWNS INSOLVENCY ACT. *By S. Kasturi Rangachariar, B.A., B.L. Published by the Law Printing House, Madras. 1915.*

This is a carefully compiled edition of the Presidency Towns Insolvency Act of 1909. The book opens with a short but connected history of bankruptcy legislation in this country showing the circumstances which made the passing of the present Act necessary. The sections have been split into their component parts and these have been annotated with case-law from the Indian as well as the English Reports. The cases from the English Reports have been necessarily numerous as our law of insolvency is principally based upon the English Bankruptcy law. The notes are full, clear and concise. Under each section reference has also been made to the analogous provisions of the English Bankruptcy Act and the Provincial Insolvency Act. There are also three Appendixes, the first two giving the full texts of the English Bankruptcy Acts of 1883 and 1890 and the third containing the Rules made under the Act by the High Courts of Bombay, Calcutta and Madras and the Chief Court of Burma. Two table of cases, one Indian and the other English, and an exhaustive subject index enhance the usefulness of this neat and handy compilation.

INDIAN EASEMENTS ACT. *By P. Ramanatha Iyer, B.A., B.L. Published by the Law Printing House, Madras. 1915.*

The book under notice professes to be a revised edition of the late Mr. Sanjiva Row's commentaries on the Easements Act, but the present compiler has much enlarged its scope by incorporating case-law from the English as well as the Indian authorities. This has been rightly done as the case-law on easements in this country has not yet grown into anything like a respectable volume and as the Indian statute on easements does little more than codify the principles of the English law of easements. The notes under the sections are both exhaustive and clear. The compiler has also very wisely quoted the opinions of eminent jurists and text-book writers on points which are not fully covered by case-law. Another important feature of this book is the Appendix in which the different kinds of easement, *e.g.*, light and air, water, support, etc., are separately grouped and under each group the complete case-law on the subject is logically and methodically dealt with. This, we have no doubt, will greatly facilitate the task of the busy lawyer in his hunt for references. There are several other Appendixes, one setting out in full the text of the English Prescription Act and the others giving extracts from several Indian enactments bearing on the subject of easement. The volume is wellgot-up.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA and NEWBOULD, JJ. APPEAL FROM APPELLATE DECREE No. 2816 OF 1914. MOULVI MAHAMMAD ISMAIL, Plaintiff, Appellant *v.* SAMAD ALI BHUIYAN AND ORS., Defendants, Respondents. 17th December 1915.

Contract—Agreement, if opposed to public

policy—Compounding of compoundable offence—Charge under sec. 325 of the Indian Penal Code—Complaint under secs. 147, 325, I. P. C.

The Plaintiff sued for a declaration that certain documents executed by him in favour of the Defendants were invalid and void for want of consideration. In the Court of first instance the case was tried on the question whether the Plaintiff executed the document under coercion. That Court held that there was no coercion exercised upon the Plaintiff and the suit was dismissed.

On appeal the finding of the Court of first instance on the point was affirmed; but then it was contended before that Court that the contracts were opposed to public policy, as they were entered into for compounding a criminal case.

The Plaintiff was accused of having committed offences under secs. 325 and 147, I. P. C., in the petition of complaint but the Magistrate after perusing the petition of complaint and examining the complainant thought fit to summon the Plaintiff only under sec. 325. There was nothing to show that there was any truth whatsoever in the allegations as to rioting or that there was apprehension in the mind of the Plaintiff that he would be convicted under that section.

Held, that the contracts were not opposed to public policy, as the offence under sec. 325, I. P. C., being compoundable, was compounded with the permission of the Magistrate.

Majibar Rahman v. *Muktasher Hossein* (I. L. R. 40 Cal. 113) and *Williams* v. *Bayley*, L. R. I. H. L. 220 (1816) distinguished.

Dr. Dwarka Nath Mitter and *Babu Gour Chandra Pal* for the Appellant.

No one appeared for the Respondents.

A. T. M. *Appeal dismissed.*

Civil Appellate Jurisdiction. Before Sharfuddin and Roe, JJ. Appeal from Order No. 297 of 1915. RAM KRIPAL SINGH, Judgment-debtor, Appellant *v.* BABU KEDAR NATH BOSE, and anr., Decree-holder, Respondents. 5th January 1916.

Decree, execution of—Injunction—Limitation Act (IX of 1908), sec. 15, Sch. I, Art. 182—Civil Procedure Code (Act V of 1908), Or. XXI, r. 66 (c)—Valuation of property made by the judgment-debtor.

The appeal was by a judgment-debtor from an order of the Subordinate Judge.

A suit was instituted by the Plaintiff, in which there were several Defendants, two of whom were minors represented by a pleader of the Court as their guardian *ad litem*. The suit was decreed. A suit was thereupon brought by the Defendants of the first suit to set aside the decree passed in the first suit, on the ground that it was obtained through fraud. An order of injunction for stay of execution of the decree in the first suit was passed by the High Court.

The present application for execution in the original suit was made on the 18th November 1914. An application just before the present application was made on the 19th April 1911.

An objection was made by the judgment-debtor on the ground that the application was barred. This objection was rejected.

Held, that the application was within time, as the period for which the execution of the decree was staved, was excluded under section 15 of the Limitation Act.

The Court below directed the decree-holder to mention in the sale proclamation the valuation given by the judgment-debtor in his objection petition.

Held, that cl. (c) of r. 66 of Or. XXI of the Code of Civil Procedure included the valuation made by the judgment-debtor of the property proposed to be sold; and that the Court below was quite within the clause when it ordered that the sale proclamation should mention, not only the valuation as alleged by the decree-holder but also the valuation as alleged by the judgment-debtor in his objection petition.

Babu Akshay Kumar Banerjee for the Appellant.

Babu Gopal Chunder Some for the Respondents.

A. T. M. *Appeal dismissed.*

GANGAHARI CHAKRAVARTI *v.* NABIN CHANDRA BANIKYA.

ornaments of the weight of one *tola* in order that they might be melted and new ornaments made therewith. No time was fixed within which the work was to be finished. The Plaintiff asserts that the Defendants put him off from time to time and that ultimately when on the 24th March 1914 he pressed the Defendants for the ornaments, they promised to make and deliver them within fifteen days. This period, however, expired and yet the Plaintiff has not been able to get the ornaments. He consequently instituted this suit on the 11th May 1914, and prayed, in the alternative, either that the Defendants be directed to return to him the one *tola* of gold or that a decree for the price thereof, namely, Rs. 25, might be made against them. The Small Cause Court Judge has dismissed the suit on the ground that it is barred by limitation. In our opinion, this view cannot possibly be supported.

The case is governed either by Art. 49 or 115 or 145 of the Indian Limitation Act. Art. 145 provides that a suit against a depository to recover movable property deposited must be instituted within 30 years from the date of deposit. This article, as was observed in *Krista Kamini* v. *Administrator-General* (1) and *Administrator-General* v. *Krista Kamini* (2) applies even when the property is not recoverable in specie. The article does not also cease to be applicable merely because the Defendant, after demand, wrongfully refuses to return the property; such refusal does not bring into operation Arts. 48 and 49. [*Narmadabai* v. *Bhavani—Shankar* (3) and *Gangineni* v. *Gottipati* (4).] Consequently, Art. 145 may be applied in so far as the first prayer in the plaint is concerned, namely, recovery of one *tola* of gold which, if his case is true, was made over by the Plaintiff to the Defendants for a specific purpose, not yet carried out.

But even if Art. 115 is not applied, no question of limitation arises either under Art. 49 or Art. 115. Art. 49 provides that a suit for compensation for wrongfully detaining specified movable property may be instituted within three years from the date when the detainer's possession becomes unlawful. In this case, the detainer's possession did not become unlawful till he had wrongfully refused to apply the gold to make ornaments as he had originally agreed to do. According to the Plaintiff there was no refusal till the 8th April 1914. Consequently the suit is within time. The same result follows if Art. 115 is applied. Under that article, a suit for compensation for the breach of any contract, express or implied, not in writing registered and not specially provided for, may be instituted within three years from the date when the contract is broken. In this case, the contract was not broken till the 8th April 1914; indeed it is not the case for the defence that there was a demand by the Plaintiff on an earlier occasion and a refusal on their part. In our opinion the view taken by the Small Cause Court Judge is erroneous and his decree cannot be supported.

The result is that this Rule is made absolute, the judgment and decree of the Court below set aside, and the case remanded for trial on the merits. The Petitioner is entitled to the costs of this Rule. We assess the hearing fee at one gold mohur.

Rule made absolute.

(1) 7 C. W. N. 476 (1903).
(2) I. L. R. 31 Cal. 519: s. c. 8 C. W. N. 500; 6 C. L. J. 535 (1904).
(3) I. L. R. 26 Bom. 430 (1902).
(4) I. L. R. Mad. 56 (1909).

PRIVY COUNCIL.]
[Appeal from Madras.]

Viscount Haldane.	V. Venkata-
Lord Parmoor.	narayana
Lord Wrenbury.	Pillay, since de-
Sir John Edge.	ceased (now re-
Mr. Ameer Ali.	presented by V.
1915,	Kuppusami
Heard, 3, November.	Pillay), Appel-
Judgment,	lant,
17, November.	*v.*
	V. Subbammal & anr., Respondents.

Will of Hindu—Two Wills by same testator making different dispositions of property, and former giving his widow power to adopt—Absence of words of revocation in latter—Both Wills invalid by reason of property being coparcenary property at testator's death—Widow if may exercise power of adoption—Doctrine of dependent relative revocation.

A Hindu, then the sole surviving coparcener of a divided share of ancestral property, executed on 8th September 1889 a document which contained an appointment of his wife and his daughter to be executrixes and consisted of two parts: (1) a disposal of the property in a certain way and (2) an authority to his widow, in case the executant should die before completing the adoption as his son of one V. P., to complete the adoption, and in case V. P. should die during the widow's life-time to take certain other persons in adoption. On 9th February 1890 he completed the adoption of V. P. himself and on 21st March 1890 executed another Will which contained no words of revocation of the previous Will and was wholly silent as to the adoption, and whilst it stated that the property was ancestral, it proceeded to provide that in case V. P. should happen to die at any time, his issue should enjoy the property, and that on the failure of such issue, it should be divided amongst his daughter's sons. The testator died on 4th April 1890, and V. P. on 4th June 1891. The widow adopted P. on 13th August 1906:

Held—*(1) That the disposition of 8th September 1889 was a Will.*

(2) That as another member V. P. had entered the coparcenery, the testator was, after his adoption, not competent to dispose of the property and the Wills to that extent became ineffectual.

That the portion of the first Will which gave a power to adopt remained unaffected and was not revoked by the subsequent Will.

An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

Alexander *v.* Kirkpatrick (4) *relied on.*

Tupper *v.* Tupper (1), Quinn *v.* Butler (2) *and* Baker *v.* Story (3) *referred to.*

Appeal from a judgment of the Madras High Court, (Sir Charles Arnold White, C. J., and Sankaran Nair, J.), dated the 12th March 1912, which affirmed a judgment of Wallis, J.

The facts of the case are fully stated in the judgments.

The testator executed two testamentary documents. The first dated 8th September 1889, among other things, provided as follows:—

"I have appointed my wife Subbammal and my daughter Rajammal to be my executrixes after my death. I have nominated as my son Siranjeevi Venkatakrishna Pillay who is my grandson by daughter and the son of my said daughter Rajammal. If by Divine Will I should die before completing the said adoption in the ceremonial form that should be observed according to the custom prevailing among the Hindus, my wife Subbammal

(1) 1 K. and J. 665; 69 Eng. Rep. 627 (1855).
(2) L. R 6 Eq. 225 (1868).
(3) 31 L. T. N S. 631; 23 W. R. 147 (1874).
(4) L. R 2 H. L. Sc. 397 (1874).

shall, after my death, complete the necessary ceremonies and take in adoption my said grandson as my adopted son, in the presence of my friends and relations and purohiter and other persons. . . . .

" In case any danger may happen to my grandson Siranjeevi Vencatakrishna Pillay during the life-time of my wife Subbammal who is one of my executrixes, my wife Subbammal may according to her wishes take in adoption one of my aforesaid daughter Rajammal's sons and give my properties to that son."

Subsequently, he adopted Vencatakrishna Pillay and made another Will, dated 21st March 1890. It contained no reference whatever to the first Will, and proivded among other things as follows :—

" My executors shall preserve and take care of the income of the whole of the aforesaid properties and all, and shall deliver up the same to my son Vencatakrishna Pillay after he attains the age of 22 (twenty-two) years. My aforesaid son shall keep all the immovable properties mentioned in my Will and maintain himself by means of the incomes accruing therefrom, only so, and he shall have no power to sell or mortgage or dispose of in any other way even one of those properties.

" Should my son Vencatakrishna Pillay happen to die at any time, his issues shall enjoy the same. Should he have no issues, the same shall be divided and be given to the issues of my daughter Rajammal. They also may spend only that income and shall not take the estate. Should Rajammal, my aforesaid daughter, have no issues, Rajammal shall enjoy the incomes of the aforesaid properties for life, and after her death the necessary expenses for the charity of Maruttisvarar of Tirukachur, Chingleput District, shall be conducted with the income accruing from the aforesaid properties."

The present Appellant raised the contention that on a proper construction of the two documents, and of the second in particular, the widow had no authority to make the adoption of the Respondent after the death of the first adopted son, Vencatakrishna Pillay.

Both Courts decided against the Plaintiff. The reasons given by the High Court would appear from the following extract from their judgment :—

" Mr. Justice Wallis held, and we agree with him that the second Will was inconsistent with the first and that if the second Will had been operative there would have been a clear revocation of the earlier Will. There remains, however, the further question, and this was the main question argued in the appeal—does the second Will although inoperative as a testamentary disposition of the property with which it purported to deal, revoke the authority to adopt conferred by the first Will. Wallis, J. answered this question in the negative, and although the point is not free from difficulty, we have come to the conclusion that he was right.

" The answer to the question we have to determine would seem to depend on whether what is termed in the books the doctrine of dependent relative revocation applies to this case. This doctrine is discussed in the last edition of Jarman on Wills on pages 148, 169 and 170. One would have thought that *primâ facie* a devise which was inoperative as a disposition of property would have been inoperative as a revocation of an earlier disposition. But the Courts have recognised a distinction between cases where the infirmity of the second Will was apparent on the face of the Will, and the defect was intrinsic, and cases where the Will was

inoperative for reasons outside the instrument, *i.e.*, where the defect was extrinsic. In the former case the second devise would not operate as a revocation of the earlier devise. In the second case it would. In *Tupper* v. *Tupper* (1), where a testator by his Will bequeathed valid legacies to various persons, and by a codicil revoked them "and in lieu thereof" bequeathed a legacy which failed under the Mortmain Acts, it as held the revocation took effect. (In this case, it is to be noted there was an express revocation). It has also been held that where the second devise failed through the incapacity of the devisee the prior devise was revoked. (See the cases cited in Jarman on Wills, page 170). In *Baker* v. *Story* (3), Sir G. Jessel held that, where a testator by his first Will devised his real estate to his widow absolutely and by his second Will, which contained no clause of revocation, devised his real estate to his widow for life and after her death to charity, although the devise to the charity was void the absolute devise to the widow was revoked. In *Ex parte Ilchester* (5) it is said that where the second instrument failed of effect 'by some accident independent of the instrument,' it yet produced a revocation.

"Instances of cases where the defect in the second instrument was a formal defect (*e.g.*, non-compliance with the Statute of Frauds) apparent on the face of the instrument, and the Courts have held that the earlier instrument was not revoked, are to be found in *Onions* v. *Tyrer* (6) and *Kilbeck* v. *Wood* (7).

"It may no doubt be said with some force that a case where the second instrument though failing through the incapacity of the devisee, nevertheless, operates as a revocation of an earlier instrument, is not easily distinguishable from a case like the present where the second instrument fails by reason of the fact that the property which the testator purports to dispose of cannot be made the subject-matter of testamentary disposition. The incapacity of the devisee, however, is not necessarily apparent on the face of the instrument, whereas in the present case the fact that the testator purports to dispose of ancestral property is apparent on the face of the Will, and this, as it seems to us—if we are to decide this case with reference to this doctrine of dependent relative revocation—brings it within the class of cases where the defect in the second instrument may be said to be intrinsic and not extrinsic.

"Wallis, J. held, on the authority of the House of Lords' decision in a Scotch case *Alexander* v. *Kirkpatrick* (4), that the second Will in the present case did not operate so as to revoke the authority to adopt conferred by the first.

* * * *

"No doubt the two instruments in question in *Alexander* v. *Kirkpatrick* (4) were conveyances and no question of the intention of a testator to be gathered from the terms of a Will arose (This may account for the fact that we find no reference to this case in Mr. Jarman's book or in Mr. Theobald's book). Lord Hatherley, however, in his judgment in *Alexander* v. *Kirkpatrick* (4) considered some of the Will cases and observed: 'The Court feels itself in this position, according to the cases cited by Mr. Pearson [*Onions* v. *Tyrer* (6)], that it can discover an intention to revoke only in the altered

(1) 1 K. and J. 665 ; 69 Eng. Rep. 627 (1855).
(3) 31 L. T. N. S 631 ; 23 W. R. 147 (1874).
(5) 32 Eng. Rep. 142 at p. 150 (1803).
(6) 1 P. Wms. 343 ; 2 Vern. 741 (1716)
(7) 5 L. J. Ch. (O S.) 61 ; 38 Eng. Rep. 217 (1826).
(4) L. R. 2 H L Sc. 397 (1871).
(6) 1 P. Wms. 343 ; 2 Vern 741 (17.6).

disposition which is attempted to be made by the second insrument; and if that disposition fails, then also the Court must fail to perceive an indication of an intention to revoke the first, the Court not being able to find that there is in truth any inconsistent disposition at all in consequence of that which was intended to be such having wholly failed to take effect.'

"We are prepared to apply the principles of this decision to the case before us and to hold that the authority to adopt was not revoked.

"The other points raised in the appeal were not very seriously pressed."

Hence this appeal which was revived by the present Appellant, *vide* 19 C. W. N. 641 : s. c. L. R. 42 I. A. 125.

Sir Robert Finlay, K. C., and *Mr. Bhugwandin Dubé* for the Appellant submitted that the document dated 8th September 1889, was a non-testamentary instrument authorising the widow to adopt, and that it was inadmissible without registration. *Secondly*, if it was a Will, the authority to adopt was subject to the contingency of Venkatakrishna Pillay dying before adoption. It did not confer upon the widow a general authority to adopt. *Thirdly*, the first Will was revoked by the second Will. The second was a complete disposition of the whole of the testator's property, and superseded the first.

Both the lower Courts had concurrently held that the second Will was inconsistent with the first. The second Will put an end to all authority to adopt, even supposing that it was given by the first. It was true that the second Will had been declared inoperative under the Hindu Law, but that could not prevent the Appellant from using the second Will to show that the testator intended to revoke the authority to adopt.

The testator had adopted in his life-time, and he thought that that was enough. He did not contemplate a second adoption as would appear from his disposition of the property made by the second Will. The testator believed that the second devise would be good under the Hindu Law. It was not necessary to use the word "revoke" or its equivalent in the second Will. The terms of the second Will were absolutely inconsistent with those of the first, and that inconsistency was enough to revoke the first.

The English doctrine of dependent relative revocation had no application to the facts of the case. The second Will was complete by itself and there was nothing to indicate that the first Will had to remain operative in case the disposition made in the second Will could not be carried into effect. The second Will did not fail by reason of any intrinsic defect. The case of *Alexander* v. *Kirkpatrick* (1), was a case of two conveyances and not of Wills, and therefore had no application.

Reference was made to the following authorities :—*Tupper* v. *Tupper* (1), *Onions* v. *Tyrer* (6), *Baker* v. *Story* (3) and *Quinn* v. *Butler* (2).

Their Lordships reserved judgment without hearing *Mr. L. DeGruyther, K.C.* and *Mr. Kenworthy Brown*, Counsel, for the Respondents.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD WRENBURY.—At the date of the first testamentary instrument, *viz.*, the 8th September 1889, the testator, Vencataramu was sole surviving coparcener of the property here in question. It was ances-

(1) 1 K. and J. 665 ; 69 Eng. Rep. 627, 650 667, 669 (1855).
(2) L. R. 6 Eq. 225 (1868).
(3) 31 L. T. N. S. 631 ; 23 W. R. 147 (1874).
(4) L. R. 2 H. L. Sc. 397 (1874).
(6) 1 P. Wms. 343 ; 2 Vern. 741 (1716).

tral property, but a division had been effected, and of the testator's divided share he had no coparcener. He could, therefore, dispose of it. Under those circumstances he made a Will, dated the 8th September 1889, which contained an appointment of his wife and his daughter to be executrixes and for the present purpose consisted of two parts, *viz.* : (1) a disposal of the property in a certain way, and (2) an authority to his widow in a certain event to take a son by adoption.

He had, and it appears by the Will that he had, nominated as his son Venkatakrishna, who was a son of his daughter Rajammal, but he had not completed the adoption. By his Will he directed that if he should die before completing the adoption, his wife Subbammal should, after his death, complete the necessary ceremonies, and take the said grandson in adoption, and his Will contained the following clause :—

"In case any danger may happen to my grandson Siranjeevi Venkatakrishna Pillay during the life-time of my wife Subbammal who is one of my executrixes my wife Subbammal may according to her wishes take in adoption one of my aforesaid daughter Rajammal's sons, and give my properties to that son."

An argument was tentatively put forward, but was not pressed by the Appellant's counsel that this document was not a Will. Their Lordships can entertain no doubt that it was a Will. It contained an appointment of executors, and (as has already been pointed out) it was executed by a testator who at its date could dispose of the property of which he purported to dispose.

On the 9th February 1890 the testator completed the adoption of Venkatakrishna. Another member of the coparcenary thus entered the joint family, and when the testator subsequently died, the property was ancestral property, of which he was not at that date competent to dispose. In this sense, and to this extent, the Will of the 8th September 1889 became ineffectual.

On the 21st March 1890 the testator executed another Will. It contains a new appointment of executors. They are the two executors appointed by the Will of the 8th September 1889, and a third. It discloses on its face that the property of which it purports to dispose is ancestral, but nevertheless purports to dispose of it although at this date the testator had a coparcener, and could not dispose of it. It contains in Art. (5) a gift that, in case Venkatakrishna shall happen to die at any time, his issues shall enjoy the property. It contains no words of revocation of the previous Will; is wholly silent as to adoption; and does not refer in any way by revocation or otherwise to the clause in the Will of the 8th September 1889 set out above, which gave the widow a contingent power of adoption.

On the 4th April 1890 the testator died. The Will of the 8th September 1889 was not, and the Will of the 21st March 1890 was, admitted to probate. On the 4th June 1891 Venkatakrishna died.

In 1893 the Plaintiff in the present proceedings being the brother of Venkataramna and thus reversionary heir to Venkatakrishna instituted a suit, and on the 20th November 1894 obtained a decree that the Will of the 21st March 1890 was null and void, and inoperative according to Hindu Law. This must have meant as regards the disposal of the ancestral property.

In this state of facts the widow Subbammal, on the 13th August 1906, adopted the Defendant Parthasarathi.

The present suit is one instituted by Venkatanaraiyana, as reversionary heir of Venkatakrishna, against Subbammal, the

widow, and Parthasarathi, the son adopted by the widow, for a declaration that his adoption was illegal and invalid.

The Appellant advanced two contentions (1) that the document of the 8th September 1889 was not a Will—with this their Lordships have dealt above—and (2) that if it was a Will, it was revoked by the Will of 21st of March 1890, and that no power existed in the widow in 1906 to make an adoption.

The Appellant rests his case not upon any words in the Will of 1890 revoking the Will of 1889, for there are none, but upon such an inconsistency between the two Wills as that the provisions of the earlier Will cannot stand with the existence of the later Will. It has already been pointed out that the Will of 1889 consists of two parts and assuming for the moment that the contention is well founded as to the one part, *viz.*, that which effects a disposal of the property, it does not touch the other part, *viz.*, that which gives a power to adopt.

Whether the contention is well founded as regards the other part, *viz.*, that which effects the disposal of the property, turns upon the application of the doctrine of dependent relative revocation. This is really a question of intention. If by his Will a testator gives property to A, and by codicil gives the same property to B, and if in the event it turns out that B cannot take, it has to be ascertained from the language of the testator as found in his testamentary documents whether he intended that the gift to A should be displaced altogether or that it should be displaced only in favour of B, and (if B cannot take) the gift to A should remain. If, as in *Tupper* v. *Tupper* (1), the testator's language is that (1) he revokes the gift to A and (2) in lieu thereof he gives to B, it may well be that there is a revocation for all purposes. If, as in *Quinn* v. *Butler* (2), the donee of a power to charge does by his Will charge with 4,000*l.* to be paid to A and 3,000*l.* to be paid to B, C and D equally, and then by codicil revokes the aggregate charge of 7,000*l.* made by his Will and charges with 7,000*l.* for A, the charge in the Will is no doubt gone for all purposes.. If, as in *Baker* v. *Story* (3) A takes absolutely under the Will, but under the codicil takes for life only with a gift over which fails, and there is an ultimate effectual residuary gift, it is difficult to find any room for a contention that the gift by Will is not gone altogether. But no one of these authorities is pertinent to the present case. *Alexander* v. *Kirkpatrick* (4), although a case upon two dispositions, of which the former contained a power of revocation, and not upon two Wills, contains a principle applicable in their Lordships' opinion to the present case, *viz.*, that an alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

It is admitted that by the Will of 1890 the testator could not give his ancestral properties as he purported to do, but it is argued that from the fact that he purported so to give them there is to be inferred an intention that if he could not give them as he purported to do in 1890 his disposition in 1889 should nevertheless be revoked- and the argument goes beyond this to affirm that not only his disposition of property in 1889 but also the independent provision conferring a power to adopt given in 1889 is in like manner revoked. Their Lordships do not accept either argument as well founded. The effect of that which

(1) 1 K and J. 665 ; 69 Eng. Rep. 627 (1855).

(2) L. R 6 Eq 295 (1868).

(3) 31 L. T. N. S. 681 ; 23 W. R. 147 (1874)

(4) L. R. 2 H. L. Sc. 397 (1874).

has taken place is that there are two testamentary instruments. The later must no doubt prevail over the earlier, but the contingent power to adopt in the earlier instrument is unaffected by anything in the later. In their judgment it has been rightly held that on the 13th August 1906 the widow had the power of adoption which she exercised, and the Plaintiff's case fails.

Their Lordships will humbly advise His Majesty that the appeal fails and must be dismissed with costs.

Solicitor: *Mr. John Josselyn* for the Appellants.

Solicitor: *Mr. Douglas Grant* for the Respondents.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

Appeal from Original Civil Jurisdiction.

No. 23 of 1915.

Sanderson, C. J. Woodroffe, J. Mookerjee, J. 1915, 29, November.	Bilasiram Thakursidas, Defendant, Appellant, *v.* E. A. Gubbay, Plaintiff, Respondent.

Contract—Anticipatory breach—Delivery by instalments—Damages, assessment of.

In a case of an anticipatory breach of contract involving deliveries in several instalments in several months, the true measure of damages would be the sum-total of the differences between the market rates at the appointed times for delivery in each month and the contract price.

Per Sanderson, C. J.—*Where a contract only limited delivery of goods by shipments during certain months and no specific instalments for delivery were mentioned:*

Held—*That the buyer was not bound to accept delivery of the whole lot of the goods either at the beginning or at the end of the period limited in the contract.*

Per Woodroffe, J.—*Where a question is one of pure fact and there is evidence to support the finding of the Court of first instance, it is incumbent on the Appellant to show that the finding is clearly erroneous for the Appellate Court to reverse that finding.*

Per Mookerjee, J.—*Where a contract is for delivery of goods by shipments during several months, in the absence of an express agreement to that effect, an agreement to accept delivery by instalments may be inferred from the conduct of the parties and the circumstances of the case.*

In the absence of any indication to the contrary the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of the goods.

The suit out of which this appeal arose, was one for damages for breach of contract for the sale and purchase of a certain quantity of Java sugar. Mr. Justice Chaudhuri decreed the suit in favour of the Plaintiff and awarded him the sum of Rs. 15,259-12 by way of damages. Against this judgment the Defendant appealed and the only question raised in the appeal was as to the amount of damages awarded and the principle on which they should have been awarded.

The Plaintiff on the 4th June 1914 contracted to purchase from the Defendant 300 tons of brown Java sugar at Rs. 6-0-6 per bazar maund, the sugar to be "delivered duty paid *ex* Kidderpore Dock's jetty or ghat" and as per cl. 2 of the contract "shipments to be made by steamers during July to December 1914. Shipment in any month may be by one or more steamers." and the same clause provided a grace of

seven days for late shipment, so that taking the length of time for the voyage from Java to Calcutta into consideration according to evidence, the latest day for delivery for any month's shipment would be about the 19th day of the month following, and the contract further provided by its cl. 12 "that the agreement was to be deemed to be and to be construed as a separate contract in respect of each shipment."

On the 10th August 1914 after the declaration of war in Europe the Defendant wrote to the Plaintiff that on account of the war no sugar could be shipped from Java without effecting insurance on extra war rates and asked whether the Plaintiff was prepared to pay the extra war insurance. In reply the Plaintiff on the 12th August wrote to say that he was prepared to carry out all and only such obligations as were included in the terms of the contract. As there were no provisions for extra war insurance in the contract itself, the Defendant on the 13th August wrote to the Plaintiff saying that unless the Plaintiff gave a definite reply within two days accepting the extra war risk the Defendant would consider the contract as cancelled. In reply the Plaintiff challenged the Defendant's right to cancel the contract and later on wrote to ask as to when and by what steamer the July shipment of the sugar was to be expected, and the Defendant on the 18th August wrote to tell the Plaintiff that he the Defendant had already cancelled the contract as per his letter of the 13th August. The Plaintiff received this letter after office hours on the 18th August and treated it as a definite repudiation of the contract and on the 19th August demanded from the Defendant the sum of Rs. 1,832-14 as damages for breach of contract in respect of the July shipment of 50 tons the last day of delivery for which was on the 19th August and the Plaintiff calculated his damages with regard to this on the basis of the difference between the market price of similar sugar on that day and the contract price. The Plaintiff tried to purchase the remaining 250 tons of similar sugar August to December shipments but only succeeded in getting one contract for 50 tons August shipment at Rs. 8 per bazar maund on the 20th August, and on the 26th August the Plaintiff filed his suit for damages claiming Rs. 15,259-12 assessing his damages as follows:—(1) Rs. 1,832-14 being the difference between the contract price and the market price on the 19th August the last day for delivery for the July shipment; (2) Rs. 2,685-6 being the difference between the contract price and the purchase price as to the 50 tons August shipment contracted to be purchased on the 20th August; and (3) Rs. 10,741-8 being the difference between the contract price and the market price on the 19th August (the day of the breach) for September to December shipments as to the remaining 200 tons which was at the rate of Rs. 8 per ton.

There was no mention in the contract as to the quantity to be shipped in any of the six months July to December but the Plaintiff construed the contract to mean 50 tons per month and the suit was brought and proceeded with on that basis, and judgment was given in favour of the Plaintiff for the amount claimed and against this judgment the Defendant appealed.

The judgment of Mr. Justice Chaudhuri which was delivered on the 19th March 1915 was as follows:—

CHAUDHURI, J.—The Plaintiff purchased 300 tons of brown Java sugar from the Defendant firm shipments July to December, 50 tons each month. The contract

provided an extra seven days for each month's shipment, that is to say, the July shipment could have been made in the first week of August and so on. There is evidence that the voyage from Java to Calcutta direct, takes 11 days; therefore the first shipment was due to arrive about the 17th or 18th of August 1914. In the meantime war had been declared and the Defendant firm wrote to the Plaintiff asking him if he was prepared to pay extra war insurance rate and in the event of his not agreeing, whether he would cancel the contract. The Plaintiff replied that he would abide by the terms of his contract. Then on the 18th August came a letter from the Defendant saying that he already cancelled the contract, although there had been no previous cancellation by him. It is quite clear that the Defendant's letter of the 18th must be taken as his repudiation. This letter was received by Gubbay the Plaintiff on the 18th August between 6 and 7 P.M. when it was too late for him to take any steps that day. The next day he went to the market and tried to purchase ready goods at "spot price." The rate for the same quality was Rs. 7-6-6 rising to Rs. 7-8. He tried that day and the next, to buy forward shipments August to December, and managed to get one lot of 50 tons at Rs. 8 for the August shipment. The evidence is quite clear that at that time there were a large number of buyers and very few sellers. I accept the evidence which has been given by the Plaintiff with regard to what he did, and the rates he was offered. It is supported by the evidence of Mr. Manessah who is in the Sugar Department of a very large firm in Calcutta. He has produced his books, and his evidence entirely supports the claim made by the Plaintiff. There was another witness of the name of Chiman Ram on behalf of the Plaintiff. He was examined and partially cross-examined. He was asked to produce certain books and his examination stood over in consequence. As he failed to appear by the time the rest of the evidence was finished, the Plaintiff's counsel asked that his evidence should be rejected altogether. The Defendant also did not desire that the case should stand over for further cross-examination. So I am treating that evidence as not given. The defence has been three-fold: (1) The contract was of a wagering nature. That defence was abandoned. (2) That under the terms of the contract the Defendant was entitled to claim extra war insurance from the Plaintiff, and he not having agreed to pay it, the Defendant was entitled to cancel the contract. There is no support for this from the contract. I do not think the Plaintiff could have been justly called upon to pay the extra rate. (3) That having regard to the state of the market, it was the duty of the Plaintiff to try and minimise the loss as much as possible. I do not think the Plaintiff could have done more than what he did. The market had gone up. Sellers were anxious to settle, and a large number of settlement contracts were entered into in the market. There were very few forward sellers, but there was a large number of buyers. I think the Plaintiff is entitled to damages on the basis claimed in the plaint, namely for the July shipment the "spot price" for ready goods, for the August shipment at Rs. 8 and also for September to December at the same rate.

With regard to the evidence on behalf of the Defendant most of the contracts were settlement contracts. Messrs. Ralli Brothers' Banian who was examined said that the Ralli Brothers were not sellers at the rate mentioned by him. He could not

say whether they were sellers at Rs. 8 or not. He said he did not know. This I find difficult to accept. There was another witness named Munna Lal who purported to give evidence of an actual sale. It is difficult to say from his evidence as to what the nature of that transaction was. It seems to me to have been in the nature of a settlement, in which the Defendant was concerned. The Plaintiff had not sufficient opportunity to investigate the particulars of that transaction. I do not think the rates for settlement contracts in the then condition of the market can be treated as the bazar rate. People settled on the best terms they could. The rate for actual sales ought to be accepted. There is no dispute practically about the ready rate. The Plaintiff tried to purchase against the other shipments from different sellers, all well-known in the Calcutta market, and failed to get more favourable rates. I prefer the evidence given on his behalf and decree the suit with costs on Scale No. II including reserved costs.

Sir S. P. Sinha (with him *Mr. N. N. Gupta*) for the Appellant.

Mr. Zorab (with him *Mr. Hyam*) for the Respondent.

Sir Satyendra.—The Defendant by his letter of the 13th August clearly indicated his intention of cancelling the contract on the 15th August and the 15th August and not the 19th August should be taken as the date of the breach of the contract.

The Court of first instance was in error in treating the contract as other than one entire contract for 300 tons. There is nothing in the contract to prevent the seller from saying that he could tender the whole lot of 300 tons in July shipment.

[WOODROFFE, J.—This point is not taken in the grounds of appeal.]

Sir Satyendra.—Ground No. 4 covers it.

[SANDERSON, C. J.—That deals only with the date of the breach, you there say that the 15th, not the 19th August, should be taken as the date of the breach.]

Sir Satyendra.—Plaintiff treated the letter of the 13th August as a repudiation of the whole contract, and Plaintiff was bound to minimise his damages. It was a rising market and he should not be allowed to split up the 300 tons into several 50 tons. The damages should be assessed on the whole 300 tons at the market rate of the day on the date of the breach. This would mean a reduction of about Rs. 5,000 in damages.

[SANDERSON, C. J.—According to you it would not entitle the buyer to say to the seller "I will not take more than 50 tons a month" if the seller chose to deliver the whole lot of 300 tons either in July or in December."]

Sir Satyendra.—Yes, the contract merely says shipments July to December.

[MOOKERJEE, J.—According to you the seller might have deferred the instalments and delivered the whole quantity of the sugar in December.]

Sir Satyendra.—That is so.

[SANDERSON, C. J.—Don't the words in cl. (2) and cl. (12) of the contract indicate shipments by instalments?]

Sir Satyendra.—Yes, there is nothing to prevent the seller from shipping by instalments. In *Brandt* v. *Lawrence* (12), the contract was for shipment of 4,500 qrs. of Russian oats "shipments during February" and a shipment of 1,139 qrs. was held to be a good shipment and the Defendant was held bound to accept it.

[SANDERSON, C. J.—Your argument is that the vendor is entitled to ship by instalments in reasonable quantities and the buyer cannot refuse to accept delivery,

(12) 1 Q. B. D. 363; 1876.

but that the buyer cannot insist on delivery by instalments.]

Sir Satyendra.—In a case of anticipatory breach of contract such as this, damages should be assessed once for all when the contract is repudiated. In the case of *Calamnius* v. *Dowlais Iron Co.* (5) the contract was for 5,000 to 6,000 tons of iron ore to be delivered "during the months of June, July, August and September," no special stipulation was made as to the quantity to be delivered in any month and it was held that the contract could not be construed to mean delivery by equal monthly instalments.

The damages ought to have been assessed on the basis of the market rate on the 15th August and for the whole of the 200 tons.

The Court of first instance did not appreciate the evidence on behalf of the Defendant and was wrong in rejecting that evidence as to the market rate.

Mr. B. C. Mitter—(on the 29th November 1915, the second day's hearing) I am holding Sir S. P. Sinha's brief and I desire to be heard on behalf of the Appellant.

[SANDERSON, C. J.—We thought the junior counsel in the case was to follow Sir Satyendra, but we are reluctant to allow a second counsel to appear and address for a counsel who left Court before finishing his argument.]

Mr. Mitter.—But I have since been briefed, Sir Satyendra has transferred his brief to me. I would be very brief and ask for special leave to place a short point before your Lordships.

[SANDERSON, C. J.—It is inconvenient that fresh counsel should be brought in at this stage. We would give you leave but let this not be a precedent.]

Mr. Mitter.—It was for the purchaser to elect whether he would accept the seller's repudiation of the contract on the 15th August, or consider it as still open. If the purchaser elected to treat the contract as broken he must consider the contract broken as on the day when intimation of the repudiation was first given and not a subsequent date. *Johnstone* v. *Milling* (13).

Mr. Zorab for the Respondent.

[SANDERSON, C. J.—You need not address us on the question of construction of the contract as to shipments by instalments.]

Mr. Zorab.—Defendant's letter of the 13th August was not a clear renunciation of the contract. It left him a *locus penetentiæ*. The first clear indication of the repudiation of the contract was given in the letter of the 18th August received by the Plaintiff after office hours and therefore the 19th August should be taken as the day of the breach.

It does not matter when the breach occurred. The measure of damages is the difference between the contract price and the market price on the last day when delivery should have been given. *Brown* v. *Muller* (10), *Frost* v. *Knight* (9) and *Roper* v. *Johnson* (1).

As to July shipment the damages assessed were on the basis of the difference between the contract price and the market price on the day when delivery should have been given and that was also the day of the breach of the contract.

As to the August shipment the damages are on the basis of the difference between the contract price and the price actually paid or contracted to be paid for a similar contract.

With regard to the remaining four

(5) 47 L. J Q. B. 575 (1878).

1) L. R. 8 C. P. 167 (1873).
(13) 16 Q. B. D. 460, 467 (1886).
(9) L. R. 7 Exch. 111 (1872).
(10) L. R 7 Exch. 319 (1872).

shipments of 200 tons, we have minimized damages by assessing them on the basis of the difference between the contract price and the market price on the day of the breach for similar sugar September to December shipments.

As to market rates this is a question of fact, and the Court of first instance after considering all the evidence in the case preferred the evidence as to those rates given on behalf of the Plaintiff and the Appellant has shown no reason for upsetting the finding of the Court as to a pure question of fact.

Mr. Mitter in reply.—Where question before the Court is one of inference only, Court of first instance is in no better position than the Court of Appeal. *Montgomerie & Co., Ld.* v. *Wallace James* (14).

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case the Plaintiff brought his action against the Defendants claiming damages for breach of contract. The contract was in respect of 300 tons of brown Java sugar, which was to be delivered in Calcutta, and the contract price was Rupees six and pies six per bazar maund. The goods were to be delivered *ex* Kidderpore Dock's jetty or ghat, and the shipments were to be made by steamers during July to December 1914. The date of the contract was the 4th of June 1914 and the first shipment would have to be made in July. But in the contract there was a clause giving the shipper seven days' margin, so that if he shipped the July shipment by the 7th of August, it would be in accordance with the terms of the contract. It was given in evidence in the course of the case that the length of the voyage would be eleven days, but it was said on behalf of the Plaintiff that it would be thirteen days, and for the sake of this case we may take it from eleven to thirteen days, so that the first shipment under this contract, namely the July shipment, if the shipper took the whole margin which was allowed to him, that is, the first seven days of August, would be due to be delivered in Calcutta about the 18th or 19th of August.

Now, on the 4th of August, as every body knows, war was declared, and a letter was written a few days afterwards by the Defendants in these terms, "We beg to intimate to you that owing to the war no sugar can be shipped from Java without war insurance being effected on payment of extra war rates. We shall thank you to intimate to us if you are prepared to take the sugar on payment of the extra war insurance rates charged therefor. Unless we hear from you within 24 hours agreeing to pay the extra war insurance rates we shall take it that you have cancelled the July to December portions of the above contract which has been ready for despatch from Java." The answer to that from the Plaintiff was, "I write to inform you that I am bound by the contract under which I have purchased and you have sold me the sugar and that I am prepared to carry out all and only such obligations as are included in the terms of the contract." On the 13th the Defendants wrote "unless you give us a definite reply to whether you accept the condition within two days, we shall consider the contract as cancelled." On the 14th the Plaintiff replied practically confirming what he had already said that he stood by his contract. On the 18th he wrote complaining "that he had not yet received notice of arrival of his July shipment of sugar purchased from the Defendants under contract No. 503." On the 18th of August, the Defendants wrote as

(14) [1904] A. C. 73 (1903).

follows :—" With reference to your letter of the 14th and 18th instant, we regret we cannot add anything now to what we wrote to you on the 13th instant. Please note that we have already cancelled your contract. Further correspondence with regard to the said contract will be useless." Now, upon that, the first point that was raised by the learned Counsel for the Defendants was that that was a repudiation of the contract and that the repudiation took effect on the 15th of August basing their argument upon the letter of the 13th of August in which they said " unless you give us a definite reply to whether you accept the conditions within two days we shall consider the contract as cancelled." It has been argued on the part of the Plaintiff that that was not a definite repudiation and that it gave time for further consideration, further correspondence and further negotiations, and if the Defendants had chosen to go back upon what they said in the letter of the 13th of August they could have done so. I think the Plaintiff is right upon that point and that the letter of the 13th August was not a sufficiently definite statement of repudiation, and as a matter of fact the actually definite repudiation was not made until the 18th of August 1914. That letter of the 18th was delivered between 6 and 7 P.M. of the 18th, and I do not think it can be seriously disputed that it was too late for the Plaintiff to do anything on that day. Therefore, the matter stands in this way, that on the 18th of August the Defendants repudiated their contract and definitely told the Plaintiff that they were not prepared to carry it out any further. Therefore, there was a breach of the contract on the part of the Defendants, and the question arises to what damages the Plaintiff was entitled.

Now, such a question as this in my experience nearly always gives rise to matters which are very difficult to decide, and I do not think that this is an exception in that respect—it does raise difficulty as to the proper measure of damages.

The first point on this part of the case which was raised by the leading Counsel for the Defendants is this: He argued that although the Defendants the sellers were entitled to deliver the 300 tons of brown Java sugar by instalments by shipment in each month, from July down to December, the buyer had not the right to demand delivery by such shipments or instalments but that the sellers if they had chosen could have delivered the whole of the consignment—the whole of the 300 tons in August; or, on the other hand, he could have postponed delivery of the whole 300 tons until the last month specified in the contract.

In my judgment that is not a correct construction to be put upon this contract—it is not in accordance with the terms of the contract, nor is it in accordance with the common sense of the matter. I am of opinion that just as a seller had the right to deliver by separate shipments spread over the months from July to December, the buyer in the same way had the right to demand delivery of the goods during those months from July to December. It would be an astonishing proposition from a business point of view that the seller could have delivered by instalments in the way he claimed he had the right to do, yet the buyer was bound to take the whole lot at the beginning of the period or at the end of the period. For these reasons, I do not think that the first point raised by the learned Counsel was a good point.

The next point that was raised by the learned Counsel for the Appellant was in respect of the July shipment. The

learned Judge who tried the case, in assessing the damages has taken the market price for the July shipment to be Rs. 7-6-0, and he has deducted from that the contract price, Rs. 6-0-6 pies, and has awarded damages upon that basis. It was argued by the learned Counsel for the Appellant that the learned Judge should have taken a lower rate than Rs. 7-6 annas as the market price. I think there was sufficient evidence to justify the finding of the learned Judge that Rs. 7-6-0 was the market price in respect of the July shipment, and I do not think there is sufficient reason for disturbing the learned Judge's judgment upon that point.

The next point that was raised by Sir Satyendra is that in assessing the damages, not only ought the July shipment be taken at the ready rate, but the August shipment also ought to be taken at the ready rate. As I understood him, his ground was that inasmuch as the shipper, if he had liked could have delivered the August shipment by the 15th of August, therefore the market rate for the ready goods (I am not sure whether that is the correct way of specifying the matter: what I mean is the market rate for the goods which could be delivered then), ought to be taken in respect of the August shipment. I do not think that that is a sound contention for the reason that the shipper was not bound to deliver the August shipment until September and that until September arrived there would have been no breach of contract (apart from the repudiation) on the part of the seller if he had not delivered the August shipment. I, therefore, do not think it is correct to say that the learned Judge in assessing the damages for the August shipment was bound to take the ready rate.

But then comes the matter which I think is really difficult in this case. That is with regard to the shipments other than the July shipment. The learned Judge has taken the market price as Rs. 8 and he has deducted from that the contract price Rs. 6-0-6 pies. Now, with the greatest deference to the learned Judge who tried this case, I cannot bring myself entirely to agree with that part of his judgment which deals with the evidence which was given on behalf of the Defendants. The evidence which was given on behalf of the Defendants consisted of the evidence of the representative of Messrs. Ralli Brothers, and another gentleman whose name was Munna Lal—I am leaving out the evidence of another witness because both the learned Counsel for the Appellant have laid no stress upon his evidence.

Now, to my mind, there was evidence given which requires very careful consideration. There was first of all the evidence of the representative of Messrs. Ralli Brothers who produced his market rate book which was made up in the ordinary course, every day at 5 o'clock in the afternoon and presumably, a gentleman, who represents such a well-known firm as Messrs. Ralli Brothers, goes to the market, makes up his book at the end of each day, is in a position to know what the market rates were, and the entries are made from day to day in the ordinary course. Speaking for myself I think that is most cogent evidence and further, when I compare the entries in that book as far as I can, with the entries which were made in the market rate book of Messrs. Sassoon & Co., namely with regard to the 15th, 17th and 18th August, I find that the rates which were entered in Messrs. Sassoon & Co.'s book agree practically with the rates entered in Messrs. Ralli Brothers' book, thereby showing that they are *bonâ fide* business entries. Un-

fortunately Messrs. Sassoon & Co.'s entries with regard to the forward rates did not go beyond the 18th : but up to the 18th they do conform to the entries in Ralli Brothers' book. Then after the 18th Messrs. Ralli Brothers' entries are in respect of the forward rates for shipments from July to December which is the period specified in the contract, with which we are concerned. Those rates on the 19th August were Rs. 7-7-0, on the 20th August Rs. 7-10-0, on the 21st August Rs. 8-0-0 for ready, and the rate for forward August to December Rs. 7-14-0. The learned Judge with regard to that has simply said this, " with regard to the evidence on behalf of the Defendant most of the contracts were settlement contracts." Well, it may be so ; the contract to which the witness referred specifically may have been a settlement contract, but I may point out here that with regard to the entries made in the book, Ram Coomar Bhakat has said, " there were buyers and sellers in the market for ready and forward goods—otherwise there can be no rates." Then the learned Judge goes on to say, " Messrs. Ralli Brothers' Banian who was examined said that Ralli Brothers were not sellers at the rate mentioned by him. He could not say whether they were sellers at Rs. 8 or not. He said he did not know. This I find difficult to accept." It seems to me, with great respect to the learned Judge that he has not given sufficient consideration to the very cogent evidence which was put forward by this representative of Messrs. Ralli Brothers in respect of the entries in the book. Further than that, there was evidence given by a witness called Munna Lal who spoke to a particular transaction of the 19th of August " for September to December shipment at the price of Rs. 7-3 " and with regard to him the learned Judge says " there was another witness named Munna Lal who purported to give evidence of an actual sale. It is difficult to say from his evidence as to what the nature of that transaction was. It seems to me to have been in the nature of a settlement, in which the Defendant was concerned." Now, the evidence was that it was not in the nature of a settlement, and there was not any ground for the statement that Munna Lal and the Defendant were connected in some shape or form with the transaction. These are the grounds for my saying, with great deference to the learned Judge, that he has not given sufficient consideration to the evidence on this point. But the matter does not stop there. Supposing I am not satisfied that the evidence of the Defendant has been sufficiently appreciated, what is the position? I have got to consider now upon the evidence what are the rights of the parties, and I think that if I were now to proceed upon the evidence which is before me, to assess the damages upon a correct basis and upon the right principle as laid down by the authorities, as far as I understand Mr. Mitter, I should have to come to the conclusion that the Plaintiff would be entitled to more damages than the learned Judge has already awarded him, and I will now proceed to say why. The principle upon which the damages should be assessed is this : I am reading from a passage in Leake on Contract, 6th Ed., p. 638, which correctly states the law on the point. " Where there is a contract for the sale and delivery of goods at a future time, or in instalments at future times, a notice by the seller to the buyer of his intention not to deliver may be accepted and acted upon as an immediate breach, and the buyer is *prima facie* entitled to damages measured by the difference between the contract

price and the market price at the appointed time or times of delivery, leaving it to the seller to show in mitigation that he could in the interval have obtained a new contract upon better terms, or if the time for delivery has not elapsed when the damages are assessed, the future damages must be estimated prospectively." To make it perhaps a little bit clearer I may read *Roper* v. *Johnson* (1), where there was a contract to deliver coal during certain months, as in this case, and where the Defendant refused to deliver any coal, and the Plaintiff brought an action for damages for this breach. It was held that in the absence of evidence on the part of the Defendant that the Plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried. Therefore, I repeat that if I had to begin now and assess the damages afresh upon the true basis, I should have to consider, first of all, what was the contract price that was fixed by the contract, and I should have to ascertain from the evidence what the market price was in August, September, October, November and December, and then to subtract the contract price from the market price at the appointed times of delivery in each month, and add the differences together, in order to make out the total amount of damages. It is in evidence that from August the market was a rising market. Then we have the evidence that the market price increased until it rose to something like Rs. 10 perhaps even more Rs. 10-1 anna. Therefore I say that if I had to begin now to assess the damages again, as far as I can see according to the evidence, I should have to award to the Plaintiff a larger sum than that which he has obtained under the judgment of the learned Judge. Therefore, although I cannot say that the judgment which the learned Judge has given is good with regard to the way in which he has treated the Defendant's evidence, I am not in a position to say that the Plaintiff ought to be awarded less damage than what the learned Judge has given him. If I had to disturb that judgment, I should have to proceed to assess the damages upon the right principle, and according to the evidence I should have to award to the Plaintiff more than what he has already obtained, and for this reason I do not think that it would be right for me to disturb the judgment of the learned Judge.

I think this covers all the points which have arisen in this appeal.

The appeal must, therefore, be dismissed with costs.

WOODROFFE, J.—On the question of the market rate we have been asked to say that the finding of the learned Judge that the rate in August and September to December was Rs. 8 is wrong. If the evidence be closely examined it will be found that the only item which directly bears upon the Appellant's argument is that which was given by the witness Ram Coomar Bhakat the sugar banian of Messrs. Ralli Brothers. The question in this case is not in my opinion so much the issue whether if we had heard the case ourselves we should or should not have preferred his evidence to that given on behalf of the Plaintiff but whether that evidence having been rejected by the learned Judge it is by itself sufficient to enable us to hold that the judgment on this point is erroneous. I refer to the evidence

(1) L. R. 8 C. P. 167 (1873).

of Ram Coomar Bhakat because the evidence of the witness Norendra Krishna was not relied upon on behalf of the Appellant; and the only other witness is the 3rd witness Munna Lal. He states that on the 19th August 1914, he purchased 50 tons of September to December shipment at Rs. 7-3 from one Janki Das Bullabux. The rate at which that sale was effected is different from and lower than that given as the market rate on the same date by the witness Bhakat and is a lower rate than that which it is contended by the 12th ground of appeal should have been awarded to the Plaintiff. What then is the evidence of Bhakat upon which the Appellant's argument rests. He is the sugar banian of Messrs. Ralli Brothers and is certainly an important witness. He states that the rate of ready goods on the 19th August was Rs. 7-7-0 for forward goods deliverable July to December same rate, and on the 20th August ready goods were quoted at Rs. 7-10 and forward for the same month at the same rate. Now, against this we have it upon the evidence of this witness that there was on the 19th a sale to Messrs. Shaw Wallace & Co. at a rate which was higher than that which is stated to be the market rate on the 19th August and on the 20th August we have a sale to Messrs. Ralli Brothers at Rs. 7-8 which is lower than what was stated to be the market rate for the 20th August. We further have it that when the witness was asked whether if any one wished to purchase from him from the 17th to 20th August he would have sold at the rate at which he had sold to Messrs. Ralli Brothers on those dates, he replied that he would have sold to Messrs. Ralli Brothers and Shaw Wallace & Co., if they wished to buy. But he would not sell to other buyers at this rate. When he was asked at what rate he would have sold to them he made a somewhat vague statement that the rate would depend upon the parties 0-1-0, 0-2-0, 0-3-0 or higher according to the customers. He was further asked whether Messrs. Ralli Brothers whose banian he was were prepared to sell at Rs. 8. With regard to this he says he did not know he could not say. With regard to this portion of his evidence Mr. Justice Chaudhuri finds some difficulty in accepting it and speaking for myself, I think, I should have found some difficulty considering what the position of the witness was, namely, he was the banian of Messrs. Ralli Brothers and so far as the sugar business of Messrs. Ralli Brothers was concerned he was in fact the representative of Messrs. Ralli Brothers. This witness, however, affords strong corroboration to another piece of evidence given on behalf of the Plaintiff when he states that the market went steadily up and that the rate upon the day on which he gave evidence was as high as Rs. 10-1. Now, the question before us on this matter is one of pure fact. There is evidence which supports the learned Judge's finding, though it is true that some of the criticisms which have been passed on it may be said to be well founded. On the other hand I am clearly of opinion that it is not sufficient to show as it is incumbent on the Appellant to show that the evidence before us is such that the finding is so clearly erroneous that it should be reversed.

As regards the question of construction of the contract and that it was not in fact repudiated until the 18th of August and as regards the rate as regards the July shipment I agree with what has been said by the Chief Justice. I have nothing further to add. I agree with him that the appeal should be dismissed.

MOOKERJEE, J.—This is an appeal by the

BILASIRAM THAKURSIDAS *v.* E. A. GUBBAY.

Defendant in a suit for damages for breach of a contract, made on the 4th June 1914, for delivery of 300 tons of brown Java sugar by him to the Plaintiff at the rate of Rs. 6-0-6 per maund. The contract provided that the shipments would be made by steamers during July to December 1914, and that any shipment might be made within seven days after the expiry of the particular month. After this contract had been made, war was declared on the 4th August 1914. Six days later, the seller wrote to the buyer and asked him to bear the extra war insurance. The purchaser replied that he was bound by the contract and was prepared to carry out all and only such obligations as were included in its terms. The result of further correspondence was that on the 18th August 1914, the seller intimated to the purchaser that he had definitely cancelled the contract: the present suit was thereupon instituted on the 26th August 1914. The Plaintiff claimed damages for the July instalment at the difference between the market rate on the 20th August 1914 and the contract rate. As regards the August instalment, he claimed damages at the difference between the forward rate on the 20th August 1914 and the contract rate. For the later instalments of September, October, November and December he claimed damages at the same rate. Mr. Justice Chaudhuri has decided the claim in full. That decree has been assailed before us substantially on two grounds; the first raises the question of the true interpretation of the contract; the second involves the question of the principle on which damages should be assessed.

In support of the first ground, it has been argued that upon a true construction of the contract, the seller was under no obligation to deliver the goods by monthly instalments, and that, in fact, he was at liberty to deliver the goods in one instalment on any date between the 1st July and the 31st December 1914. This contention is, in my opinion entirely unfounded. It is well settled that an agreement to accept delivery by instalments may, in the absence of an express agreement, be inferred from the conduct of the parties and circumstances of the case. [*Thornton* v. *Simpson* (2), *Tarling* v. *O'Riordan* (3) and *The Colonial Insurance Co. of New Zealand* v. *The Adelaide Marine Insurance Co.* (4).] The contract in the present case does not expressly state that the goods were to be delivered in monthly instalments, much less that the instalments were to be of equal quantities. But there are indications in two paragraphs of the instrument, namely, the twelfth and the sixteenth, that the parties contemplated delivery in instalments.

This, however, is not decisive of the question whether the buyer could insist upon delivery by instalments: that must be determined with reference to the conduct of the parties and the circumstances of the case. Now, if we look to the correspondence between the parties which preceded the institution of this suit, we find that on the 10th August 1914 the seller referred to "the July and August portions of the contract," which he stated were ready for despatch from Java. On the 18th August, the purchaser referred to "my July shipment of sugar." On the 19th August the solicitors of the purchaser spoke of the 550 tons which should have been shipped in July, and there is a similar statement in their letter of the 20th August. The second paragraph of the plaint states expressly that the De-

(2) 6 Taunt 556 (1816).
(3) 2 L. R. Ir. 84 (1870).
(4) 12 A. C. 128 (1887).

fendant had agreed to deliver sugar to the Plaintiff in monthly shipments of 50 tons each, to be made by steamers during July to December 1914. This was not challenged in the written statement, though I do not overlook the comprehensive allegation that whatever was not expressly admitted therein must be deemed to have been denied. An examination of the proceedings before the trial Judge also shows that both parties proceeded on the assumption that the goods were to be delivered in monthly instalments. It is further plain that no business man would read the contract in the way suggested by the Appellant: it is impossible to believe that the parties could have intended that the buyer should be entirely at the mercy of the seller and that the latter was at liberty to deliver the goods either in one or in many instalments just as suited his convenience. I hold, accordingly, that the interpretation which the Appellant now seeks to place upon the contract should not be accepted. It is further clear that in the absence of any indications to the contrary, [as in *Calaminus* v. *Dowlais Iron Co.* (5),] the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of goods. [*Coddington* v. *Paleologo* (6).]

In support of the second ground, which treats of the question of the measure of damages, the judgment of Mr. Justice Chaudhuri has been criticised on the ground that he has not correctly appreciated the evidence and that he has in fact ignored what was weighty evidence in favour of the Appellant. Our attention has been drawn specifically to three points in the judgment. *First*, that it minimizes the effect of the evidence as to the market rates given by the Defendant, on the ground that the evidence related to the rates of settlement contracts; it has been pointed out that a similar criticism may validly be directed against the evidence on behalf of the Plaintiff which has been accepted and has been made the foundation of the decision. *Secondly*, the rates for the settlement contracts have not been treated as relevant evidence: it has been pointed out with considerable force that the rates for settlement contracts must affect the market rate and must, therefore, afford more or less valuable evidence relevant to the subject under discussion. *Thirdly*, the evidence of the witness Munna Lal has been disregarded on the ground that he has spoken of a transaction in which the Defendant was concerned: it has been conceded that there is no evidence on the record which would justify this statement.

It appears to me upon an examination of these grounds, as also the entire evidence on the record, that the judgment under appeal is open to valid criticism. That however does not justify the conclusion that the decree must be reversed. The question for adjudication is, what is the principle upon which damages should be assessed. If the damages have been assessed upon an erroneous principle, the judgment cannot stand: but it does not follow that the Appellant is entitled to a reduction of the amount specified in the decree: he must satisfy the Court that on the correct principle he is not liable for the amount decreed against him.

The principle applicable to cases of this description may be concisely stated. The general principle is that when the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for non-delivery. The measure of damages

(5) 47 L. J. Q. B. 575 (1878).
(6) L. R. 2 Exch 193, 197 (1867).

is the estimated loss directly resulting from the seller's breach of contract. Where there is an available market for the goods in question, the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they should have been delivered: the principle is lucidly stated by Lord Atkinson in the case of *Wertheim* v. *Chicoutimi Pulp Co.* (7). "It is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in, if the contract had been performed. That is a ruling principle. It is a just principle. The rule which prescribes as a measure of damages, the difference in market prices at the respective times above mentioned is merely designed to apply this principle, and as stated in one of the American cases cited: [*Grand Tower Co.* v. *Phillips* (8)], it generally secures a complete indemnity to the purchaser. But it is intended to secure only the indemnity. The market value is taken, because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market; and that, if he wanted to get others in their stead, he could obtain them in that market at that price." This principle has been applied to cases in which there is an agreement to deliver goods in instalments and the contract is repudiated before the time for performance arrives. The leading decision on the subject is that in the case of *Roper* v. *Johnson* (1) which accords with *Frost* v. *Knight* (9) and *Brown* v. *Muller* (10). In that case, the Defendants contracted to sell to the Plaintiffs 3,000 tons of coal to be taken during the months of May, June, July and August. The Plaintiffs having failed to take any coal in May, the Defendants on the 31st of that month, wrote to the Plaintiffs to consider the contract cancelled. The Plaintiffs on the next day replied, refusing to assent to this, and sent to take coal under the contract on the 10th of June, when the Defendants positively refused delivery. The action was commenced on the 3rd of July. These propositions were laid down in the case: *first*, that, on the authority of *Simpson* v. *Crippin* (11), the Defendants had no right to rescind the contract by reason of the Plaintiff's default in not sending to take the May delivery: *secondly*, that the Plaintiffs had elected to treat the positive refusal of the Defendants on the 10th of June as a breach of the contract on that day: *thirdly*, that, in the absence of any evidence on the part of the Defendants that the Plaintiffs could have gone into the market and obtained another similar contract on such terms as would mitigate their loss, the measure of damages was the sum of the difference between the contract price and the market price at the several periods for delivery, although the last period fixed for delivery had not arrived when the action was brought or the cause tried. There is an instructive passage in the judgment of Mr. Justice Brett, as he then was, to which reference may be made—"to entitle a Plaintiff to recover damages in an action upon a contract, he must show a breach, and that he has sustained

(7) [1911] A. C. 301, 307 (1910).
(8) 90 U. S. 471 (1874).
(1) L. R. 8 C. P. 167 (1873).
(9) L. R. 7 Exch. 111 (1872).
(10) L. R. 7 Exch. 319 (1872).
(11) L. R. 8 Q. B. 14 (1872).

damage by reason of that breach. The general rule as to damages for a breach of a contract is, that the Plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. . . . Now, although the Plaintiff may treat the refusal of the Defendant to accept or to deliver the goods, before the day for performance, as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach. The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; and when you come to estimate the damages it must be by the difference between the contract price and the market price at the day or days appointed for performance and not at the time of breach. . . . It seems to me to follow . . . That the Plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that *primâ facie* that is the proper measure of damages: leaving it to the Defendant to show circumstances which could entitle him to a mitigation. No such circumstances appeared here: there was nothing to show that the Plaintiffs ought to have or would have gone into the market—a rising market—and obtained a similar contract." In the case before us, the damages have been assessed on a different principle, and, as I read the authorities, on an erroneous principle: the method propounded by the Appellant is equally erroneous. If the damage had been assessed on the correct principle, the evidence shows that the Plaintiff would have been entitled to a larger sum than what has been awarded to him. But Mr. Mitter has contended that the Court should not now consider a case inconsistent with that expressly made in the plaint. The Appellant, however, cannot invite the Court to set aside the judgment of the trial Judge and make a decree in his favour on what the Court considers an erroneous basis. Nor can the case be sent back, for the remand would be fruitless from the point of view of the Appellant: the result will be that the Plaintiff will on remand get a larger sum than what has been awarded to him. I hold accordingly that the decree as made by Justice Chaudhuri should stand.

Messrs. R. M. Chatterjee & Co., Solicitors, for the Appellant.

Messrs. Watkins & Co., Solicitors, for the Respondent.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 67 OF 1914.

JENKINS, C. J. N. R. CHATTERJEA, J. 1915, Heard, 7, 10, 13 and 15, May. Judgment, 28, May.	DURGA CHARAN CHANDER, Plaintiff, Appellant, *v.* THE KHARDA COMPANY, LD., Defendants, Respondents.

Second appeal—Onus—Suit by purchaser under registered kobala against Defendant in possession—Plaintiff, if has to prove passing of consideration—Recital in deed admitting receipt of consideration, value of.

A Plaintiff has to prove his title when a Defendant in possession pleads he is only a benamdar *but he shows a* primâ facie *title by producing and proving a conveyance which usually contains a recital of the receipt of consideration.*

The onus in such a case is on the Defendant to show non-payment of consideration.

DURGA CHARAN CHANDER *v.* THE KHARDA COMPANY, LD.

The fact that the Defendant is in possession is an important element to be taken into consideration in determining whether the transaction is benami. *But there is no presumption in favour of* benami *even where the Defendant is in possession.*

Where the lower Appellate Court held that the Plaintiff's purchase was benami, *being influenced by the erroneous view that the onus was on the Plaintiff, though it relied also on the fact that the Defendant was in possession, the finding was reversed in second appeal and the case was sent back for re-hearing.*

A recital in a deed of sale admitting the receipt of consideration is evidence, though not conclusive, against the vendor.

This was an appeal under sec. 15 of the Letters Patent filed on the 26th June 1914 against the decree of Mr. Justice Coxe, dated the 28th May 1914, passed in Appeal from Appellate Decree No. 2959 of 1911, which had been preferred against a decree of Mr. T. W. Richardson, District Judge of 24-Parganas, dated the 30th May 1911, reversing a decree of Babu Bhagabati Ch. Kundu, Munsif at Sealdah, dated the 21st November 1910.

The judgment of Coxe, J., was as follows :—

COXE, J.—The Plaintiff in this case obtained a conveyance of certain land from one Ram Chandra. Subsequently Ram Chandra's heirs sold it to the Defendant Company, who obtained possession. The Plaintiff brought this suit, not for recovery of the land but for compensation for the demolition of a building erected upon it by the Company. The suit was decreed. In appeal the learned District Judge held that the Munsif has misplaced the burden of proof in not requiring the Plaintiff to prove the reality of his purchase and that the company was in no way bound by any statement in the Plaintiff's conveyance. This view has been attacked before me with considerable force by the learned Vakil for the Plaintiff-Appellant. It is urged that the burden of proving that the ostensible was not the real state of things rested on the party who affirmed this and that inasmuch as the Defendant Company derived title from Ram Chandra they were, under sec. 18 of the Evidence Act bound by the admission of Ram Chandra in the Plaintiff's conveyance that consideration had passed. It appears to me that these considerations have great weight but the view of the learned District Judge is supported by the case that he quotes, namely, *Bisheswur* v. *Harbans* (3) though that was a case in which the successor-in-interest of the person making the admission derived title through a forced sale.

But it seems to me that in the present case the learned District Judge has gone beyond holding that the Plaintiff had failed to prove the genuineness of his purchase and has arrived at the positive conclusion that the purchase was not genuine, a finding with which this Court cannot interfere. The Judge says—"on the evidence as a whole I arrive at the conclusion that the sale to the Plaintiff was a colourable sale and the transaction was a *benami* transaction." The finding seems to me in great measure to be based on the view which the Judge evidently takes that the Plaintiff never obtained possession under his purchase and is, in my opinion a conclusive finding of fact.

The appeal must therefore be dismissed with costs.

[The Plaintiff preferred this appeal under the Letters Patent.]

Babus D. N. Chuckerbutty and *Kalikinkar Chuckerbutty* for the Appellant.

Mr. S. R. Das and *Babu Ambikapada Chowdhury* for the Respondent.

(3) 6 C. L. J. 659 (1907).

DURGA CHARAN CHANDER *v.* THE KHARDA COMPANY, LD.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff-Appellant sued the Defendant Company for damages for having demolished a building, a 21/80 share of which is alleged by the Plaintiff to have been purchased by him from one Ram Chandra Banerjee in the name of one Bepin Behari Haldar on the 10th December 1907. The Defendants also purchased the same share from the heirs of Ram Chandra on the 22nd September 1908. They also purchased the remaining shares from the other co-sharers and dismantled the whole building in October 1908. The defence was that the alleged purchase by the Plaintiff from Ram Chandra was a colourable and *benami* transaction and the Plaintiff had not acquired any title under it.

The Court of first instance placed the burden of proving the *benami* upon the Defendants, and decreed the suit, but that decree was reversed by the District Judge on appeal, and the decree of the District Judge was affirmed on Second Appeal by Mr. Justice Coxe. The Plaintiff has preferred this appeal under the Letters Patent.

The learned District Judge was of opinion that the Munsif had wrongly placed the onus of proving *benami* upon the Defendants. He held that "the burden was clearly upon the Plaintiff to prove the reality of the sale to him and the fact that consideration had passed from him to Ram Chandra," that he had failed to prove the same, and came to the conclusion that the sale to the Plaintiff was a colourable and *benami* transaction.

Now, the Plaintiff claimed the property under a registered conveyance from Ram Chandra through whom the Defendants also claimed it. The execution of the *kobala* by Ram Chandra has been proved and the *kobala* has been produced by the Plaintiff. Apparently a valid transfer was effected by the *kobala*, and the onus therefore lay upon the Defendants to show that it was not a real transfer.

It is contended on behalf of the Defendants that the principle is inapplicable to a case where the Defendant in possession sets up the plea of *benami*. No doubt the fact that the Defendants are in possession is in their favour, and is an important element to be taken into consideration in determining whether the transaction is *benami*. But there is no presumption in favour of *benami* even where the Defendant is in possession. In *Uman Persad* v. *Gandharp Singh* (1) where the Plaintiffs sought to recover possession on the strength of certain deeds against the Defendants in possession who pleaded that the deeds were *benami*, the Judicial Committee observed "It is familiar to us all that the system of putting property *benami* is so extremely common in India, that the mere fact of a deed being executed in proper form and apparently effecting a valid transfer to another is not as good evidence of a real transfer as it would be in other countries, and even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. Still such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is *benami* transaction."

No doubt a Plaintiff has to prove his title where the Defendant in possession pleads that he is only a *benamdar*, but he shows a *primâ facie* title by producing and proving his conveyance which usually contains a recital of receipt of the consideration. In the present case also, the *kobala* contains an admission by the vendor (Ram Chandra) of the receipt of consideration. That admission is evidence, though not

(1) I. L. R. 15 Cal. 20 (28) (1887).

conclusive, against the Defendants [*Fulli Bibi v. Bassiruddi* (2).] The learned District Judge however is of opinion that this "case should be distinguished from those cases in which one of the parties to a deed denies the truth of a statement made as to the passing of the consideration"; and that the "issue of *benami* or not *benami* turns principally on the question whether the Plaintiff has shown that he paid the stated consideration to Ram Chandra." But the Defendants stand in the same position as Ram Chandra himself through whom they claim, and the non-payment of consideration is a matter to be taken into account in determining whether the *kobala* was *benami*. The onus therefore is upon the Defendants to show the non-payment of consideration.

It is contended on behalf of the Defendants that the learned District Judge has considered the question of possession, and upon a consideration of the whole evidence has come to the conclusion that the *kobala* was a *benami* one, and the same view has been taken by Coxe, J. But it seems to us that the conclusion arrived at has been influenced by the view taken by the District Judge as to the incidence of the burden of proof. The question of possession, no doubt, is to be taken into consideration, as well as other circumstances and probabilities in deciding whether a *kobala* is a real and *bonâ fide*, or merely a *benami* transaction, but the learned District Judge appears to have arrived at the conclusion that the *kobala* was *benami*, by placing the onus upon the Plaintiff of proving the reality of the transaction and the passing of the consideration.

The judgment of Coxe, J., and the decree of the District Judge are accordingly set aside, and the case sent back to the lower Appellate Court for a re-hearing of the appeal according to law. Costs to abide the result.

The Plaintiff complains before us that some important evidence which he wanted to adduce for proving payment of consideration to his vendor had been excluded by the Courts below.

It is stated in the *kobala* of the Plaintiff that the consideration was paid by a currency note for Rupees One thousand, the number of which was mentioned in it. The Plaintiff stated in his deposition that he drew the note from the Commercial Bank and paid it over to his vendor Ram Chandra. After the close of evidence on both sides he applied to the Court to be allowed to adduce further evidence, but the application having been disallowed, the Plaintiff applied to withdraw from the suit with liberty to bring a fresh suit. The application was granted by the Court, but the order was set aside on revision by this Court, and the Munsif was directed to take up the case at the stage at which the order for withdrawal was made. The Plaintiff then applied for summons upon the Liquidator of the Commercial Bank and the Comptroller of Paper Currency to produce certain books of their offices and it appears that certain clerks of the said office were present in Court with the books required. The Defendant objected to the reception of further evidence, and the Munsif was of opinion that having regard to the order of the High Court the Plaintiff could not be allowed to adduce further evidence. We think that under the circumstances the Plaintiff ought to have been allowed to tender the books in evidence and we direct the lower Appellate Court to do so. The Defendants also will be entitled to adduce evidence relevant to the question.

Appeal allowed.

(2) 12 W. R. (F. B.) 25; 4 B. L. R. (F. B.) 54 (1869).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1323 OF 1913.

MOOKERJEE, J. BEACHCROFT, J. 1914, 8, June.	JOTIRAM KHAN, Defendant, Appellant, *v.* JONAKI NATH GHOSE and another, Plaintiffs, Respondents.

Bengal Tenancy Act (Act VIII of 1885), sec. 1, as amended by sec. 3 of Act I B. C. of 1907—Land in suburb of Calcutta let out in 1898 for 5 years—Lessee holding on till sued in ejectment in 1910—Status of lessee, non-occupancy raiyat—"Town of Calcutta," extension of, by amending Act—Statute not declaratory but amending—No retrospective operation—Limitation—Sch. III, Art. (1) (a)—Non occupancy raiyat holding over after term, if holds on from year to year.

Defendant on 16th December 1898 took a five year's lease from Plaintiff of an agricultural holding situated within the present Municipal limits of Calcutta but beyond the limits of the town of Calcutta as determined by the proclamation of the Governor-General in Council, dated the 10th September 1794, issued under sec. 159 of statute 33, Geo. III, c. 52. Plaintiff on 9th November 1910 having sued to eject the Defendant,

Held—*That until the Bengal Tenancy Amendment Act of 1907 came into force, the Bengal Tenancy Act applied to the case and Defendant had in consequence acquired the status of a non-occupancy raiyat when the Amendment Act came into force, and this status was not affected by the provisions of sec. 3 of the Amendment Act which gave a new definition of the expression "Town of Calcutta" as used in sec. 1 of the Bengal Tenancy Act, making it co-extensive in area with the present municipal limits of Calcutta.*

The explanation added to sub-sec. (3) of sec. 1 of the Bengal Tenancy Act by sec. 3 of Act I B. C. of 1907 is an amending statute and not merely one of a declaratory character and cannot therefore be given retrospective operation.

Statutes which are properly of a declaratory character have a retrospective effect.

But the nature of the statute must be determined from its provisions, and the mere fact that the expression "it is declared" has been used, is by no means conclusive as to the true character of the Legislation.

Held—*That the suit was barred by Art. (1) (a) to Sch. III of the Bengal Tenancy Act.*

Under the Bengal Tenancy Act there is no raiyat who holds from year to year and if the tenant is a non-occupancy raiyat who does not hold under a lease for a term, he cannot be ejected under the provisions of cl. (c) of sec. 44.

This was an appeal from a decision of H. Walmsley, Esq., District Judge of Zilla 24-Parganas, dated 4th January 1913, affirming that of Babu Purna Chandra Bose, Alipore, dated 14th November 1911.

The facts of the case will appear from the judgment.

Babu Mohini Mohan Chatterjee for the Appellant.

Babus Tarakishore Choudhury, Dwarka Nath Chakravarty and *Satis Chandra Ghatak* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendant in a suit for arrears of rent and for ejectment. The Defendant was inducted into an agricultural holding on the 16th December 1898 by the Plaintiffs who granted him a lease for five years. The holding is situated within the present Municipal limits of Calcutta, but is beyond the jurisdiction of the Town of Calcutta as determined by the Proclamation of the Governor-General in Council, dated the 10th September 1794 and issued under sec. 159 of Stat. 33, Geo.

III, c 52 (Rules and Orders of the High Court, Ed. Hechle p. 555). On the 9th November 1910 the Plaintiffs commenced this action, not only for the recovery of arrears of rent then due but also for ejectment of the Defendant on the allegation that they had terminated his tenancy by service of a notice to quit. The suit has been decreed for both rent and ejectment. There is now no contest as to the liability of the Defendant for the arrears decreed. The only question in controversy is, whether the Plaintiffs are entitled to the decree for ejectment. The answer must depend on the status of the Defendant.

The case for the Plaintiffs is that the status of the Defendant must be determined with reference to the provisions of the Transfer of Property Act and that he is consequently liable to be ejected after service of the prescribed notice to quit. The case for the Defendant is that his tenancy, in its inception was of an agricultural holding, that he acquired the status of a non-occupancy raiyat under the Bengal Tenancy Act, and that at the date of the commencement of this suit, he was a non-occupancy raiyat whose tenancy had not been terminated. The Courts below have held that the tenancy of the Defendant was terminable and has been duly terminated by service of notice to quit under the Transfer of Property Act, as the provisions of the Bengal Tenancy Act had no application thereto. This view is challenged in this appeal as erroneous.

The Bengal Tenancy Act, as framed in 1885, provided in sec. 1 that its provisions were not to extend to any land within the Town of Calcutta. At that time the Municipal limits of Calcutta were identical with the limits of the "Town of Calcutta" as defined by the notification of the Governor-General in Council, dated the 10th September 1794. There was consequently, no room for contention at that time that the operation of the Bengal Tenancy Act was not excluded in the case of land in the suburbs of the "Town of Calcutta." In 1888, the Calcutta Municipal Act was passed by the Bengal Legislative Council, and as a result thereof, lands which were originally comprised in the suburbs of the Town of Calcutta were brought within the jurisdiction of the Corporation of Calcutta for Municipal purposes. It was held by this Court in the case of *Biraj Mohini Dassi* v. *Gopeswar Mullick* (1) that this circumstance did not in any way affect the operation of the Bengal Tenancy Act, that the "Town of Calcutta" mentioned in sec. 1 was not equivalent to "Calcutta" as defined for the purposes of the Calcutta Municipal Act, 1888, and that, notwithstanding the extension of the limits of Calcutta for Municipal purposes, the Bengal Tenancy Act was applicable to lands situated outside the limits of the "Town of Calcutta," though included, for Municipal purposes, within the limits of "Calcutta." Consequently, when on the 16th December 1898, the Defendant obtained his lease of the disputed land from the Plaintiffs, he forthwith acquired the status of a non-occupancy raiyat of an agricultural holding governed by the provisions of the Bengal Tenancy Act. Subsequently, on the 22nd May 1907, the Bengal Legislative Council passed the Bengal Tenancy Amendment Act, 1907, (Act I of 1907), and what we are called upon to consider in this appeal, is the effect, if any, of this Legislation on the status of the Defendant. Sec. 3 of the Bengal Tenancy Amendment Act, 1907, is in these terms: "To sub-sec. (3) of sec. 1 of the Bengal Tenancy Act, the following explanation shall be added, namely, the words "The Town of Calcutta" mean,

(1) I. L. R. 27 Cal. 702 (1899).

subject to the exclusion or inclusion of any local area by notification under sec. 637 of the Calcutta Municipal Act, 1899, the area described in Sch. I to that Act." The effect of this explanation is to give a new definition of the expression "Town of Calcutta" for the purposes of the Bengal Tenancy Act, namely, to make it equivalent to "Calcutta" as determined from time to time, for Municipal purposes, under the Calcutta Municipal Act, 1899. The disputed land, already stated, was beyond the limits of the "Town of Calcutta," but within the limits of "Calcutta" as defined in Sch. I of the Calcutta Municipal Act, 1899. Consequently, when the Bengal Tenancy Amendment Act, 1907, came into force, the land ceased to be subject to the operation of the Bengal Tenancy Act. To take one illustration. If at any time after the Bengal Tenancy Act had ceased to be applicable, the land became vacant and the landlords settled a new tenant thereon his tenancy would not be governed by the provisions of the Bengal Tenancy Act. But the question arises, whether the Bengal Tenancy Amendment Act, 1907, retrospectively affects the status of persons, who, before its commencement, had acquired rights in respect of the land; does it destroy such rights, and transform a tenant, who had at that time the status of an occupancy or a non-occupancy raiyat, into a tenant from year to year or month to month? The Courts below have adopted the view that as the addition to sub-sec. (3) of sec. 1 of the Bengal Tenancy Act is called an "Explanation," there was no alteration of the law, in other words, that the legislation of 1907 was merely declaratory of the law and might legitimately be given retrospective operation. This reasoning is, in our opinion, clearly fallacious. It need not be disputed that statutes, which are properly of a merely declaratory character, have a retrospective effect, because, if the statute is in its nature declaratory the argument that it must not be construed so as to take away pre-existing rights ceases to be applicable [*Attorney General* v. *Theobald* (2).] But, as was pointed out by Halsbury, L. C., in the case of *Harding* v. *The Commissioners of Stamps for Queensland* (3), the nature of the statute must be determined from its provisions, and the mere fact, that the expression "it is declared" has been used, is by no means conclusive as to the true character of the legislation. Tested in the light of this principle, what is the position in the case before us? The addition to sub-sec. (3) of sec. 1 of the Bengal Tenancy Act is, no doubt, called an "explanation"; but in reality it effects a vital alteration in the law. It is worthy of note that the Bengal Tenancy Amendment Act, 1907, is described as an Act to amend the Bengal Tenancy Act, 1885; it is not even in terms a declaratory Act. It is further plain that another addition which has been made to the same sub-section of sec. 1 and refers to areas comprised within a Municipality constituted under the Bengal Municipal Act, 1884, also effects a fundamental alteration in the law. In our opinion, there is no room for serious controversy, that the law was materially altered by the legislation of 1907 and that the provisions of sec. 3 cannot be given a retrospective operation. This view is supported to some extent by the provisions of sec. 9, sub-sec. (3), (see sec. 19 (2) of the Bengal Tenancy Act). We hold accordingly that the status of the Defendant was not affected by the Legislation of 1907, which gave a new definition of the expression "Town of Calcutta," as used in sec. 1 of the Bengal Tenancy Act.

(2) 24 Q. B. D. 157 (1890).
(3) [1895] App. Cas. 769 at p. 775.

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If, then, the status of the Defendant was not affected by the legislation of 1907, what are his rights? Under sec. 44 (*c*) of the Bengal Tenancy Act, he was, as a non-occupancy raiyat liable to ejectment on the ground that the term of the lease had expired. It is plain that in cl. (c) the expression "the lease" refers to the registered lease under which the non-occupancy raiyat had been admitted to occupation of the land. The Defendant was admitted to occupation of the land under a registered lease on the 16th December 1898. The term of the lease expired on the 16th December 1903, when the Bengal Tenancy Act was still in force in the locality. He could, consequently, have been ejected under the provisions of the cl. (c) of sec. 41, which was then controlled by sec 45, since repealed. Sec. 45 was in these terms: "A suit for ejectment on the ground of the expiration of the term of a lease shall not be instituted against a non-occupancy raiyat, unless notice to quit has been served on the raiyat not less than six months before the expiration of the term and shall not be instituted after six months from the expiration of the term." The landlords had thus to satisfy two conditions, if they intended to avail themselves of the provisions of sub-sec. (*c*) of sec. 44. They were bound to serve a notice upon the Defendant, not later than the 16th June 1903 and if he did not vacate the land, they were bound to commence a suit for ejectment against him not later than the 16th June 1904. This they did not do. The Defendant continued in occupation of the holding, and rent was thereafter admittedly received from him. The Defendant was thus a non-occupancy raiyat on the 22nd May 1907, when the Bengal Tenancy Amendment Act came into force; as that legislation did not affect his status, he continued to be a non-occupancy raiyat and was such at the date of the suit. Meanwhile, sec. 45 has been repealed by the Bengal Tenancy Amendment Act 1907. It is accordingly argued that the Plaintiffs are no longer fettered by the restriction previously imposed by the section and are now entitled to proceed to eject the Defendant under cl. (3) of sec. 44. There is, however, an insuperable obstacle in their way. The Bengal Tenancy Amendment Act, 1907, no doubt repealed sec. 45, but it introduced, at the same time, a new cl. 4 (a) in Sch. III, to the effect that a suit to eject a non-occupancy raiyat on the ground of the expiration of the term of his lease must be instituted within six months from the expiration of the term, consequently, if the Defendant be still deemed to hold under the lease of the 16th December 1898, the term of the lease expired on the 16th December 1903, and at the date of the commencement of this suit, a period much longer than six months had expired. On the other hand, if it be contended that the Defendant no longer holds under the lease of the 16th December 1898, he cannot be ejected on the ground that the term of his lease has expired. It has finally been argued that after the expiry of the lease of the 16th December 1898, the Defendant became a tenant from year to year, and, that consequently at the end of any year, he may be deemed a non-occupancy raiyat the term of whose lease has expired. This is entirely fallacious. Under the Bengal Tenancy Act, there is no raiyat who holds from year to year, and if the tenant is a non-occupancy raiyat who does not hold under a lease for a term, he cannot be ejected under the provisions of cl. (*c*) of sec. 44. From every possible point of view, it is plain that the tenancy of the Defendant has not been legally terminated by service of notice to quit, and the claim for ejectment must fail.

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It has been ingeniously argued, as a last resort, that the Plaintiffs are entitled to eject the Defendant under cl. (*d*) of sec. 44, which provides that a non-occupancy raiyat shall be liable to ejectment on the ground that he has failed to pay an arrear of rent. The obvious answer is, that this was not the foundation of his claim in the plaint. If such a claim had been put forward, it could have been made only in accordance with the provisions of sub-sec. (*1*) of sec. 66, and to the decree made in a suit so framed, the provisions of sub-sec. (*2*) of sec. 66 would have applied. We need not however, deal with this aspect of the case in detail, because the claim was based only on cl. (*c*) of sec. 44.

The result is that this appeal is allowed, and the decree of the District Judge set aside in so far as it entitles the Plaintiffs to eject the Defendant. The Appellant will have his costs both in this Court and in the Court of the District Judge, and each party will pay his own costs in the Court of first instance.

Appeal allowed.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 783 OF 1915.

HOLMWOOD, J.	KRISHNA GOVINDA PAL,
MULLICK, J.	Appellant,
1915,	*v.*
7, December.	KING-EMPEROR.

Indian Penal Code (Act XLV of 1860), secs 471, 466—Using a forged document—Mere filing of a copy of which original forged, if equivalent to user —Proof of similar other forgeries, when proper.

The accused was convicted under sec. 471 read with sec. 466, I. P. C., for filing in a proceeding under sec. 107, Cr. P. C., a copy of a registered lease taken out from the Registration Office it being alleged that the transcript in the Registration Office was itself a forged interpolation. Evidence was adduced of a number of other registration books containing forgeries relating to documents in respect of the same property. There was no evidence connecting the present accused with the makers of these forgeries.

Held—*That the evidence was wholly inadmissible.*

That a series of transactions which are not the offence charged can only be used as evidence of the intention of the person who forged the document and not as evidence of forgeries.

That it is extremely doubtful whether the mere filing of a copy, of which the original is alleged to be a forgery, is user of a forged document.

This was an appeal preferred on the 12th September 1915 against the order of Mr. F. W. Ward, Sessions Judge of Tipperah, dated the 22nd July 1915.

The material facts will appear from the judgment.

Mr. P. L. Roy, and *Babus Monmotha Nath Mukherjee, Bepin Chandra Bose* and *Upendra Kumar Roy* for the Appellant.

Mr. Monier, Babu Manindra Nath Banerjee and *Muhammad A. K. Fazlul Huq* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

HOLMWOOD, J.—This is an appeal from the judgment and sentence of the learned Sessions Judge of Tipperah who agreeing with the Assessors found the Appellant Krishna Gobinda Pal guilty of an offence under sec. 471 read with sec. 466, I. P. C., and sentenced him to five years' rigorous imprisonment.

It appears that a document of the year 1862 was entered in the Register book of the Registration Office at Comilla, Vol. 1, Book 3, purporting to be a *mokurari* lease for 50 years in favour of the grandfather of the accused Girish Chandra Roy, who has

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been acquitted, coupled with an agreement to make the lease permanent on the expiry of 50 years, that is, from the year 1319. A copy of this document was obtained from the Registration Office and filed in a proceeding under sec. 107, Cr. P. C. We do not know what the meaning of the filing the document in such a proceeding is, but the evidence which is very conflicting comes from persons who were called upon to show cause in the 107 proceedings on the other side to the effect that they saw the Appellant put this bit of paper on the table in front of the *peshkar*. The Magistrate's record would show that the witness Ram Kanai who is now dead produced the document in the witness box and proved it, and the Magistrate says, in a note in the middle of this evidence that the document was filed and established, the accused himself who was a witness stated to the Magistrate that there was such a document in the possession of his master Girish Chandra Roy, and he shortly described its contents and he said it had been filed. But he did not say that he filed it himself, although there was no possible reason why he should not have said so, as at that time there was no question as to the genuineness of the document. He also says that he first came to know of the existence of this lease for 50 years, eleven years ago. He does not set up any case that the original lease was a permanent *kaemi* lease, and he gives a perfectly true account of the document as it appears in the Register in the Registration Office.

The learned Judge has come to the conclusion that the transcript in the Registration Office is itself a forged interpolation made after the year 1910 and in proof of this he adduces the evidence of a number of other Registration books in which there are what he calls obvious forgeries, and these apparenlty refer to documents relating to the same property. But we need hardly point out that a series of similar transactions which are not the offence charged can only be used as evidence of the intention of the person who forged the document and not as evidence of forgery.

It cannot conceivably be used as evidence that the present accused in the year 1912 used the copy of a forged document knowing it to be forged. Who the people were who forged the other documents, if they were forged, and for what purpose they forged them is not necessarily known to the accused, and there is absolutely no evidence connecting the present accused with them. We have therefore altogether excluded this evidence.

The learned Judge then rightly sets himself to determine four questions, the *first*, was the document of which Ex. 38 is a certified copy forged; *secondly*, did either of the accused know it to be forged; *thirdly*, did either of the accused use it as genuine; and *fourthly*, did they do so fraudulently or dishonestly.

At the outset we find ourselves in entire disagreement with the learned Judge as to the factum of forgery. The learned Judge appears to have misdirected himself by reason of his not observing that the salient clause of the document is contained in its very first paragraph. He was under the impression that the document was throughout a temporary lease and that at the very end of it a clause had been interpolated transforming it into a permanent lease. He considers that this is not only inconsistent but must have been intentionally done with intent to commit fraud. He says, "the lease if it is what the prosecution says it originally was is a perfectly straightforward document that any intelligent person can understand, an ordinary temporary lease terminable [illegible]"

year 1318. The lease as it exists now however appears to contain a contradiction in terms. To the average layman it is quite meaningless. It is only a trained lawyer who could say what its legal effect would actually be. No doubt important documents are occasionally drawn up in ambiguous language but fortunately that is very rare. Other things being equal therefore the internal evidence is enormously in favour of the prosecution." But he has omitted to notice that at the very beginning of the document, as we have said, it is stated that this is a temporary lease for 50 years up to the year 1318, and that from the year 1319 a temporary lease will be given, that is to say, it is a lease for a term with an agreement to give a permanent lease at the end of it. Whether that would be enforcible without a further document we are not concerned to say, But the intention of the parties is certainly perfectly clear and there is nothing meaningless about the document if it is read as a whole.

But the great difficulty about holding it to be a forgery is this that on the prosecution theory it cannot have been forged till after the year 1910, and anybody looking at the book of the Registration Office which we have before us could not fail to be convinced that this transcript was engrossed many many years ago; that the ink as well as the paper on which it is written is just as old as the earlier part of the book which is admittedly genuine. It appears to us to be absurd to say that people sat down in 1912 to write on that paper over 50 years old, that they manufactured faded ink which also appears to be of equal age and succeeded in making a perfect transcript without any sign of ink running or sinking through the paper or any of the usual traces of modern forgery. Moreover it is still more difficult to believe that they got the Sub-Registrar of 1862 out of his grave and made him sign his name in the book. There is not the faintest suspicion so far as we can see that the Sub-Registrar's signatures on these numerous alleged forged documents are not absolutely genuine. They are certainly written by the same hand as made all the earlier entries. The writing is very characteristic. There is no attempt to make a copy of it. The signatures are not *facsimiles*, but they are all of the same character as that of the admitted signature, and we can have no doubt that they are genuine.

That being so, the whole case falls to the ground, though we may in justice to the accused say that we are equally able to hold that there is no evidence worthy of the name to show that he made use of this document or that he had any dishonest intention ,or that he had any idea that the original was a forgery. It is also extremely doubtful whether the mere filing of a copy is user of a forged document. The copy itself is certainly not a forged document and the conditions in which it has been held that the user of a copy amounts to an offence in the cases of *Queen* v. *Nujum Ali* (1) and *Emperor* v. *Mulai Singh* (2), are clearly distinguishable from this case, inasmuch as they were cases where the offender used the copy knowing or having reason to believe that the entries in the original documents were forgeries, and intending to use them for fraudulent purposes. On every point that is necessary to establish the charge we are able to find in the Appellant's favour.

We accordingly set aside the conviction and sentence and direct the acquittal and release of the accused.

MULLICK, J.—I agree.

Appeal allowed.

(1) 6 W. R. (Cr.) 41 (1866).
(2) I. L. R 28 All. 402 (1906).

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REPORTS (*See* Index).

The Governor General elect, a lawyer.

The appointment of Lord Chelmsford as Viceroy and Governor General of India is of special interest to lawyers. We believe that this is the first time that one who has practised in the Law Courts as a barrister has been appointed to the Viceroyalty in India. The Governor General elect has the reputation of being an erudite lawyer. He took first class honours in law at the Oxford University and obtained there a fellowship of the All-Souls College. He is known to have kept up his legal studies even now. He also comes from a distinguished legal family being the grandson of Lord Chancellor Chelmsford (Thesiger). He was evidently appointed Governor of Queensland and New South Wales, in succession, because when these Colonies were framing an autonomous constitution for themselves, he was considered as the right person who could not only give proper advice to them in this behalf but could also safeguard the Imperial interests of Great Britain. When the Prime Minister of His Majesty the King is a distinguished barrister, it is nothing out of the way to have a barrister and a good lawyer for Governor General. Lord Chelmsford comes out to India with experience of the constitution and administration of the self-governing colonies and latterly he has been acquiring both military and financial experience. He is a man of sound and all-round education and for a man of his type all that is needed to make a successful administrator is sympathy, strength, breadth of view, devotion to duty and an eye to economy in the civil administration in these critical times.

Mr. P. L. Roy as Additional Legal Remembrancer.

We are glad to find that Mr. P. L. Roy, Bar.-at-Law has been appointed Additional Legal Remembrancer to the Government of Bengal. His duties will evidently be similar to those of the Director of Public Prosecutions in England. Mr. Roy is a criminal lawyer of mature experience and we are sure that his services as an adviser in criminal prosecutions will be eminently useful to Government. Mr. Roy has always been known to possess the fine instincts of a gentleman. While he has been always kind and considerate in his dealings with men, at the same time he combines in him firmness, a strong sense of duty and sound judgment. We feel no hesitation in saying that no better selection could have been made for the responsible duties with which he will be entrusted.

Necessity for a Director of Public Prosecutions.

We also congratulate the Government on having created this office even at the time of the present financial stress. It is not unlikely that this new office may result in the curtailment of legal expenditure of the Government of Bengal which has gone up considerably in recent years (no doubt, through extraordinary causes) by judicious advice and directions in conducting such prosecutions. The inordinate length of some public trials have elicited from time to time adverse comment both from the Bench and the public press. It cannot be denied that absence of proper legal advice often contributes to the prolongation of trials, which mean so much more expense to Government and hardship to the accused. The investigating officers, not unlike private complainants, are often over-confident about their cases. Officers in charge of an enquiry collect informations

from various sources and unless these are checked, compared, sifted and co-ordinated by a capable lawyer and directions given by him as to who may be successfully prosecuted and on what charges, witnesses may be called at random and a lot of irrelevant evidence offered.

Reckless joinder of charges such as that of general conspiracy, when a conviction may be more speedily secured for the offences committed or abetted, often result, as we have tried to show in these columns, in waste of public money and funds. The same may be the case when one or more accused persons are put on their trial on mere suspicion or on the off chance of securing a conviction with others against whom evidence is not forthcoming. The moral effect of the failure of the case against such persons is the very opposite of what is desired. For all these reasons we welcome the appointment and feel confident that it will prove a source of benefit alike to the Government and the people. In conclusion we may mention that the suggestion for a Director of Public Prosecutions came from the English Bench. Lord Chief Justice Cockburn in the course of his charge to the jury in a conspiracy trial observed: "the whole course of the case has confirmed me in the opinion I have long entertained as to the necessity for a public prosecutor, to conduct and to control public prosecutions." From experience it has been found that the duties of conducting and controlling public prosecution cannot with advantage be combined in the same person and the Director in England only advises and controls public prosecutions. The Additional Legal Remembrancer here also will have nothing to do with the conducting of cases in Court but will similarly advise and control.

CRIMINAL CONSPIRACY.

When charge under sec. 120B, I. P. C., may be joined with offences committed.

Apart from the objections advanced by Lord Chief Justice Cockburn in *R.* v. *Boulton* (12 Cox C. C. 87) noticed by us in our previous article, it may be shown from a general consideration of the scheme of the Indian Penal Code that when offences are committed even by conspiracy, the new secs. 120A and 120B need not and ought not to be brought into requisition except in the class of cases noticed by us below.

The Penal Code provides for the punishment of all offences when committed and their abetment in the same manner as if the offence had been committed by the abettor.

If an offence punishable under the Indian Penal Code has been committed, it is needless to say that the proper course is to establish the charge by evidence and, if proved, punish the accused according to such law.

No advantage is to be gained by prosecuting for an offence which has been committed under a charge of conspiracy, under secs. 120A and 120B, I. P. C., even if it were permissible to do so.

For, in a charge of conspiracy it would not be enough to give evidence of the commission of an offence or its abetment but *evidence must be given of criminal combination (agreement) for the purpose of the commission of the crime.*

When the evidence of *agreement* or *criminal* combination fails the charge of conspiracy fails.

The English Judges have invariably held that evidence of conspiracy must go to establish *preconcert*. See the concluding lines of Lord Coleridge's charge to the jury in *R.* v. *Murphy*, 8 C. and P. 297. Mr. Justice Woodroffe in his Commentary of sec. 10, Evidence Act, says that *preconcert* must be proved under that section. 5th Ed. p. 155 top.

It follows that to establish that an offence has been committed in pursuance of a conspiracy, it is not enough to bring home to the alleged offenders the offence committed but also *preconcert* in respect of the same. This may be done in terms of the Evidence Act by furnishing evidence of things *done*, *said*, or *written* since the first formation of the intention by one and maturing the intention into *common intention* (see sec. 10, Evidence Act), *i.e.*, an agreement. So Sir John Woodroffe says that sec. 10 is hardly a rule of evidence and lays down practically the substantive law of conspiracy, see Evidence Act, p. 153.

When an offence is committed it may be established by proof of the transaction and connecting the accused with it. But in a case of conspiracy a mass of evidence as to antecedent conduct has to be given.

Thus it follows that it is much more difficult to prove that a crime has been committed in pursuance of a conspiracy than that an offence has been committed by certain persons.

It may be asked what advantage is gained by bringing in a mass of evidence of antecedent conduct in connection with evidence of the commission of an offence?

Supposing it can be established after all by such

evidence that an offence has been committed in pursuance of a conspiracy what does the prosecution gain when all the accused charged are before the Court and may be proceeded against as abettors?

The punishment cannot be any higher than that for the offence committed. Why then waste public time and money and harass the accused and punish them by putting them to enormous costs?

So what Lord Chief Justice Cockburn rightly condemned is not only contrary to law and justice but is contrary to common sense.

It is therefore only fair to assume that the Indian Legislature never contemplated that offences when committed should be indirectly prosecuted on a charge of conspiracy, under the new secs. 120A and 120B of the Indian Penal Code.

The object of sec. 120A is not to overlap the provision of Indian Criminal Law for the punishment of offences committed and sufficiently provided for in the Code, but only to supplement and thus to punish combinations to commit offences or illegal acts or even lawful acts by illegal means.

It is doubtful whether these sections may be put into operation when a series of offences have been committed with which individuals cannot be connected except by overt acts which go to show that they have been committed by them in pursuance of a conspiracy which can be proved. But even then such cases would fall within the scope of secs. 107, 108 and 109 of the Indian Penal Code. The case of *Kali Munda*, I. L. R. 28 Cal. 797 shows that offences committed in pursuance of a conspiracy or abetments by conspiracy were punishable even before 1913, under the Penal Code.

But the scope of the law of conspiracy has been enlarged by sec. 120A in the following manner. In the first place if a plot has been formed for committing an offence, and if concert or agreement for the purpose may be proved, no overt act or any other offence need be proved. It also brings within it cases where a crime is contemplated or an offence or series of offences have been committed by a number of persons but which cannot be brought home to them or at any rate to all of them and yet there is sufficient and satisfactory evidence that these offences have been planned by common concert by some and others have joined the conspiracy at its inception or at a subsequent period. Then charges may be framed for the substantive offences read with sec. 109 and a count under secs. 120A and 120B may be added.

Some simple illustrations may serve to explain this :— (1) Take the case where the prosecution can prove that A, B, C, D have *conspired* to commit theft.

They find evidence that A has committed theft and B has abetted A. But they cannot prove that C and D have actually taken any part in the commission of the theft. If they have proved conspiracy between them all to commit thefts generally C and D may be convicted under sec. 120B, I. P. C., and A and B for theft and conspiracy, though the sentences must be one and the same under both counts.

Next take the case where there is proof that A and B have conspired but proof is wanting that C and D are members of the con-

If the prosecution can show that certain offences have been committed in pursuance of the conspiracy and it is also shown that C is connected with one and D is connected with the other offence, that would establish that C and D are also members of the conspiracy.

If A and B have not committed any offence beyond forming the plot they would be equally punishable along with C and D on a charge of abetment by conspiracy under sec. 109 and a charge under sec. 120B may be added but conviction cannot be had under both counts.

By way of a more specific example take the case where A and B are receivers of stolen property and it is provable that A and B entered into agreement with C and D, certain thieves, that they would purchase or dispose of such stolen articles as the latter may bring to them. But A and B are not privy to any thefts committed by C and D. Further that the offence of receiving has not been actually committed or is not provable. But the plot or the agreement as above is provable. Here A and B may be charged along with C and D under sec. 120B, I. P. C.

Thus it is in cases where the prosecution is in a position to show preconcert, plot, combination or agreement for a criminal purpose, yet cannot connect the accused with any offence, that the proper course is to charge them for the criminal combination or conspiracy under sec. 120B, I. P. C.

That there is a plot or criminal combination may be proved either by direct or circumstantial evidence.

CONTRACTS—DEFENCES: FRAUD.

MISSTATEMENT OF PRINCIPAL'S MINIMUM SELLING PRICE BY AGENT AUTHORIZED TO RETAIN WHOLE SURPLUS.

A broker, authorized to sell certain land at $12,000 or any higher price and retain the whole surplus, stated to the buyer that the land could not be bought for less than $12,500. Later, under pretence of having seen the owner at the defendant's request, he declared that the owner would take no smaller sum. He now sues on a check for $500 given by the buyer to complete payment for the land at that price and the buyer pleads fraud. *Held*, that the [illegible] may recover. *Aronowitz* v. *Woollard*, 152 N. Y. [illegible] (App. Div.).

Courts have gone far to [illegible] decree [illegible] seller's talk as immaterial, or expressing opinion [illegible] hold the buyer to a standard of care. *Page* v. *Parker*, 43 N. H. 363; *Mooney* v. *Miller*, 102 Mass. 217; *Graffenstein* v. *Epstein & Co.*, 23 Kan 443. See 2 KENT COM. 486. The overworking of these methods of approaching the problem has been criticised. See 8 HARV. L. REV. 63; 15 *id.* 576: 25 *id.* 472. But the misstatement by the seller of the lowest price he will accept furnishes an instance where "seller's talk" must be permitted although the statement is one of material fact and the buyer may not be negligent, because the inherent nature of a bargain would render any other rule highly unreasonable and impracticable. And there is much reason to extend this exemption to the agent, especially where, as in the principal case, he is the only party interested in keeping up the price. *Ripy* v. *Cronan*, 131 Ky. 631, 115 S. W. 791; *McLennan* v. *Investment Exchange Co.*, 170 Mo. App. 389, 156 S. W. 730; *cf. Merryman* v *David*, 31 *Ill.* 404. *Contra*, *Hokanson* v. *Oatman*, 165 Mich. 512, 131 N. W. 111. In the principal case, as the agent has gone further and has led the buyer to believe that the seller had been given an opportunity to reconsider, it is possible that he has exceeded his privilege and that his recovery should accordingly be defeated on account of fraud. *Kice* v. *Porter*, 22 Ky. L. Rep. 1704, 61 S. W. 266. But it seems proper to allow the buyer to reap no benefit from his meddlesome questions which would unfairly prejudice the plaintiff's bargain if truthfully answered or ignored. —*Harvard Law Review.*

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CHAPMAN and MULLICK, JJ. APPEALS FROM APPELLATE DECREES NOS. 1293 AND 1701 OF 1914. RAMPAT MAHTO AND ORS., Appellants *v.* RAM GOLAM SINGH, Respondent. 3rd January 1916.

Second appeal—Decision settling rent—Decision enhancing rent—Bengal Tenancy Act (VIII of 1885), sec. 109.

These two appeals arose out of proceedings under sec. 105 of the Bengal Tenancy Act. In the record-of-rights prepared under that Act, the lands were entered as *nij lagan*. The landlord made an application for settlement of fair rent under sec. 105 of the Act. The applications were opposed by the tenants, among other grounds, on the ground of limitation. The question of limitation was decided in favour of the landlord. Thereafter the Assistant Settlement Officer dismissed the applications on the ground that there was already an existing rent of Rs. 2-4 as. per bigha in each case. There were appeals to the Special Judge resulting in orders remanding the cases to the Settlement Officer for disposal on the merits. On remand the Assistant Settlement Officer decided that a fair rental would be Rs. 5-4 as. per bigha. Against that decision the tenants appealed and the landlord filed cross-appeals. The landlord withdrew his cross-appeals. The Special Judge finally disposed of the matter in appeal by settling rent at Rs. 8-8 as. per bigha. The tenants appealed and also applied for revision.

Held—That no second appeal lay, as the expression "settling rent" in sec. 109 of the Bengal Tenancy Act included enhancement.

That the Special Judge had no jurisdiction to grant the landlord any relief inasmuch as the landlord's cross-appeal had been withdrawn.

Babu Surendra Nath Ghosal for the Appellants.

Babus Umakali Mukerjee and *Hurnarain Pershad* for the Respondent.

Appeals dismissed.
Rules made absolute.

A. T. M.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

VISCOUNT HALDANE. LORD PARMOOR. LORD WRENBURY. SIR JOHN EDGE. MR. AMEER ALI. 1915, 16, November.	}	NAGESHAR PRASAD PANDE, Appellant, *v.* RAJA PATESHRI PARTAB NARAIN SINGH and anr., Respondents.

Res judicata—*Ostensible owner, transfer by, when binds real owner—Transfer of Property Act (IV of 1882), sec. 41.*

In a suit by A to recover from B property the title to which was disputed between A and B, M in whose favour B had on 14th March 1893 executed a usufructuary mortgage—in lieu whereof on 21st January 1895 another mortgage was executed in his favour by B—was made a Defendant apparently on the ground of his being a transferee under the mortgage of 14th March 1893. The suit was decreed.

In a suit by M to enforce his mortgage of 21st January 1895, which the representative in title of A contested, the High Court held that the decision in the previous suit was res judicata ; *and also that sec. 41 of the Transfer of Property Act did not apply to give M a title, although B had got his name entered in the Revenue papers as owner, because the application for the entry having been opposed by A, B could not be said to have been entered as ostensible owner with A's consent, and also because if M had made enquiries before he advanced money to B, he could have discovered the fact of B's opposition and facts showing B's title.*

The Judicial Committee on appeal found the judgment of the High Court to be so satisfactory and sufficient that they felt themselves justified in advising the dismissal of the appeal without following the practice of making an elaborate report.

This was an appeal from the following judgment of the High Court (Sir J. Stanley, C. J. and Banerji, J.), dated 2nd March 1911 :—

" This appeal arises out of a suit brought by the Plaintiff-Respondent for sale upon a mortgage executed by one Rudra Narain Singh on the 21st of January 1895. The property which the Plaintiff seeks to sell for realisation of the amount of the mortgage is a share in the village Saondih. The Plaintiff's allegation is that this village belonged to Babu Chet Singh and was sold by him to his wife, Dulhin Bua[illegible]ti, in the year 184[illegible] Rup Kunwari, the owner of the property and continued to be so till her death in 1887, and that upon her death it was inherited by Rudra Narain Singh as the next heir to her husband, he being the nephew of Chet Singh. One Bishun Shukal obtained a money decree against Dulhin Rup Kunwari and in execution of it caused the property in question to be attached and advertised for sale. Before the sale could take place, however, Dulhin Rup Kunwari died, and after her death Rudra Narain Singh first executed a usufructuary mortgage on the 14th of March 1893, and subsequently in lieu of the amount secured by that mortgage, the mortgage of the 21st of January 1895 on which the present suit is based. It is said that with the money raised by Rudra Narain Singh he discharged Rup Kunwari's debt to Bishun Shukal, repaid other debts and defrayed the expenses of her Gaya *shradh*. The Defendant, Raja Pateshri Partab Narain Singh, is the Raja of Basti. He brought a suit against Rudra Narain Singh for possession of several villages, one of which was the village Saondih. The Defendants to that suit were Rudra Narain Singh and various transferees of the property including the present Plaintiff. He claimed a declaration that he was entitled to the property and he prayed for possession of

it. His claim was dismissed by the Court of first instance, but this Court decreed it and the decree of this Court has been affirmed by their Lordships of the Privy Council. In that suit it was held that by virtue of a *supurdnama*, dated the 21st of March 1848, executed by Chet Singh, and a Will of Musammat Rup Kunwari made by her in 1858, the Raja of Basti became entitled to the property held by Rup Kunwari and that Rudra Narain Singh had [illegible] right to it. In the present suit the Plaintiff seeks to go [illegible] the decision in that suit. As has been stated [illegible], ... was placed in the array of Defendants. In the 29th paragraph of his written statement he contended that the then Plaintiff, that is, the present Appellant, the Raja of Basti, had no right whatever to question the validity of the transfers made in his favour. He referred in specific terms to the transfers made by Dulhin Rup Kunwari, and the hypothecation of the disputed villages by the Defendants, 1st party, namely, Rudra Narain Singh. An issue was framed to the effect whether the court-fee was insufficient, the suit being for possession by avoidance of the transfers made by Rup Kunwari and Rudra Narain Singh. This issue proceeded on the assumption that the suit was also a suit to avoid the transfers made in favour of the present Plaintiff. The issue was decided by the Court of first instance against the Defendants to that suit and no exception was taken to that decision in the Appellate Court. The result of the final decision in that suit was that the present Appellant, the Plaintiff to that suit, was declared entitled to the property claimed by him, and it was further declared that he had a right to recover possession of it from Rudra Narain Singh, who was then in possession. The question of the title of the Plaintiff to that suit was one of the material questions in the case and it was determined in favour of the then Plaintiff against the present Plaintiff who was a party to the suit. It is true that no specific mention of the mortgage now in question was made in the judgment in that suit, but we think the present Plaintiff, as Defendant, did raise the question of the validity of the mortgage in his favour and was entitled to do so with a view to resist the Plaintiff's claim [illegible] establishment of his title. He could a[illegible] does now, that by reason of [illegible]ose out[illegible]ion of the rule of estoppel, the then plaintiff, the Raja of Basti, was precluded from setting up his right to the prope[illegible] mortgaged to him, but he did not do so. We think that it is too late for him now to assert that the decision in the former suit to which he was a party and which has become conclusive as between all persons who were parties to it, should be ignored in the present suit and the question of the title of the Appellant, Raja Pateshri Partab Narain Singh, should be considered and determined independently of that judgment. It having been held between the parties to the present suit that Raja Pateshri Partab Narain Singh and not Rudra Narain Singh is entitled to the property in question, it was not, in our opinion, open to the Court in this case to hold otherwise.

"On the merits also we are of opinion that the Plaintiffs have no case against the Appellant, Raja Pateshri Partab Narain Singh. As we have said above, and as was found in the previous suit, the Raja of Basti acquired an absolute interest in the property held by Dulhin Rup Kunwari by virtue of the *supurdnama* of 1848 and the Will of Rup Kunwari of 1858. It may be, that the *supurdnama* is not binding on Rup Kunwari as she was not a party to it, and as a sale-deed had been executed in her favour before the date of the *supurdnama;*

but the Will was made by her and by virtue of it Raja Sitla Bakhsh Singh, the father of the Appellant Raja Pateshri Partab Narain Singh, became the owner of the property upon her death. She died in 1887, and therefore on the date on which the mortgage now in question was executed, the owner of the property was Raja Sitla Bakhsh Singh or the Appellant, Raja Pateshri Partab Narain Singh, and not Rudra Narain Singh, who made the mortgage.

"The Court below was of opinion that the mortgage is binding on the Appellant, inasmuch as Rudra Narain Singh's name was entered in the Revenue papers after the death of Rup Kunwari and he was the ostensible owner of the property. The learned Subordinate Judge apparently relies on the provisions of sec. 41 of the Transfer of Property Act, but he overlooks the proviso to that section which is to the effect that a transferee from an ostensible owner can defeat the real owner only if after taking reasonable care to ascertain that the transferor had power to make the transfer, he acted in good faith. There is nothing in this case to show that the Plaintiff made any enquiry whatever to ascertain the title of his mortgagor, Rudra Narain Singh. It is true the name of Rudra Narain Singh was entered in the Revenue papers, but if enquiry had been made it would have appeared that at the time when mutation of names was applied for, objections were preferred on behalf of the Raja of Basti and that the name of Rudra Narain Singh was entered simply because he was in possession. Further enquiry as to Rudra Narain's title would have led to the discovery of the fact that there was a Will by virtue of which the Raja of Basti was the owner of the property after the death of Rup Kunwari. It cannot be said that the name of Rudra Narain Singh was entered as ostensible owner with the consent of the real owner, the Raja of Basti. On the contrary, his name was entered in spite of opposition put forward by the Raja. The present Plaintiff is a person who has been lending money to the family for a long time. He resides in the same locality and was apparently acquainted with all the circumstances of the families concerned. He cannot therefore claim to be a *bonâ fide* transferee without notice so as to be in a position to defeat the title of the real owner."

[The rest of the judgment is not material.]

Mr. Bhugwandin Dubé for the Appellant submitted that the suit was not barred by *res judicata* by the previous decision *Imdad Ahmad* v. *Partap Narain Singh* (1). That was a suit for possession only, and the Appellant who was a party to that suit as a usufructuary mortgagee was not bound to put forward his mortgage dated the 21st January 1895. The previous decision did not in terms decide the present issue, nor was it necessary for the determination of the possessory action.

Mr. L. DeGruyther, K. C. and *Sir W. Garth*, for the Respondents, were not heard.

THEIR LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—Their Lordships think that they may depart from the practice of making a more elaborate report, and they desire only to say that the judgment of the High Court seems to them so satisfactory and sufficient that they do not wish to hear anything further about the case.

They will humbly advise His Majesty

(1) L. R. 37 I. A. 60; s. c. 14 C. W. N. 843 (1910).

NAGESHAR PRASAD PANDE *v.* RAJA PATESHRI PARTAB NARAIN SINGH.

that the appeal should be dismissed with costs.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for the Appellant.

Solicitor: *Mr. Douglas Grant* for the Respondent.

B. D. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1468 OF 1913.

MOOKERJEE and ROE, JJ.
1915, Heard, 26, May. Judgment, 13, July.

SHERMAN and anr., Defendants, Appellants,
v.
ALIMUDDI and anr., Plaintiffs, Respondents.

Principal and agent—Fraud by agent, principal's liability for—Act done within scope of agent's authority but not for his benefit.

Under the law of England, a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

The principle being based upon justice, equity and good conscience is applicable also in this country.

LLOYD *v.* GRACE (1) *and other cases considered.*

This was an appeal from a decision of Babu Ramesh Chandra Sen, Officiating Subordinate Judge of Backerganj, dated the 31st January 1913, confirming a decision of Babu Jadu Nath Mozumdar, Munsif, Barisal, dated the 26th June 1912.

The material facts of the case will appear from the judgment.

Babu Abinash Chandra Guha for the Appellants.

Babu Asitaranjan Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MOOKERJEE, J.—This is an appeal by the Defendants in an action for recovery of damages for illegal attachment and sale of movable property in execution of a decree for money. The facts found by the Courts below lie in a narrow compass. Two persons who may be called X and Y obtained a decree for money against four brothers A, B, C and D. The decree-holders applied for execution against D alone by attachment and sale of his moveables. The warrant of attachment was issued in due course, but the peon, on the identification of P, the agent of the decree-holders, attached three heads of cattle which belonged to B. B protested and tendered the decretal amount, but the peon who was in collusion with P, had the cattle so'd for an insignificant sum. It has been established that P acted in this manner on account of ill-feeling which he bore towards the judgment-debtors. The judgment-debtors claimed damages from the decree-holders on account of illegal attachment and sale. The Courts be'ow have concurrently decreed the suit. It cannot be disputed that the attachment was illegal; when execution had been taken out against D alone, the property of B could not be attached; besides, when the judgment-debtors offered to satisfy the decretal debt, their property could not be lawfully sold. It is obvious, consequently, that there was illegal attachment and sale of the movable property of the Plaintiffs. The sole question in controversy is, whether the Defendants are liable for the fraudulent conduct of their agent, who in collusion with the peon, has fraudulently brought about this result. The Courts

(1) [1912] App. Cas 716.

below have answered this question in the affirmative. There can be no doubt that on both principle and authority this view should be sustained.

It has not been disputed that under the law of England, a principal is liable for the fraud of his agent acting within the scope of his authority whether the fraud is committed for the benefit of the principal or for the benefit of the agent. This is definitively laid down by the House of Lords in *Lloyd* v. *Grace* (1), which overrules the dicta to the contrary by Lord Bowen in *British M. B. Co.* v. *Charnwood Forrest Railway Co.* (2) and by Lord Davey in *Ruben* v. *Great Fingall* (3). But it has been argued on behalf of the Appellant that a contrary rule was enunciated in *Barwick* v. *English Joint Stock Bank* (4), and was adopted by the Judicial Committee in *Burma Trading Corporation* v. *Mirza Mahomed Ally* (5). There is no foundation, however, for this contention. In the first place, as explained by the House of Lords in *Lloyd* v. *Grace* (1), the decision in *Barwick* v. *English Joint Stock Bank* (4) is not an authority for the proposition that a principal is not liable for the fraud of his agent unless committed for the benefit of the principal. In the second place, it is extremely unlikely that Sir Montague Smith, who was a party to the decision in *Barwick* v. *English Joint Stock Bank* (4), should have misunderstood its effect and misapplied it in *Burma Trading Corporation* v. *Mirza Mahomed Ally* (5), the judgment wherein was pronounced with his concurrence by Sir Robert Collier. In the third place, the decision of the Judicial Committee was based on the ground that the acts of the alleged agent could not be treated as the wrongful acts of a servant or agent committed in the course of his service, for the plain reason that at that time it was not shown that he was a servant or an agent for the purpose of working in the forest on behalf of the company or of doing any class of acts analogous to those complained of. Consequently, no question could arise whether the liability of the principal depended on the circumstance whether the wrong had been committed by the servant for the benefit of the master. On the other hand, Sir Robert Collier quotes with approval the observation of Willes, J., "in all these cases it may be said that the master had not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." The true meaning and effect of the ruling of Willes, J., in *Barwick* v. *English Joint Stock Bank* (4), which was approved by the Judicial Committee in *Burma Trading Corporation* v. *Mirza Mahomed Ally* (5), may also be ascertained from the opinion of the Judicial Committee in two other cases, *Mackay* v. *Commercial Bank* (6) and *Swire* v. *Francis* (7), the judgments wherein were delivered by Sir Montague Smith and Sir Robert Collier respectively. Reference may further be made to the decision of the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (8), where *Barwick* v. *English Joint Stock Bank* (4), *Mackay* v.

(1) [1912] App. Cas. 716.
(2) 18 Q. B. D 714 (718) (1887).
(3) [1906] App. Cas 439 (465).
(4) L. R 2 Exch 259 (1867).
(5) L R. 5 I. A. 130: s. c. I L. R. 4 Cal 116 (1878).
(6) L. R. 5 P. C. 394 (1874).
(7) 3 App. Cas. 106 (1877).
(8) 5 App. Cas. 317 (1880).

Commercial Bank (6) and *Swire* v. *Francis* (7) are examined and explained. Lord Selborne observes that the principle on which those cases were decided was a principle not of the law of torts or of fraud or deceit, but of the law of agency, and adds :—"The decisions in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because, as it was well put by Mr. Justice Willes in *Barwick* v. *English Joint Stock Bank* (4), with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." Lord Blackburn is equally explicit : "the substantial point decided was that an innocent principal was civilly responsible for the fraud of his authorised agent acting within his authority to the same extent as if it was his own fraud." To the same effect is the exposition by Story in his classical work on Agency (secs. 452, 456) where that distinguished lawyer states : "the principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them." The learned author adds : "the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done or he has subsequently adopted them for his own use and benefit." This statement of the law was accepted by Blackburn, J., in *McGowan & Co.* v. *Dyer* (9) and had been foreshadowed nearly two centuries earlier when Holt, C. J., held in *Hern* v. *Nichols* (10) that a merchant was accountable for the deceit of his factors, though not *criminaliter*, yet *civiliter*, for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger." This position is well illustrated by the decisions in *National Exchange Company* v. *Drew* (11), *Brocklesby* v. *Temperance P. B. Society* (12), *Pearson* v. *Dublin Corporation* (13), *Citizens' Life Assurance Co.* v. *Brown* (14), *Corporation of Glasgow* v. *Lorimer* (15), *Bowles* v. *Stewart* (16) and *Fitz Simons* v. *Duncan* (17). It may be observed that the rule as formulated by Story is in accord with a long line of authorities in the Courts of the United States, where an instructive attempt has been repeatedly made to justify the doctrine on principle. Thus, in *Higgins* v. *Watervliet* (18), Mr. Justice Andrews observed :—"Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care by the latter is the omission by the principal, and for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy

(4) L R 2 Exch. 259 (1867)
(6) L. R. 5 P. C. 394 (1874).
(7) 3 App. Cas. 106 (1877).
(9) L. R. 3 Q B. 141, 145 (1878).
(10) 1 Salkeld 289 (1708)
(11) 2 Macqueen, H. L 103 (1855).
(12) [1895] App. Cas. 173.
(13) [1907] A. C. 351.
(14) [1904] A. C. 423.
(15) [1911] A. C. 209.
(16) 1 Sch. and Lef. 209 (1803).
(17) 2 I. R. 483.
(18) 46 N. Y. 24 ; 7 Am. Rep. 293.

agents, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondeat superior* applies, provided only that the agent was acting at the time for the principal and within the scope of the business." Again, in *Jackson* v. *American Telephone Co.* (19), Mr. Justice Walker observed :— "Whoever commits a wrong is liable for it, and it is immaterial whether it is done by him in person or by another acting by his authority, express or implied. *Qui facit peralium, facit per se.* Upon this maxim of the law, is founded the doctrine that the principal is liable for the tort of his agent, and the master for the tort of his servant. If the wrongful act is done by express command of the master, or even if he has afterwards made it his own by adoption, there is no difficulty in applying the rule; but it is otherwise when the liability must proceed only from an implied authority. Where the servant does a wrong to a third person, the rule of *respondeat superior* applies, and the master must answer for the tort if it was committed in the course and scope of the servant's employment and in furtherance of the master's business." In *Alger* v. *Anderson* (20) the Court observed that the doctrine broadly stated is rested upon the ground "that the principal having held the agent out as having authority and having clothed him with power to act in a particular matter, as between two innocent persons, should suffer as having given occasion for the loss." The truth is that this rule of liability is based upon grounds of public policy; it seems more reasonable that where one of two innocent persons must suffer from the wrongful act of a third person, the principal who has employed and retained a dishonest agent and has placed him in a position of trust and confidence should suffer for his misdeeds rather than a stranger, *Philadelphia Railway Co.* v. *Derby* (21), *Washington Gas Light Co.* v. *Lansden* (22), *MacIntire* v. *Pryor* (23), *Foster* v. *Essex Bank* (24), *Reynolds* v. *Witte* (25), *Andrews* v. *Soloman* (26) and *Milburn* v. *Wilson* (27).

Reference may also be made to the decisions in *Subjan Bibi* v. *Sagina* (28), *Morrison* v. *Mackenzie* (29), *Iswar Chandra* v. *Satish Chandra* (30), *Gopal Chandra* v. *Secretary of State* (31) and *Motilal* v. *Gobindram* (32). These cases recognised the doctrine that acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though he did not in fact authorise the commission of the fraudulent act. There are, no doubt dicta in some of these cases based apparently upon a misapprehension of the rule enunciated by Willes, J., in *Barwick* v. *English Joint Stock Bank* (4), and particularly, of the expression "for the master's benefit." The true meaning and scope of the rule, however, has now been settled beyond controversy by the decision of the House of Lords in *Lloyd* v. *Grace* (1). The principle ex-

(1) [1912] App. Cas. 716.
(4) L. R. 2 Exch. 259 (1867).
(19) 189 N. C. 847; 51 S. E. 1017; 70 L. R. A. 738 (1862).
(20) 78 Fed. 785).
(21) 14 Howard 480.
(22) 152 U. S 534.
(23) 173 U. S. 89.
(24) 17 Mass. 508; 9 Am. Rep 678.
(25) 18 S. C. 5; 86 Am Rep. 678.
(26) Peter. C. C. 360; 1 Fed Cas. 878.
(27) 31 Can Sup. Court. 481.
(28) 3 B. L. R. 413 (1869).
(29) 6 C. W. N. 429 (1901).
(30) I. L. R. 30 Cal. 207: s. c. 7 C. W. N. 126 (1902).
(31) I. L. R. 36 Cal. 647: s. c. 13 C. W. N. 619 (1909).
(32) I. L. R. 30 Bom. 88 .87) (1905).

pounded there is based, as we have seen, on "justice, equity and good conscience," and no conceivable reason has been suggested, why it should be held inapplicable to this country.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

ROE, J.—Negligence and malice, mistake and fraud are so closely allied that they are often not to be distinguished. It could [illegible] and never was a good defence to an action upon a tort done by a servant or by an agent, to plead that the tort was done, not by accident but on purpose.

My learned brother has so fully traced to its source and exposed the fallacy that to render the master liable the act of the servant must be for the master's benefit, that there remains nothing for me to add. The sole test is the scope of the agent's authority.

In the case before us the act done by the agent was clearly within the scope of his authority.

I agree that the principal is liable and that the appeal be dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 11 OF 1913.

WOODROFFE, J.
NEWBOULD, J.
1915,
14, June.

KHATIBANNESSA BIBI and ors., Petitioners, Appellants,

v.

SANCHIA LAL NAHATA and ors., Decree-holders, Respondents.

Indian Limitation Act (IX of 1908), secs. 19, 20 —Payment extending limitation—Civil Procedure Code (Act V of 1908), Or. 21, r. 2—Certification of payment by decree-holders—Statement of payment in application for execution of decree if sufficient.

A decree-holder in his application for execution of his decree notified to the Court that he had received a certain sum from the judgment-debtor and relied on this payment as saving limitation. It was found that the payment had in fact been made by the judgment-debtor himself by way of interest.

Held—*That the decree-holder may either apply to certify payment before execution or may do so in his application for execution of the decree.*

That there was sufficient certification by the decree-holder and under the circumstances it was not necessary for the Court to record the certification and Or. XXI, r. 2 did not stand in the way of the decree-holder.

That in the face of the finding, the fact of the endorsement and the question as to who made it and the authority by which it was made were immaterial.

This was an appeal from an order by the District Judge of Zillah Rungpur, dated the 23rd September 1913, reversing an order of Babu Bepin Chandra Chatterji, Munsif of Rungpur, dated 29th January 1912.

The decree-holder applied for execution on 18th May 1911, stating that payment of Rs. 10 towards interest was made by the judgment-debtor on 19th June 1908. The judgment-debtor denied the payment and contended that the application was barred by limitation. The Munsif found that no payment was made and dismissed the application. The District Judge in appeal reversed the finding of the first Court and held that the execution of the decree was not barred. The judgment of the lower Appellate Court was as follows :—

"This appeal arises out of an execution case. The decree is dated 17th of February 1906, and it was executed on the 18th

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of May 1911. The decree-holder's case is that the original judgment-debtor Yakubuddin paid Rs. 10 for interest due on the decree in June 1908, and that therefore the execution application is not barred by limitation. The learned Munsif holding that the said payment was not made found that the case was barred by limitation. The decree-holder has filed this appeal.

"The decree-holder's *gomastha* Nat Mal swears that Yakubuddin paid him the said sum of Rs 10 for interest due on the decree on the 5th of Ashar 1315. This sum was entered in the decree-holder's account books. It was also entered on the back of the decree by some man of the judgment-debtor. The evidence adduced on behalf of the decree-holder appears to be reliable.

* * * *

"Comparing the evidence of both the sides I find that the payment mentioned by the decree-holder was made.

"It is contended on behalf of the judgment-debtor that the said payment not having been certified or recorded as certified cannot be recognized by the executing Court but the payment was made before the new Civil Procedure Code came into operation. Following *Hurry Prosad Chowdhuri* v. *Nasib Singh* (1) I find that the payment can be proved to show that the execution of the decree is not barred. The fact that the present execution was taken out after the passing of the new Civil Procedure Code does not preclude the decree-holder from proving the payment by which a right occured to him before the Act was passed.

"On all the above grounds I set aside the learned Munsif's order and find that the execution of the decree is not barred. The appeal decreed with costs in both Courts, pleader's fee Rs. 10."

The judgment-debtor appealed to the High Court. On the appeal the High Court (N. R. Chatterjea and Mullick, JJ.,) passed the following order of remand.

"Before proceeding further in this appeal, we think it is necessary that there should be a finding by the lower Appellate Court upon the question whether the endorsement of payment on the decree was an acknowledgment within the meaning of sec. 19 or 20 of the Limitation Act. We accordingly send the case back to the lower Appellate Court for a finding on this point, the appeal being kept on the file of this Court. The finding is to be returned within a month of the arrival of the record in the lower Court."

The finding of the District Judge on remand was as follows :—

"This appeal has been remanded by the High Court for a finding by this Court as to whether the endorsement of payment on the decree was an acknowledgment within the meaning of sec. 19 or 20 of the Limitation Act. It is conceded by the learned Pleaders on both sides that, as the endorsement was not signed by the deceased judgment-debtor Yakubuddin or by a duly appointed agent on his behalf, it was not an acknowledgment under sec. 19 of the Limitation Act and I find accordingly. Then as to sec. 20 of the Act under the proviso thereof it is only with reference to payment of the principal of a debt that an acknowledgment in the handwriting of the person making the payment, is contemplated. In the present case the alleged payment was with respect to interest and not of any part of the principal of the debt. Hence I find that the endorsement was not an acknowledgment within the meaning of sec. 20 of the Limitation Act."

Babu Purna Chandra Ray for the Appellant :—1. The payment of Rs. 10 was before the new Civil Procedure Code came into force in January 1909. The ap-

(1) I. L. R. 21 Cal. 542 (1894).

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plication for execution was made under the new Civil Procedure Code. The decree-holder did not make any application under the old Code. In that case, the payment would have been recognised. He cannot invoke the aid of the old Code. The procedure must be the procedure laid down in the new Code in Or. 21, r. 2, cl. (3). Sir John Woodroffe's Civil Procedure Code at p. 868. The payment must [illegible] certified or recorded by the Court. The decree-[illegible] the right to apply for a certificate. He has lost [illegible]

2. The payment was not made by the judgment-debtor or any person authorised by him to make it on his behalf. The requirements of sec. 20 of the Limitation Act were not complied with.

Babu Mohini Mohon Chakrabarti (with *Babu Abinash Chandra Chakrabarti*) for the Respondent.—1. It was a payment which the Court was bound to recognise in order to save limitation. The petition for execution was within three years and nothing in the new Code took away the decree-holder's right to apply for execution mentioning the payment, if within time. The Full Bench ruling in *Fukeer Chand Bose* v. *Madan Mohon Ghose* (2) lays down: Payment out of Court by a judgment-debtor to the decree-holder may be certified to the Court and proved by the decree-holder for the purpose of avoiding limitation, the provisions of sec. 206, Act VIII of 1859, notwithstanding. *Bhoobunessuree* v. *Dinonath* (3) and *Hurry Prosad Chowdhuri* v. *Nasib Singh* (1) relied on. The wording of sec. 206, Act VIII of 1859 is also similar in nature and character to that of Or. 21, r. 2, cl. (3).

The petition for execution should be taken as an application for certificate. *Gopal Das* v. *Ganga Ram* (4). It was held in this case that the decree-holder's petition was a sufficient certification under sec. 258 of the Civil Procedure Code, 1882. Sir John Woodroffe's Civil Procedure Code, p. 864, dealing with Or. 21, r. 2, cl. (3). Separate petition is therefore not necessary for certif[illegible] The decree-holder is to certify p[illegible]ecutio[illegible]. It was done in the present case [illegible]'s petition. He was to do nothing else. There is clear difference of procedure as to what the decree-holder is to do, and what the judgment-debtor is to do in Or. 21, r. 2.

2. As regards the second point, the finding of the lower Appellate Court was that Rs. 10 was paid by the judgment-debtor himself. So it was a good payment under sec. 20 of the Limitation Act.

Babu Purna Chandra Roy in reply.—The decree-holder ought to have applied first for a certificate before applying for execution.

The JUDGMENT OF THE COURT was as follows:—

The point in this appeal is very narrow and very technical. It is the case of a decree-holder applying for execution of his decree. At the time of the application he notified to the Court by his application that he had received a certain sum from the judgment-debtor and the finding of the Court is that that sum had been paid in fact by the judgment-debtor by way of interest on the judgment-debt.

The decree-holder relies upon his payment as saving limitation and the judgment-debtor replies that it cannot have that effect, because the payment of Rs. 10 by the judgment-debtor was not certified; and in the next place it did not operate to extend the limitation under the provisions of secs. 19 and 20 of the Limitation

(1) I. L. R. 21 Cal. 542 (1894).
(2) 13 W. R. (F. B.) 10; 4 B. L. R. (F. B.) 130 (1869).
(3) 11 W. R. 232 (1869).
(4) 8 A. W. N. 115 (1888).

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Act. The first point practically is this that the certification which may be given by the decree-holder under Or. XXI, r. 2, must be a certification on some days or at some time different from that on which the application for execution was made. It appears to me that the decree-holder may either apply to certify payment before execution or may do so on his application for execution of the decree. In the present case he did notify to the Court that he had received this sum of Rs. 10; and that is all that he has to do in order to certify payment. It is however said that the Court should have recorded this certification. It does not seem to me necessary under the circumstances, seeing that the application for execution was made and the Court acted on such application by allowing such execution to issue. Moreover the section speaks of "certified" or "recorded." I am therefore of opinion that Or. XXI, r. 2, does not stand in the way.

As regards the other point, it has been found that Rs. 10 was in fact paid by the judgment-debtor himself by way of interest. That finding is sufficient. The fact of the endorsement and the question as to who made it and the authority by which it is made are immaterial. The appeal fails and is dismissed with costs. We assess the hearing fee at three gold mohurs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 475 OF 1911.

MOOKERJEE, J.
BEACHCROFT, J.
1915,
13, July.

MAHARAJA BIRENDRA KISORE MANIKYA BAHADUR, Plaintiff, Appellant,
v.
KALITARA DEBI, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), sec 106, before amendment by Act III, B. C. of 1898—Decision of question of rent-free title, by settlement officer under, if operates as decree—Jurisdiction to decide question—Act III, B. C. of 1898, sec. 9 (1).

Sub-sec. (1) *to sec. 9 of Act III of 1898 B. C. (which came into force on 2nd November 1898) did not give the force and effect of a Civil Court decree to the decision of a dispute by a Settlement Officer passed before the Act came into force, which it was beyond the jurisdiction of the Revenue Officer to decide under sec. 106.*

Where in the course of a proceeding under Chapter X of the Bengal Tenancy Act, a Settlement Officer decided on 17th April 1897 that the Defendants had failed to establish their alleged rent-free title, and on the basis of this decision rent was subsequently settled and the record finally published on the 1st December 1898:

Held, *in a subsequent suit by the landlords against the Defendants for assessment of rent of the land, that the Settlement Officer had no jurisdiction under sec. 106 of the Bengal Tenancy Act as it stood before the amendment to decide a question of this character and his decision did not preclude the Court from determining the question of* lakhiraj *title on the merits.*

DONAY DAS *v.* KESHUB PUCHTI (2), RADHA KISHOE *v.* DURGANATH (1), SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* NITYE SINGH (5), DHARANI KANT LAHIRI *v.* GABER ALI KHAN (6) *and* KARMI KHAN *v.* BROJO NATH DAS (7) *referred to.*

NOBIN CHANDRA *v.* RADHA KISHORE (3) *commented on.*

This was an appeal preferred on the 2nd March 1911 against the decree of A. H.

(1) I. L. R. 32 Cal. 162 (1904).
(2) 8 C. W. N. 741 (1904).
(3) 11 C. W. N. 859 (1907).
(5) I. L. R. 21 Cal 38 (1893)
(6) I. L. R. 30 Cal. 339; s. c 7 C. W. N. 28. (1902).
(7) I. L. R. 22 Cal 248 (1894).

MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR *v.* KALITARA DEBI.

Cuming, Esq., District Judge of Zilla Tipperah, dated the 29th November 1910, reversing the decree of Babu Phanindra Mohan Chatterjee, Munsif, 2nd Court at Comilla, dated the 30th November 1909.

The facts of the case sufficiently appear from the judgment.

Babus Dwarka Nath Chakravarty and *Birendra Ch. Das* for the Appellant.

Babu Bipin Ch. Bose for the Respondent.

[redacted] COURT was as follows :—

This is an appeal by the Plaintiff in a suit for assessment of rent of land, which, the Defendants contend, they hold under a rent-free title. The Court of first instance found in favour of the Plaintiff and decreed the suit. Upon appeal, the District Judge has reversed that decision, and, has held, *first*, that the decision of the question by the Settlement Officer does not conclude the matter in controversy, and *secondly*, that from the long and uninterrupted possession of the Defendants without payment of rent to the Plaintiff or his predecessor, the inference may legitimately be drawn that the original grant was rent-free. On the present appeal, the validity of the conclusion of the District Judge upon the second aspect of the case has not been disputed, but it has been argued that the decision of the Settlement Officer which was adverse to the Defendants, operates as *res judicata*, and that it was not open to the District Judge to come to an independent determination on the merits.

From an examination of the record, it transpires that on the 17th April 1897, the Settlement Officer decided, in the course of a proceeding under Chapter X of the Bengal Tenancy Act, that the present Defendants had failed to establish before him their alleged rent-free title. On the basis of this decision of the dispute between the parties, the rent was subsequently settled and the record was finally published on the 1st December 1898. The Appellant now contends, with reference to sub-sec. (*1*) of sec. 9 of Act III of 1898 (B. C.) which came into force on the 2nd November 1898, that the decision of the Revenue Officer, though prior in point of time, was embodied in a record-of-rights published afterwards and precludes an investigation of the matter by the Civil Court.

Sub-sec. (*1*) of sec. 9 is in these terms :— "Every settlement of rent or decision of a dispute by a Revenue Officer under sec. 101 or sec. 106 of the Bengal Tenancy Act, 1885, before the commencement of this Act, in respect of which no appeal has, before the commencement of this Act, been preferred to the Special Judge appointed under sec. 108 of the Act, shall have the force and effect of a decree of a Civil Court in a suit between the parties and shall be binding." The Appellant argues that there was a decision of a dispute by a Revenue Officer under sec. 106 of the Bengal Tenancy Act, 1885, and that such decision has the force and effect of a decree of a Civil Court in a suit between the parties and is final. This contention is based upon a superficial view of the provisions of sub-sec. (*1*) of sec. 9. It was ruled by this Court in the case of *Radha Kishore* v. *Durganath* (1) that the words "every settlement of rent or decision of a dispute by a Revenue Officer" in sec. 9 are applicable only to those cases which a Revenue Officer has jurisdiction to try and are not applicable to a decision of a Settlement Officer as to the validity of a *lakhiraj* title under sec. 104 of the Bengal Tenancy Act, 1885. This conclusion coincides with the decision in *Donay Das* v. *Keshub*

(1) I. L. R. 32 Cal. 162 (1904).

Pruhti (2) where Mr. Justice Ghose observed that the Legislature could not possibly have intended to accord finality to a decision of a dispute by a Settlement Officer which it was beyond the jurisdiction of the Revenue Officer to decide under sec. 106. This view is in our opinion eminently reasonable. Reliance, however, has been placed upon the later decision in *Nobin Chandra* v. *Radha Kishore* (3) where the attention of the Court was not drawn to the cases of *Donay Das* v. *Keshub Pruhti* (2) and *Radha Kishore* v. *Durganath* (1). There is a dictum in this judgment to the effect that the doctrine of *res judicata* applies, irrespective of the question whether the decision of the Revenue Officer was or was not competent under sec. 104 or 106. In support of this view, reliance was placed upon the decision in *Nikunja Behary* v. *Radha Kishore* (4). On an examination of the judgment in that case, however, it transpires that the decision is not an authority for the proposition deduced therefrom. There it was held that the particular decision of the Revenue Officer was within his jurisdiction, and if the decision was within his competence, it was plainly final between the parties under sub-sec. (1) of sec. 9 of Act III of 1898. We may further observe, with reference to the decision in *Nobin Chandra* v. *Radha Kishore* (3), that although reliance was placed upon the doctrine of *res judicata*, the Court yet proceeded to determine the case on the merits and came to the conclusion that the claimants had failed to establish their alleged rent-free title on the basis of the *sanads* and the other documents produced by them. We hold accordingly that the Appellant can succeed, only if the decision of the Settlement Officer, dated the 17th April 1897, was a decision of a dispute, which he was competent to decide under sec. 106, Bengal Tenancy Act, as it stood before its amendment in 1898.

It cannot, we think, be seriously maintained that the Settlement Officer was competent to decide a question of this character before the amendment of the statute in 1898. This is plainly indicated by the fact that sec. 102 has now been amended by the insertion of a new clause which expressly authorises the Settlement Officer to decide, when the land is claimed to be held rent-free, whether or not rent is actually paid, and if not paid, whether or not the occupant is entitled to hold the land without payment of rent, and, if so entitled, under what authority. The very circumstance that the Legislature has inserted this clause in sec. 102 points to the conclusion that the matter provided for thereunder is not covered by the other clauses of sec. 102. This, in fact, was the view taken by a Full Bench of this Court in the case of *Secretary of State for India in Council* v. *Nitye Singh* (5) and is also in accord with the decision in *Dharani Kant Lahiri* v. *Gaber Ali Khan* (6). But it has been argued that the decision of the Full Bench should be limited to cases where the Settlement Officer is invited to decide whether an alleged rent-free grant constitutes a valid title, and in support of this our attention has been drawn to isolated passages in the judgments delivered by the Full Bench. But we prefer to accept the interpretation of the decision of the Full Bench as given by Mr. Justice Prinsep who delivered the leading judgment in that case; his view will be found in the case of *Radha Kishore* v. *Durganath* (1), and was

(1) I. L. R. 32 Cal. 162 (1904).
(2) 8 C. W. N. 741 (1904).
(3) 11 C. W. N. 859 (1907).
(4) S. A. 839 of 1900

(1) I. L. R. 32 Cal. 162 (1904).
(5) I. L. R. 21 Cal. 38 (1893).
(6) I. L. R. 30 Cal. 899 : 8 C. 7 C. W. N. 33 (1902).

confirmed on appeal by a Bench of three Judges. Reference has also been made to the case of *Karmi Khan* v. *Brojo Nath Das* (7), but that decision, rightly interpreted, does not support the contention of the Appellant. In fact, the question whether a *lakhiraj* is valid or not, does not and cannot require consideration in a case of this description. The proceeding is, not by the Government for assessment of revenue on [illegible] alleged to be held revenue free, but is by the [illegible] of an estate for assessment of rent on land claimed by the occupier to be held as rent-free. It has [illegible] been urged that if this view be taken, it would be open to any occupier of land to defeat the proceeding before the Settlement Officer by an unfounded assertion that the land was held rent-free. There is no ground for this apprehension, for as was pointed out by Mr. Justice Prinsep in *Nikunja Behary* v. *Radha Kishore* (4) it is open to the Settlement Officer to investigate whether rent has, as a matter of fact, been paid in respect of the disputed land; if it is proved that rent has been paid, the Settlement Officer is competent to assess fair and equitable rent on the land; if, on the other hand, it is proved that rent has never been paid in respect of the land, he cannot assess rent thereon merely because he is of opinion that the alleged rent-free title has not been proved. This was the law under the Bengal Tenancy Act as it stood before its amendment in 1898. The law, however, was altered in 1898 and the controversy cannot be raised again. We hold accordingly that the decision of the Settlement Officer, dated the 17th April 1897, does not operate as *res judicata*, and that it was open to the District Judge to come to a determination of the matter in dispute on the evidence before him. That determination, as we have said, is not, and cannot be, successfully assailed on the merits, as it accords with a long line of cases in this Court [*Birendra* v. *Bhoirab* (8)].

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(4) S. A. 533 of 1900.
(7) I. L. R. 22 Cal. 248 (1894).

[CIVIL REVISIONAL JURISDICTION.]

RULE [illegible] OF 1915.

D. CHATTERJEE, J.
BEACHCROFT, J.
1915,
Heard, 22 and 23, November.
Judgment, 22, December.

In the matter of PURNA CHANDRA ADDY, Pleader.

Pleader—Unprofessional conduct—Pleader a party to suit, threatening to sue Court for unwarrantable and illegal act—Court's duty to enquire into complaints against subordinate officers—Anonymous complaint to Judge.

Two brothers, decree-holders, one of whom was a pleader, finding on the date fixed for sale that the sale proclamation had not been duly published applied for issue of a fresh sale proclamation on the ground that the non-publication was due to the negligence of the Court Officers. The Munsif rejected the petition and struck off the case, whereupon they caused a notice to be written and served on the Munsif threatening him with legal proceedings to recover the costs which the notice stated had been suffered owing to the Munsif's illegal and unwarrantable conduct. The District Judge to whom the matter was reported called on the pleader to apologise to the Munsif, but he refused and the District Judge thereupon referred the matter to the High Court under sec. 14 of the Legal Practitioners Act holding that

(8) 20 C. L. J. 295 (1918).

IN THE MATTER OF PURNA CHANDRA ADDY.

the pleader was guilty of grossly improper conduct in the discharge of his professional duty,

Held—*That in the circumstances no action should be taken against the pleader under sec. 14 of the Legal Practitioners Act.*

Per D. CHATTERJEE, J.—*What was done in this case was done by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary wrong done to him as a suitor and it had no connection whatever with his professional character or anything done by him professionally.*

Per BEACHCROFT, J.—*That on the facts stated the Munsif's order dismissing the execution case was wholly indefensible, and human nature being what it is the action of the pleader was not to be taken too seriously; though he would have been well advised to offer the Munsif an apology.*

Remarks on the impropriety of addressing anonymous complaints to Court in connection with pending cases.

This was a Reference under sec. 14 of the Legal Practitioners Act made by Mr. H. Adamson, District Judge of Cuttack, dated the 1st of May 1915.

The Order of Reference was in the following terms :—

"The above named pleader and Babu Mohesh Chandra Addy are joint decree-holders. They took out execution of their decree in Execution Case No. 995 of 1914 in the Court of the 2nd Munsif of Puri. A copy of the Order Sheet of this case (marked B) is on the record. The Munsif dismissed the case as infructuous for the reasons given in his order of 15th February 1915. On the 26th February he received the letter marked A, dated 25th February. It is in the handwriting (admittedly) of Babu P. C. Addy, Pleader, one of the joint decree-holders. It is in the name of both decree-holders, but is signed only by Babu M. C. Addy. It is a notice to the Munsif that the two decree-holders are going to take legal proceedings against him for Rs. 7-7-3, the costs incurred in the execution proceedings. The letter was sent to me by the Munsif.

"The notice marked C, dated 15th March 1915 is a notice from me to the pleader under sec. 11 of the Legal Practitioners Act, calling on him to show cause why he should not be reported to the High Court as guilty of grossly improper conduct in the discharge of his professional duty [sec. 13 (*b*)]. To the notice is attached the charge.

"The pleader has not appeared in person before me, but appeared through another pleader of this Court. A suggestion made by me that an apology should be offered was not accepted.

"Briefly the charge against the pleader is that, knowing full well that no suit could lie against the Munsif in respect of his dismissal of the Execution Case, he was guilty of grossly improper conduct in the discharge of his professional duty by writing this letter in his own name and in that of the other decree-holder, and that his action was not *bonâ fide* and was dictated by a desire to harass the Munsif.

"There can be no question that in view of the provisions of Act XVIII of 1850 no suit could lie against the Munsif in respect of the order passed by him dismissing the execution case. It was argued before me that this Act only protects the Munsif if he acted in good faith, and the suggestion was made that the Munsif's action was *mala fide*. Not the silghtest attempt was made to show how his action was *mala fide*, and this suggestion in my opinion only aggravates the original

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offence. It is not my duty in this proceeding to discuss whether or not the Munsiff's order was legal. If it was illegal, the decree-holders had a means of redress by moving the higher judicial authorities. Any Court may err in law.

"It was also argued that if the notice was mere waste paper, it should be treated as such. Of course if the notice had not been written by a pleader, the present proceedings could not be taken, and the suit might be awaited. But if the notice is a mere empty threat, the pleader's conduct is in my opinion indefensible.

"It was of course argued that the pleader wrote the letter as a private party, *i.e.*, as a litigant, and therefore he could not be guilty of professional misconduct.

"It is noteworthy that despite the fact that the pleader wrote the letter in his own name and in that of his co-decree-holder, he did not himself sign it. That very fact would show that his action was not *bonâ fide*. He does not of course plead that he wrote as a Legal Practitioner at the dictation of his client.

"The real question for decision in this matter appears to me to be, whether a pleader, who is a party in a suit, is at liberty to write to the Munsif who has passed an order of which he disapproves, threatening him with a suit for recovery of the costs incurred in the suit, when as a pleader he must know perfectly well that no such suit can lie.

"It does seem to me that a pleader who acts like this is guilty of gross improper conduct in the discharge of his professional duty. A litigant, who is not a Legal Practitioner, may write such a letter, if he likes. He may even think that such a suit would lie, and may in that case bring it.

"But a pleader knows that no such suit would lie, and of course he would not waste his money by bringing it. How then can his action be *bonâ fide*? The object of the letter is obvious. The intention of the pleader who wrote it in his own name—though he shrunk from signing it—could only be dictated by *mala fides* and by a desire to harass, annoy and browbeat the Munsif.

"If such conduct on the part of a pleader, who is himself a litigant, is not improper professional conduct, then every Judge who passes an order that does not commend itself to the pleader, may be exposed to receiving a letter of this kind, threatening him with legal proceedings for 'illegal and unwarrantable conduct.' The gravamen of the charge is that as a pleader he knew no such suit would lie, and that his threat was an empty one.

"It was argued that in any case his conduct could not come within sub-secs. (*a*) and (*b*) of sec. 13, and that therefore this Court had no right to take action under sec. 14. I am of opinion that what he has done does come within sec. 13 (*b*), at any rate for this reason that he does not sign the letter as a litigant. It is in his handwriting and is signed by the other party to the suit. If he wrote it as a litigant, he should have signed it. It appears to me that it may be held he wrote the letter as a legal adviser. He has been very clever in the matter. For as it is in their joint names he may argue that he wrote as a litigant. Yet, if he wrote as a litigant, why did he not sign it himself?

"I consider it my duty to report the whole matter under sec. 14 to the High Court for such orders as the Hon'ble Judges may think fit. I come to a finding that he is guilty of grossly improper conduct in the discharge of his professional duty by writing this letter, and I consider that he should be suspended for a period as a warning."

IN THE MATTER OF PURNA CHANDRA ADDY.

Babus Sarat Chandra Roy Choudhury, Satya Churn Sinha and *Dhirendra Krishna Roy* for the Petitioners.

Babu Ram Churn Mitter in support of the Reference.

The JUDGMENT OF THE COURT was as follows :—

D. CHATTERJEE, J.—Babu Purna Chandra Addy is a pleader practising in the courts at Puri. He and his cousin Mohes had an execution case before the second Munsif of Puri. On the date fixed for sale the decree-holders found out that the sale proclamation had not been duly published. They applied for the issue of a fresh sale proclamation on the ground that the non-publication was due to the negligence of the Court officers. If the facts were, as stated above, the most proper and just course for the learned Munsif would have been to grant the application. He rejected it however and struck off the case and the whole cost of the execution was lost for no default of the decree-holders. They were naturally annoyed and took legal advice as to whether they could recover damages from the Munsif. It is said that they were advised that such a case would lie, their advisers relying on the case of *Taruck Nath Mookerjee* v. *The Collector of Hooghly* (1). Mohes insisted upon fighting out that case and a notice was given to the Munsif signed by Mohes but written out by Babu Purna Chandra to the following effect. "We have by your illegal and unwarrantable conduct as aforesaid suffered a loss of Rs. 7-7-3 pies being the amount of costs incurred as specified below : I hereby give you notice that both the aforesaid Babu Purna Chandra Addy and myself shall adopt legal proceedings against you for the said sum." The learned Munsif made a report to the District Judge of Cuttuck and the said officer instituted proceedings under sec. 14 of the Legal Practitioners Act against Babu Purna Chandra for grossly improper conduct in the discharge of his professional duty inasmuch as the letter of notice was in his handwriting and must have been written with his knowledge and by his advice and inasmuch as he knew that no such suit would lie, his action in writing it and allowing it to be signed by Mohes was not *bonâ fide* and was dictated by a desire to harass the Munsif. Babu Purna Chandra in shewing cause said that the notice was given under legal advice without any intention of harassing the learned Munsif and even if the advice was wrong he had acted *bonâ fide* as a litigant in the exercise of his legal rights and not as a pleader acting for a client and no charge of professional misconduct could lie.

The learned Judge asked him to apologize, but he chose to stand upon his legal rights and did not. The learned Judge has therefore made this reference under sec. 14 of the Legal Practitioners Act holding that the pleader was guilty of grossly improper conduct in the discharge of his professional duty.

It is contended before us that the reference is incompetent and should be discharged.

I think that this contention is right. What was done in this case was done "by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character, or any thing done by him professionally." See *In re Wallace* (2), *In the matter of Jogen-*

(1) 13 W. R. 18 (1870).

(2) L. R. 1 P. C. 283 (1866).

IN THE MATTER OF PURNA CHANDRA ADDY.

dra Narain Bosé (3), *In re a pleader* (4) and *In the matter of a first grade pleader* (5). The learned senior Government pleader who appeared in this case on notice from the Court did not support the reference as one warranted by cl. (*b*) of sec. 13, but he said that the language used was intemperate and as the pleader did not accept the invitation of the Judge to make an apology he deserved some censure by this Court. The language was perhaps a little harsh but it was the language of a litigant smarting from what he considered a wilful disregard of his just rights merely for the sake of administrative despatch when the greater part of the fault was not with him but with the office of the Court. Then again the part that he took in helping his co-litigant to give the notice was an insignificant one : he merely copied the letter and refrained from joining openly in the assertion of what he was advised was his legal right. It is admitted by his learned Vakil that the advice was wrong, and in the absence of malice his client had no right to maintain a suit for damages for a judicial act, but that does not take the case further than this that he and his advisers committed an error of law. No doubt the error was rather serious in this case as it led to a breach of that amity and mutual understanding which should always exist between the Bench and the Bar : Justice to the litigant is the end for which the Bench and the Bar are the means and the powers of the one and the privileges of the other are ordained for the attainment of that end by their harmonious co-operation. It is to be regretted therefore that there was a discord in this case. The error however was nevertheless an error of law which cannot be treated as professional misconduct. See *In the matter of Sarat Chandra Guha* (6). He has however in this Court through his Vakil expressed his regret for what has happened and there is an end of the matter.

I may in this connection mention that while the case was awaiting judgment I received a type-written envelope posted at Puri and enclosing some newspaper cuttings containing aspersions against the Munsif concerned in this case. Babu Purna Chandra through his Vakil disowns all knowledge of this and expresses his regret that anybody should have done it. I accept his statement and hold him blameless in the matter. I think it my duty however to say that whoever may be responsible for the sending of these cuttings in an anonymous cover with a type-written superscription which cannot be identified is guilty of a gross contempt of Court. It is an attempt to interfere with the due administration of justice : it is unfair to the party for whose benefit it is done ; it is unfair to the party slandered who has no means of meeting it and it is unfair to the Court which might humanly speaking be unconsciously influenced without being able to deal with the perpetrator in due course of law. Conduct like this is cowardly, ungentlemanly and in the highest degree reprehensible and I hope no one connected with the Puri Bar had any hand in it.

In this view of the case, I discharge the Rule.

BEACHCROFT, J.—I agree that the reference ought to be discharged on the ground that the case is not one within sec. 13 (*b*) of the Legal Practitioners Act. I am, however, sceptical of the truth of the pleader's allegation that he took and acted on other legal advice in sending the objec-

(3. 5 C. W. N. 48 (1900).
(4) 18 M. L. J. 184 (1907)
(5) I. L. R. 24 Mad. 17 (1900).
(6. 4 C. W. N. 668 (1900).

tionable letter to the Munsif. But even if it be assumed that it was sent with the intention of annoying the Munsif, I do not think it necessary to take any further notice of the matter.

We have no explanation from the Munsif as to why he rejected the prayer for issuing a fresh sale proclamation in the execution proceedings, but on the facts stated his order dismissing the execution case appears to be wholly indefensible. The Munsif ought to have been thankful to the decree-holders for bringing to his notice the defect in the execution proceedings, and incidentally in the working of his office, instead of penalizing them for it. Human nature being what it is one must not view the action of the pleader too seriously. Having had time for reflection he would have been well advised to accept the suggestion of the learned District Judge and offer an apology to the Munsif. I am not impressed by the offer of an apology in this Court at the eleventh hour when the pleader felt that he might get into trouble. But in the circumstances the matter may now be allowed to rest.

I associate myself with the strictures of my learned brother on the sending of anonymous communications.

Reference discharged.

[CIVIL REVISIONAL JURISDICTION.]

REFS. NOS. 11 TO 13 OF 1913.

CARNDUFF, J.
RICHARDSON, J.
1913,
5, December.

In the matter of JOGESH CHANDRA GUPTA and others, Pleaders.

Pleader, unprofessional conduct—Rules as to receiving instructions and accepting vakalatnamas, compliance with—Judge's duty to enforce compliance and take disciplinary measures on breach—One pleader appearing for another—Practice—Court to be informed.

Where a pleader who was charged with having filed a petition for revival of a suit without authority alleged in defence that he had been instructed to appear by a clerk of the Muktear of the party, and that it had been (erroneously) represented to him that the vakalatnama *filed in the original suit contained his name :*

Held—*That the pleader had acted in contravention of sec. 13, cl.* (a) *of the Legal Practitioners Act in the matter of receiving instructions.*

That even if the vakalatnama *did contain the pleader's name, mere verbal acceptance of it would not be in compliance with cl.* (e), *r. 45, Ch. XI, of the High Court's General Rules and Circular Orders.*

Where a pleader appears for another pleader who is unable at the moment to attend Court, he ought to let the Court know that he is so appearing.

Per RICHARDSON, J.—*The rule in regard to the acceptance of* vakalatnamas *should be strictly and scrupulously observed in the Subordinate Courts. In connection with the enforcement of the rules, it is always open to a Judge to refuse to hear a pleader or to refuse to allow a pleader to act who has not accepted a* vakalatnama *in the prescribed manner. It is also the duty of the Judge to take such action as may be appropriate, in regard to infractions of the rule which escape notice at the time and are brought to light subsequently.*

These were References by Mr. J. D. Cargill, District Judge of Mymensingh, dated 6th September 1913, made under sec. 14 of the Legal Practitioners Act on the basis of reports made to him by the Munsif of Jamalpur.

The orders of the District Judge were in the following terms :—

(1) On 21st February 1913, Babu Jogesh

IN THE MATTER OF JOGESH CHANDRA GUPTA.

Chandra Gupta, a pleader of Jamalpur Munsifi, filed a petition on behalf of Maharaja Jagadindra Nath Ray Bahadur under Or. 9, r. 4, C. P. C., for revival of rent suit No. 1813 of 1912 which had been dismissed for default, without any *vakalatnama*. It has been explained that the pleader was instructed by one Amritalal Dey, a clerk, under the Maharaja's Muktear, to appear in this case and that he appeared and acted on the belief induced by representations of Amrita that the *vakalatnama* filed in original suit No. 1843 of 1912 contained his name, which as a matter of fact it did not. The *vakalatnamas* used in Jamalpur Munsifi are printed documents containing names of most of the local pleaders and it has been urged that Jogesh Chandra Gupta did not suspect that his name was not in it. On 16th June 1913, after the present proceedings were started a fresh *vakalatnama* empowering Jogesh Babu to act was filed.

In my opinion the pleader was guilty of unprofessional conduct in that he appeared and acted in rent suit without a *vakalatnama*. The *vakalatnama* filed on 16th June 1913, cannot have retrospective effect.

There are three retained pleaders of the Maharaja at Jamalpur and it is not clear why Babu Jogesh Chandra Gupta should be engaged in the Maharaja's cases unless, as has been suggested, he, with the help of Amrita, who appears to be on intimate terms with him, had endeavoured since the illness of the retained pleader Babu Jogesh Chandra Dutt to be engaged as one of the Maharaja's pleaders. It may be noted that Jogesh Babu did not do any act in connection with the aforesaid case except filing the petition for re-hearing on the 21st February 1913, all acts in connection with the case having been done by Arendra Prasad Das and Sashi Mohan De, retained pleaders of the Maharaja. It was therefore clearly his duty to satisfy himself about his employment by reference to the responsible officers of the Maharaja at Jamalpur or otherwise, and since, as has been admitted, he failed to do this he cannot be held to have used proper care in the discharge of his professional duties.

It may further be noted that in several other cases as mentioned in the Munsif's report which should be perused the pleader appeared and acted without a *vakalatnama* and on one occasion received adjournment costs. In case No. 1993 of 1912 he accepted in writing a *vakalatnama* on behalf of the Defendant and the *vakalatnama* filed by the Plaintiff showed that he was also engaged as the Plaintiff's pleader, and he acted as pleader for both parties by filing a petition for adjournment on behalf of the Plaintiff and a list of witnesses on behalf of the Defendant. There can therefore be little room for doubt that he is guilty of gross unprofessional conduct and has been in the habit of appearing and acting without proper authority. In my opinion in the interests of good administration he should be suspended for a reasonable term.

(2) In suit No. 1992 of 1913 of Jamalpur Munsifi Babu Sashi Mohan De, pleader of Jamalpur, appeared for the Defendant on 15th January 1913 and filed a petition for time to file a written statement. He subsequently appeared for the Plaintiff on 3rd April 1913 and filed a *hazira* or list of witnesses. The pleader admits that he acted for both parties in the suit but he states that he did not receive any fee from either. His explanation states that he acted for the Defendant at the request of the clerk of the Defendant's pleader Babu Jogesh Chandra Dutt who was ill and subsequently for the Plaintiff at the request of a clerk

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of the Plaintiff's pleader who was late in coming to the Munsif's Court.

Babu Sashi Mohan De is a pleader of 17 years' standing. He was not engaged by either of the parties and it was improper for him to appear for either of them without satisfying himself that he was engaged. His excuse of inadvertence is inadequate. His expression of regret appears to the Munsif whose report may be read to be wanting in sincerity.

Vakalatnamas used in the Jamalpur Munsifi are printed documents containing the names of all or nearly all, the pleaders of the Jamalpur Bar and the appointment of a pleader by a party has to be gathered from his note of acceptance or endorsement on the back of the *vakalatnama*. Sashi Babu neither accepted the *vakalatnamas* nor made any endorsement on them as required by r. 45 (*c*), Chap. XI, High Court's General Rules and Circular Orders (Civil) page 301. The affidavits sworn on the 9th and 14th August 1913 by clerks of Plaintiff's and Defendant's pleaders in this case show that he was not engaged as a pleader by any party. It further appears that there were two other pleaders who had been engaged on behalf of the Defendant and who could have acted for Jogesh Babu on the day he was ill. Sashi Babu's explanation that he worked to accommodate Jogesh Babu therefore loses its force. In my opinion Babu Sashi Mohan De is guilty of unprofessional conduct and I beg to recommend that he be severely censured or suspended for a short period. In this connection reference may be made to my previous reports Nos. 1112 and 1113, dated 6th September 1913 regarding other pleaders of Jamalpur where this kind of unprofessional conduct is far too common.

(3) On 4th June 1913 Babu Mohim Chandra De, pleader of Jamalpur, filed a written statement on behalf of Defendants Naku and Genda Mandal in Rent Suit No. 554 of 1913 without any *vakalatnama* to appear and act on their behalf. It is explained that the aforesaid Defendants appeared before the pleader on several dates and intimated to him on 4th June 1913 that they had appointed him as a pleader on behalf of both by a *vakalatnama* filed in the case. As a matter of fact till and on that date only one *vakalatnama* had been filed in the case. It bears the date 26th Baisak 1320 (B. S.) corresponding to 9th May 1913 and was executed by Defendant Naku Mandal alone and accepted by Babu Kamini Kant Bhattacharjee, pleader. This *vakalatnama* is a printed document and contains the names of all or nearly all the pleaders of Jamalpur Munsifi (about 21 in number) including Babu Mahim Chandra De. The printed *vakalatnama* shows the names of all the pleaders including pleaders engaged by the Opposite Party and it is not possible to presume appointment of a pleader on behalf of any party without acceptance in writing by such pleader. It would be unsafe and improper to act upon a verbal acceptance of such a *vakalatnama*. It is admitted that after inspection of the record on 5th June 1913, the pleader found that he had acted without authority but he did not bring the matter to the notice of the Munsif. This discounts the plea of *bonâ fides* taken by him. After the proceedings under the Legal Practitioners Act had been started, he filed on 14th June 1913 a fresh *vakalatnama* duly executed by both the Defendants in the aforesaid rent suit and accepted by himself and Babu Kamini Kumar Bhattacharjee, pleaders.

In my opinion the pleader has been guilty of unprofessional conduct in that he appeared and acted in Rent Suit No. 554 of 1913 without a *vakalatnama*. The *vaka-*

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latnama filed on 4th June 1913 cannot have restrospective effect. The plea that the pleader acted on the representation made to him by the Defendants, who are illiterate persons, tends to show that in the discharge of his professional duties he did not, to say the least, use due diligence and care. It has been brought to light in the case of pleader Babu Jogesh Chandra Gupta, which forms the subject of a separate report, that at Jamalpur Munsifi similar occurrences are not so rare as they should be. In the interests of good administration, it is desirable to impress upon the pleaders the necessity of performing their duties as Legal Practitioners with due care and caution. The pleader has expressed his sincere regret and I do not think that any severe action is called for. If the Hon'ble Judges will express their disapproval of the pleader's conduct and warn him, this, it appears to me, will meet the needs of the case and have a salutary effect on the Jamalpur Bar.

Dr. Rash Behari Ghose and *Babu Naresh Chandra Sen-Gupta* on behalf of the Pleader in Ref. No. 11.

Mr. A. B. Guha and *Babu Birendra Kumar De* on behalf of the Pleader in Ref. No. 12.

Dr. Rash Behary Ghose, Moulvi A. K. Fazlal Huq and *Babu Naresh Chandra Sen-Gupta* on behalf of the Pleader in Ref. No. 13.

Babu Ram Charan Mitter in support of the three References.

The JUDGMENT OF THE COURT was as follows :—

CARNDUFF, J.—These are three references made to this Court under sec. 14 of the Legal Practitioners Act, 1879.

The first relates to one Jogesh Chandra Gupta, who is a pleader practising at Jamalpur, and the charge of professional misconduct against him is that he filed a petition for the revival of a rent suit, which had been dismissed without having any authority to do so.

His reply to the charge is that he had been instructed to appear by a clerk of the muktear of the Plaintiff in the case, and that he acted on the belief, induced by the representation of that person, that the *vakalatnama* filed in the original suit contained his name, although as a matter of fact, it did not.

As regards the first part of this reply, it seems to me that far from being any excuse, it indicates a disregard of sec. 13, cl. (*a*) of the Legal Practitioners Act, which provides that no practitioner shall take instructions in any case except from the party on whose behalf he is retained, or some person who is the recognised agent of such party, or some servant, relative or friend authorised by the party to give such instructions.

Then as regards the remainder of the reply, the first remark that I would make is that it is high time, it should be understood, that more is required than the appearance of a pleader's name in the *vakalatnama* signed by a litigant, and that mere verbal acceptance is not sufficient. The practice at Jamalpur, and, I believe, in many other places in the mofussil is to use printed forms of *vakalatnama* containing the names of most (if not all) of the members of the local bar. Now the duty of a pleader who is prepared to accept a *vakalatnama* of this kind in which his name appears, is under cl. (*e*), r. 45, Chap. XI, of the High Court's Civil Rules and Orders to note on it the date and the name of the person from whom it is received, with an endorsement to the effect that he is satisfied that the person from whom he received it is either the party himself, or a certificated muktear, or one who has been authorised by the party to deliver it

to him as the case may be. Babu Jogesh Chandra Mitter would therefore not have been justified in appearing even had the *vakalatnama* contained his name, and the asssurance of a person from whom he ought to have refused to receive any instruction, obviously does not extenuate the offence. It appears that he has, on other occasions been guilty of similar laches, and that on one he actually received adjournment costs, and I agree with the District Judge in holding that he has been guilty of unprofessional conduct.

But having regard to the fact that he is only 24 years of age and has been practising for hardly a year and a half, to the laxity of the practice I have referred to, and to the further circumstance that this is, so far as I know, the first case of the kind that has been brought to the notice of this Court, I think it will meet the ends of justice if we record an expression of our severe displeasure and let the matter rest there.

The next case relates to one Sasi Mohan Dey who is also a pleader of Jamalpur. The charge against him is in respect of his having filed a petition for time to lodge a written statement on behalf of the Defendant and subsequently presented a *hazira* (list of witnesses) on behalf of the Plaintiff. His excuse is that he was not engaged for either party, but that in each instance, he acted simply to oblige an absent pleader at the instance of the lattar's clerk.

A pleader may, no doubt, and not infrequently does appear for a friend who is unable at the moment to attend Court; but in such a case he ought to let the Court know that he is so appearing, and that is the invariable practice so far as my experience goes, and where it is followed there can of course be no confusion or misunderstanding in connection with the matter. This pleader is of 17 years' standing, and he ought I think to have known better. But on the whole, it will be sufficient to accept his expression of regret and record our censure.

Regarding the 3rd case of Babu Mohim Chandra Dey, it is unnecessary to say much. His offence is of a comparatively trifling nature, and the recommendation of the learned District Judge is merely that he be warned. He has already expressed his regret, and the learned Counsel who appears on his behalf has admitted that his conduct is open to censure. I think that all that we need say is that his conduct is reprehensible, and that we trust that he will profit by the warning conveyed by this proceeding.

RICHARDSON, J.—I agree. A strict and scrupulous observance of the rule in regard to the acceptance of *vakalatnamas* is required in the High Court and the rule must similarly be strictly and scrupulously observed in the Courts below. In connection with the enforcement of the rule, it is always open to a Judge to refuse to hear a pleader, or to refuse to allow a pleader to act, who has not accepted a *vakalatnama* in the prescribed manner. But it is also of course the Judge's duty to take such action as may be appropriate in regard to infractions of the rule which escape notice at the time and are brought to light subsequently.

[CIVIL REVISIONAL JURISDICTION]

RULE NO. 662 OF 1915.

D. CHATTERJEE, J.
BEACHCROFT, J.
1915,
Heard, 3, December.
Judgment,
22, December.

MOHESH CHANDRA ADDY, Petitioner,
v.
PANCHU MUDALI, Opposite Party.

Vakalatnama, *acceptance of, by pleader—Endorsement of acceptance in writing, if necessary—*

MOHESH CHANDRA ADDY *v.* PANCHU MUDALI.

Civil Procedure Code (Act V of 1908), Or. 3, r. 4—High Court General Rules and Circular Orders Ch. XI, r. 45 (c), Vol. 1, p. 301, interpretation of—Endorsement if must be made in all cases before vakalatnama is filed.

* *An acceptance or act by a pleader named in a* vakalatnama *would, if allowed by Court expressly or by implication, be valid and operative even without an endorsement in writing on the* vakalatnama *by the pleader, but r. 45 (c), Ch. XI, p. 301, vol. I of the General Rules and Circular Orders of the High Court requiring acceptance of a* vakalatnama *by endorsement in writing ought to be complied with.*

Per D. CHATTERJEE, J.—*The Rule is a salutary rule prescribed for safeguarding the interests of litigants and should be followed in the Mofussil in the manner indicated by the construction placed thereon by the High Court. Courts in the Mofussil must be specially careful in enforcing this rule in cases of compromise and withdrawal of cases and withdrawal of money or documents.*

BEACHCROFT, J.—*Courts should insist on the Rule being observed by pleaders practising before them and the pleader who does not conform to it ought not to be heard.*

Per BEACHCROFT, J. (on the interpretation of the Rule).—Quære—*Whether after the first acceptance a mere endorsement of acceptance is sufficient in the case of pleaders subsequently appearing.*

Per D. CHATTERJEE, J.—*Such endorsement made in the presence of the Court or the* sheristadar *or the Bench officer and dated (provided all the pleaders so accepting a* vakalatnama *are named in it) should be sufficient.*

*This was a Rule granted on the 5th July 1915 against an order of Babu J. N. Ghosh, Munsif, Puri, dismissing Small Cause Court Suit No. 210 of 1915 for default.

The facts of this case material to this report will appear from the judgment.

Babu Satya Churn Sinha for the Petitioner.

No one appeared for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

D. CHATTERJEE, J.—The whole trouble in this case is due to a misunderstanding and some uncertainty of practice in the acceptance of *vakalatnamas* in the Mofussil.

The facts are that the Petitioner filed a suit in the Small Cause Court at Puri in charge of the Second Munsif and engaged three pleaders Babus Poorna Chandra Addy, Raj Kishore Das and Jogendra Chandra Mitra. Babu Poorna Chandra accepted the *vakalatnama* by endorsing his name on its back as usual. The two other pleaders did not sign the *vakalatnama*. On the date of hearing Babu Jogendra Chandra signed the *hajira* of witnesses and Babu Raj Kishore attempted to conduct the case by offering to examine the witnesses. There is some difference between the Petitioner and the learned Munsif as to what then took place. The learned Munsif says he asked Raj Kishore Babu to accept the *vakalatnama* on the record, the Petitioner says Raj Kishore Babu was asked to file a fresh *vakalatnama*. I take the facts as stated by the learned Munsif to be correct especially as there is no affidavit by the pleader and the Karpardaz who swears the affidavit does not know English and could not have understood what was said. But I cannot conceive why Raj Kishore Babu should have allowed the case to be dismissed for default unless he misunderstood the order of the Court and thought that he

was required to file a fresh *vakalatnama* which he could not do as his client was absent. As it is I think there was some such mistake and the case was dismissed for default and Babu Jogendra Chandra who had filed the *hajira* without signing the *vakalatnama* was given a notice to shew cause why he should not be proceeded against under the Legal Practitioners Act. There was then an application for re-hearing but that also ultimately failed as on the date of hearing an application for postponement was made by the Agent of the client acting under a special power-of-attorney which was not registered. There is no provision in the Registration Act which makes the registration of a special power-of-attorney compulsory but the Court is not bound to presume its genuineness unless it is registered, see sec. 85 of the Evidence Act, and the learned Munsif was within his rights in refusing to act upon the application of the agent. As regards the acceptance of *vakalatnamas* the practice in the High Court is that one or more Vakils endorse their acceptance on the *vakalatnama* before it is filed, and if any other Vakil named in the *vakalatnama* wants to accept it later, he makes his endorsement before the Deputy Registrar or his assistant and the endorsement is initialled by the said officer and dated. Vakils who are engaged later generally endorse their acceptance when the record is in the Bench but many Vakils work without endorsing their acceptance unless the omission is brought to their notice.

Or. III, r. 4, of the Civil Procedure Code does not expressly say that the acceptance of the *vakalatnama* should be in writing and it was held by Banerjee, J., in 1901, in the case of *Shama Prosad Ghosh* v. *Taki Mullik* (1) that under similar provisions of sec. 39 of the old Code, no writing was necessary for the acceptance of a *vakalatnama* and it was sufficient if the Vakil acting was named as one of those authorised in the body of the *vakalatnama*. This matter came before the English Committee of this Court in April 1910 upon a reference from the District Judge of Khulna and the learned Judges (Sir Lawrence Jenkins, C. J., Harington, J., Brett, J., Mookerjee, J., and Carnduff, J.) directed the Registrar to say that Or. III, r. 4, does not require the acceptance of a *vakalatnama* to be in writing. The matter came up again in 1914 upon a reference from the District Judge of Tipperah and the same answer was given. The letter of the Registrar in that case is printed in 19 C. W. N. xxvi. The file shows that r. 45 (*c*) of the High Court Rules and Circulars published in 1910 was referred to by the District Judge. It appears however from enquiries made from the Registrar of the Appellate Side that the answer was given in accordance with the precedent in the Khulna case, without placing the matter before the English Committee again. The next reference was by the District Judge of Cuttuck in 1915 made in consequence of a representation from the Puri Bar Association objecting to an order of the 2nd Munsif of Puri directing that every acceptance of *vakalatnamas* must be in compliance with r. 45 (*c*), Chap. XI, p. 301, Vol. 1, General Rules and Circular orders (Ed. 1910) whether it is before or after the *vakalatnama* is filed and the same answer was given directing that in case of a subsequent acceptance by a new pleader of a *vakalatnama* previously filed by another pleader, the date of the acceptance should be added. This answer was also given by the Registrar on the authority of the Khulna case without any fresh consideration by the English Committee. All these

(1) 5 C. W. N. 816 (1901).

references however deal with the case of several acceptances of the same *vakalatnama* by several pleaders at different times, and none of them deals with the case of a pleader acting without accepting the *vakalatnama* in writing. I think that Or. III, r. 4, C. P. C., does not require that the acceptance of a *vakalatnama* should be in writing.

An appearance or act therefore by a pleader named in the *vakalatnama* would, if allowed by the Court expressly or by implication, be valid and operative. The High Court Rule however was made to be followed and is a salutary rule prescribed for safe-guarding the interests of litigants and should certainly be followed in the Mofussil in the manner indicated by the construction placed on the same in the answers to the several references. It must be fully complied with by the pleader who first accepts the *vakalatnama* and all subsequent acceptances must be made by endorsements made in the presence of the Court of the *sheristadar* or the Bench officer and dated provided of course all the pleaders so accepting a *vakalatnama* are named in it. Courts in the Mofussil must be specially careful in enforcing this rule in cases of compromise and withdrawal of cases and withdrawal of money and documents.

There was evidently a misconception in this case. Raj Kishore Babu retired as he probably thought he was required to file a fresh *vakalatnama* which he was not in a position to do and the learned Munsif held that "Babu Jogendra Nath who had filed the *hajira* had no authority from the Plaintiff to file the same." As I have shown above Babu Jogendra Nath had been duly authorised by the *vakalatnama* to represent the Plaintiff and had signified his acceptance of the same by acting as aforesaid and would presumably have put down his signature on the *vakalatnama* if the omission had been brought to his notice. I therefore make the Rule absolute and direct that the case be restored to the file and tried in due course of law.

BEACHCROFT, J.—The Petitioner obtained this rule mainly on the strength of allegations in the affidavit to the effect that the learned Munsif sitting as Judge of the Small Cause Court would not allow his pleader Babu Raj Kishore Dass to examine his witnesses as the pleader had not accepted the *vakalatnama* already filed, and directed the pleader to file a fresh *vakalatnama*, which the pleader was unable to do in the absence of the Petitioner, in consequence of which the suit was dismissed for default. In support of the rule it has been argued that Or. III, r. 4, of the Civil Procedure Code, does not require the acceptance of the pleader to be in writing. In addition to the opinion expressed by Banerjee, J., in *Shama Prosad Ghose* v. *Taki Mullik* (1) to the effect that acceptance need not be in writing reliance was placed on an article in Vol. 19 of the Calcutta Weekly Notes, page xxvi, in which it was alleged, quoting the letter of the Registrar of the Appellate Side of this Court, that the High Court refused to accept a recommendation of the District Judge of Tipperah that all the pleaders who wished to appear in a case must sign the *vakalatnama* before it is filed in Court. In fact it appears that the recommendation of the District Judge of Tipperah was not brought to the notice of the Judges, but was dealt with by the Registrar on the precedent of an answer given to the District Judge of Khulna in 1910. On that occasion an enquiry by the District Judge was considered by the English Committee and an answer was sent based on the opinion expressed by Banerjee, J. It does not appear, however, that any

(1) 5 C. W. N. 816 (1. 01).

reference was made to r. 45 (*e*) in Chap. XI of the Court's General Rules and Circular Orders, a rule which had been made subsequently to the decision in *Shama Prosad Ghose* v. *Taki Mullik* (1).

That Rule requires that a pleader accepting a *vakalatnama* shall note on it the name of the person from whom it has been received with an endorsement to the effect that he is satisfied that the person from whom he received it is either the party himself or a certificated Mukhtear or one who has been authorised by the party to deliver it to him as the case may be. The learned Munsif appears to be of opinion that the introduction of this rule has had the effect of making acceptance in writing obligatory by a pleader accepting a *vakalatnama*. I do not think that that is the effect of the rule. I am of opinion that there can still be an acceptance by the pleader other than in writing. But if this Court has, in the exercise of its powers, framed certain rules which must be observed by pleaders, a pleader who does not conform to those rules ought not to be heard. Although there may be an acceptance, as between party and pleader, other than in writing, if the rules require that a pleader is to sign the *vakalatnama* or make any particular endorsement on it the Court before which the pleader practises ought to insist on the rule being observed, before it allows him to plead.

Coming to the facts of this particular case I am certainly not prepared to accept the allegation that the Munsif asked the pleader to file a fresh *vakalatnama*. The learned Munsif has sent an account of what happened, *viz.*, that he asked the pleader if he had accepted the *vakalatnama* already filed, the pleader replied that he had not, the Munsif then told the pleader that if he accepted it he might appear, otherwise not, and the pleader did not accept the *vakalatnama*. I will assume in favour of the Petitioner that when the Munsif speaks of acceptance he refers to the making of such endorsements as are required by r. 45 (*e*) already referred to.

The Munsif's account of what happened concludes the matter. But in any case even if the Munsif had not denied the allegation in the affidavit, there would be nothing before us to justify the view that the Munsif had asked for a fresh *vakalatnama*. The affidavit is sworn by a person who does not know English, while the conversation in Court took place in English, and the affidavit is in the qualified form "the facts stated are true to the best of my knowledge," without any information as to the source of the knowledge. Affidavits thus qualified are constantly being made and it is as constantly pointed out that the qualification renders the affidavit useless as evidence of any particular fact.

Nor am I prepared to take the view that the pleader misunderstood what the learned Munsif said. The pleader himself does not say so, I know that there is a general objection among the members of the profession to swearing affidavits, an objection for which in many cases there is no justification. I can well understand a pleader objecting to swear an affidavit if that involves his alleging facts which throw discredit on the conduct or work of a judicial officer in whose Court he has to practise, but I do not see what considerations can stand in the way of his saying, if true, that he was mistaken in what the Judicial Officer said. Now far from there being any misunderstanding in this case, there is every reason for thinking that the Munsif wanted the pleader to make the endorsement required by r. 45 (e) and that the pleader deliberately refused to make it.

It is clear from the papers before us

(1) 5 C. W. N. 816 (1901).

MOHESH CHANDRA ADDY *v.* PANCHU MUD ALI.

that the Munsif has been trying to enforce the complete observance of the rule not only by the first pleader accepting a *vakalatnama*, but by those appearing on the strength of the original *vakalatnama* at subsequent stages of the case, while the members of the bar have maintained the position that after the first endorsement, a mere endorsement of acceptance is sufficient in the case of pleaders subsequently appearing and there is no doubt that there was—for I understand that the learned Munsif has been transferred—considerable friction between him and the members of the Bar. It is not necessary, nor have we the materials, to attempt to apportion the blame for this state of affairs, but apparently both sides held their ground, and I believe the present incident was merely an outcome of this difference of opinion. Incidentally I may observe that this state of things led to a reference by the District Judge to this Court which was unfortunately disposed of by the Registrar on the authority of the reply given to the District Judge of Khulna, though the point referred was an entirely new one.

It is not necessary in the present case to decide which of the two views of r. 45 (*c*) advanced is the correct one, though there is something to be said in favour of both.

What does concern us in the present case is whether we ought to interfere with the order dismissing the suit. It is true no doubt that we have on the one hand an affidavit giving a garbled account by a person who was not in a position to understand what actually took place: perhaps he was misled. On the other hand it is hardly fair to make the litigant suffer for a difference of opinion between the Court and the pleader as to the latter's duties.

I therefore agree to the order proposed by my learned brother.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

GOVT. APPS. NOS. 4 AND 5 OF 1915.

HOLMWOOD, J.
MULLICK, J.
1915,
Heard, 8, 9 and 10, December.
Judgment, 14, December.

KING-EMPEROR,
v.
MONMOHAN ROY and others.

Indian Penal Code (Act XLV of 1860) secs. 109, 120B, 420,—Abetment by conspiracy—Indian Evidence Act (I of 1872), sec. 10.

The accused M was a loader of the E. I. Railway Company. The case for the prosecution was that when making out the weights in the consignment notes he entered a weight less than the actual with the result that the railway company received a sum less than they were entitled to and the other accused who were a firm of merchants paid, as consignees of goods, illegal gratification to M for this fraudulent work. It appeared that the name of M signed by himself appeared in one of the note books of the firm of D and J and the jama-kharach *of the firm showed the payment of certain sums to accused M. The accused were tried and convicted by the Deputy Magistrate under secs. 120B, 420, 420/109, 161, 161/109, I. P. C., but the Sessions Judge in appeal being of opinion that the conviction under sec. 120B could not stand on the ground that the offences were committed before that section came into force took into consideration only the direct evidence against M of making the endorsement of false weight and finding this to be insufficient acquitted all the accused.*

Held—*That the Sessions Judge rightly held that the conviction under sec. 120B, I. P. C., could not stand by reason of the fact that the offences were committed before that section came into force, but he*

KING-EMPEROR *v.* MONMOHAN ROY.

entirely omitted to notice that this was immaterial as the law of abetment includes abetment by conspiracy which was distinctly charged before the Magistrate under sec. 420/109, I. P. C. That being so the circumstantial evidence of conspiracy to defraud the railway company was to be considered.

That under sec. 10 of the Evidence Act the note books and jama-kharach *of the firm of D and J could be used as evidence of abetment by conspiracy against M.*

These were appeals preferred by the Crown against the order passed on appeal by S. K. Ghosh, Esq., Sessions Judge of Hughly, on the 23rd February 1915, acquitting the accused who were convicted under secs. 120B, 420, 161, 420, 161/109, I. P. C., and sentenced to various terms of imprisonment by Babu R. N. Chatterjee, Deputy Magistrate, Howrah, on 20th February 1914.

The facts of the case material to this report will appear from the judgment.

Mr. Norton and *Babu Manindra Nath Banerjee* for the Appellant.

Babus Dasarathi Sanyal, Monmotha Nath Mukherjee, Jogendra Nath Majumdar and *Jitendra Lall Banerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

These are two Government appeals arising out of an alleged series of conspiracies to defraud the East Indian and connected railways by endorsing a false weight on the back of the consignment note whereby the railway receipts were made out for sums much less than what was really due to the railway companies and the consignees benefited by the fraud to the extent of the freight wrongly calculated, so that in one year the railway companies concerned have lost Rs. 12,500.

The procedure was very simple if sufficiently ingenious. The clerk, whose duty it was on any given day to convert the true weights in tons into the Indian weight in maunds from the weighment slip sent from Howrah after the wagons had been weighed, entered a weight several tons less than that on the slip and made the corresponding shortage in the calculation of the weight in maunds. The clerk whose duty it was to calculate the freight to be charged, it is said was thereby deceived, though it is quite possible he may have been an accomplice, and charged a large sum less than the railway was entitled to for carrying the goods. The consignees who took delivery profited by the fraud and in the cases now before us are said to have paid the accused Monmohan Roy, a loader of the E. I. Railway Company, various sums as an illegal gratification for helping to carry out the fraud by making false endorsements on the consignment notes.

The trial of the cases was held before Babu R. N. Chatterjee, an experienced Deputy Magistrate at Howrah, and in both the cases he dealt with the evidence as a whole in exhaustive and careful judgments and eventually convicted in case No. 4 Monmohan Roy the loader, E. I. Railway, Dinonath Pal the head of the firm of molasses merchants at Kooshtea, and Janaki Nath Pal his son, also a member of the firm, under sec. 120B, I. P. C., conspiracy to defraud, and sentenced Monmohan Roy to one year's rigorous imprisonment, Janaki Nath to nine months', and Dino Nath to four months' under three counts, the sentences to run concurrently. He also gave various terms under secs. 420, and 420 read with 109, 161 and 161 read with 109 apparently all to run concurrently so that the sentences under 120B were really the substantive sentences in the case.

KING-EMPEROR *v.* MONMOHAN ROY.

In appeal the learned Sessions Judge has dealt with the cases in a somewhat perfunctory manner and has made cross references to the evidence and judgments in the two cases which is irregular and confusing. He has rightly found that the convictions under sec. 120B cannot stand by reason of the fact that the offences were committed before that section came into force, but he has entirely omitted to notice that this is immaterial as the law of abetment includes abetment by conspiracy which was distinctly charged before the Magistrate under sec. 420/109. This has led him to consider nothing but the direct evidence against Monmohan of making the endorsement of false weight on the consignment notes, and finding this evidence to be insufficient on grounds which we shall presently have to deal with he has thrown out the whole case holding that unless and until the alleged act of cheating is proved against Monmohan no question of taking an illegal gratification or of abetment can arise.

It is hardly necessary to point out that there is such a thing as circumstantial evidence and as was remarked by Sir Lawrence Peel, C. J., in the case of *R.* v. *Hadger* (1), "It is perfectly true that the dark covertness of crime cannot often be laid open, that conspiracies like other crimes must be generally supported by circumstantial proof."

Here the circumstantial proof of a conspiracy to defraud the E. I. Railway is overwhelming though at the outset we can only say that certain firms conspired with certain officers of the railway to that end. In this particular case we have the specific firm of Dinonath Pal in negotiation with the accused Monmohan about something and as this firm has through its dealings with one of the loading officers of the Howrah Goods Station been able to defraud the companies of considerable sums and as Monmohan's own name signed by himself appears in one of the note books of the firm and there is positive evidence which if believed proves that it was Monmohan's duty to make out the weights on the consignment notes we think that there can be no doubt that under sec. 10 of the Evidence Act the note books and *jama-kharach* of the firm of Dinonath can be used as they were used by the learned Deputy Magistrate as evidence of abetment by conspiracy against Monmohan Roy. As regards the Judge's finding that the evidence as to the figures being in Monmohan's hand has broken down by reason of the inability of the witnesses to stand the test of a partially concealed attendance register we can only say that the test imposed was not a fair test and the greatest expert in handwriting in the world could not have succeeded in it. But we may point out that the witness Madhub, Superintendent of the Goods Office, who has 23 years of unblemished service in the railway came so extraordinarily near to complying with the test that we are convinced that he is intimately acquainted with Monmohan's handwriting and can recognise it.

He was tested with the first page of the attendance register where the names of Upendra Nath Das and Monmohan Roy immediately follow one another and he picked out the figures against the name of Upendra Nath Das as being in Monmohan's handwriting. Now an examination of the book clearly discloses that the entries of the names and the figures of these two loaders are in the same hand as frequently happens throughout the book and would naturally be the case when two men arrive together and one sits down to write their names and the hour of their

(1) Starkie on Evidence, p. 132 (1852).

arrival. From admitted writing of Monmohan's we can have no doubt that the names are written by Monmohan and not by Upendra and therefore presumably the figures which are bold and characteristic are also Monmohan's. The same bold and characteristic figures appear on the back of the consignment notes (Exs. 8, 9 and 12) which are the subject of the charges and we can see no reason to doubt the genuineness of Madhab's identification of his figures.

We do not rely so much upon Kali Charan Sarkar's evidence because he is said by the defence to be the person who must have entered the figures and it is quite possible that he may have been an accomplice. At any rate he like all the other subordinate clerks in the Goods Office shows a tendency in cross-examination to give the facts a turn favourable to Monmohan. Dealing next with the considerations which have been urged by the defence to show that Monmohan could not have entered the figures and that it was not his duty to do so, we can only say that we believe the positive evidence of Superintendent Madhub that it was his duty and we do not accede to the contention that Mr. Pemmell, the Senior Inspector of Accounts, E. I. Railway, who derives his knowledge primarily from Madhab, is personally ignorant of what he deposes to.

The delegation of authority may be in the hands of Madhab but the superior who has had charge of the enquiry must be assumed to have satisfied himself that what he himself vouches for is a fact.

It is also obvious from the details of the procedure that the officer who loads and seals the wagon and marks the consignor's statement would naturally be the proper person to enter the actual weight found by the weighing clerks at the coal yard.

The contentions against this are that Monmohan goes out to work in the yard at 3 P.M. and it is assumed does not return to the office, as the witnesses say that the office closes at 5 P.M. though any one who has work to finish can stay on as long as he chooses. It is pointed out that Monmohan loaded the wagon about which the first count of the charge in this case is concerned on the 1st November. The weighment slip was received on the 2nd November and it is in evidence that these slips come in at 4 P.M. and are received by Kali Charan Sarkar or some other clerk and as the railway receipt was prepared after the weights in maunds had been calculated on that same day, the 2nd November, Monmohan cannot have had anything to do with it. This is assuming that Monmohan does not return to the office at 5 P.M. or after, of which there is no evidence. On the contrary the attendance register shows that he seldom if ever left office before 6 P.M. so that he had ample time to perform this simple duty in respect of all wagons loaded under his supervision the day before.

It is always easy where there are several men working in the office to try and shift the responsibility to some one else. Of course when a man is absent from illness or any other cause some one else must do his work and the evidence to this effect is sought to be used to throw a doubt on Monmohan's complicity in the transactions evidenced by Exs. 8 and 9. Those exhibits however themselves show that Monmohan was in office on those days and filled in the forms.

With regard to Ex. 12, Monmohan's writing does not appear as the wagon was loaded at Shalimar by one Pasupati Mandal who was acting for Upendra Nath Das. The evidence is however clear that even Upendra Nath had nothing to do with working out the weights in maunds and

that this was always done by Monmohan and it is a remarkable circumstance that the figures by whomsoever made are exactly similar to those on Exs. 8 and 9. Coming now to the note books and *jama-kharach* of the firm of Dinonath Pal we find it admitted that Janakinath in this particular case, just as we shall see the *gomastha* Narain did in case No. 5, came down to Calcutta to purchase molasses and his expenses are entered in the *jama-kharach* books which have been laid before us. There is also mention of sums paid by him to Monmohan in the same book on the dates to which these consignment notes refer. A money order sent by Narain in connection with another case shows that it was this Monmohan Roy of the Ramkrisnapore Howrah Goods Office that was in communication with the firm of Dinonath and there is no other Monmohan Roy in the office according to the evidence.

Moreover Monmohan Roy's signature, undoubtedly genuine, appears in one of the note-books under a sentence the meaning of which has not been discovered. It runs "*Tumi loile pore ami ar jaibo na,*" which means "after you have taken I will not go any more." It was sought to be urged that these note-books and *jama-kharach* had been obtained under a search warrant and that all the formalities had not been carried out.

It appears that a search warrant was issued but it was not used as the books were voluntarily produced by the old man Dinonath who appears to have had no knowledge of the fraud and to have given every assistance to the Police.

The attack is therefore shifted from the alleged irregularities to the delay in producing them in Court and it is also pointed out that the passages which Sadananda Babu the Auditor of the E. I. Railway and the Sub-Inspector speak to as being admitted by Janaki were not marked at the time. The search was ordered by a Magistrate who had no seisin of the case before the investigation was nearly completed and the books appear to have gone at once to the superior Police officer at Howrah and to have been examined by the Government Pleader. They were produced in Court in their regular sequence when the Sub-Inspector Jaganath Mukerjee and Babu Sadananda Paulit, P. W. 10 and 11, proved them. There is no internal trace of their having been tampered with and we can see no ground whatever for holding that any of the entries in the note-books have been fabricated. The *jama-kharach* kept in the ordinary course of business are clearly untouched. We think there can be no doubt that Janaki Nath paid Monmohan Roy Rs. 3 on the three occasions shown in the books and that the proved and completed fraud coupled with the evidence of Monmohan's duties and his handwriting fully establish Monmohan Roy's guilt under sec. 420, I. P. C., and Janaki Nath Pal's abetment of the same under sec. 420/109.

The learned Counsel for the Crown does not press the charge against Dinonath Pal. He is a very old man and has ceased to take any active part in the affairs of the firm. He appears to have suspected nothing of what his son and servants had been doing and gave the authorities every assistance in his power. We are therefore disposed to dismiss the appeal of Government in his case and confirm his acquittal.

As regards Monmohan Roy and Janaki Nath Pal we think the sentences originally passed by the Magistrate under sec. 120B were quite appropriate especially as in Monmohan's case there is another case of a similar nature in which we are delivering judgment after

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REPORTS (*See* Index).

Counsel of one High Court appearing before another.

The recent application by Sir Rash Behary Ghose before an Appellate Bench of the Allahabad High Court for leave to appear, has given rise to a discussion as to the propriety of the grant or refusal of such leave by one High Court to legal practitioners of another High Court. We are gratified by the courtesy shown by the Hon'ble Judges of the Allahabad High Court to Sir Rash Behary in granting him such leave. A great deal of misapprehension seems to exist in this respect. It is not a fact that the Judges of the Calcutta High Court have always refused leave to counsel practising in the other High Courts to appear before them. In the great *Wahabi* case, Mr. Anstey came over from Bombay to apply for a *habeas corpus* on behalf of Ameer Khan, and although he was not on the rolls of the Calcutta High Court, he was allowed to appear and argue the case. Then in the Calcutta High Court Sessions, Mr. Inverarity of the Bombay High Court, was allowed to appear for Jacob in the famous Hyderabad diamond cheating case. Mr. Rattigan, who was also engaged by Jacob as junior to Mr. Inverarity, threw up his brief apprehending opposition from the Calcutta Bar. It is said that the Calcutta Bar, through its senior members, intimated to him that they would withdraw their objection but before that he had terminated his engagement.

In the well-known Hearsay defamation case against the *Pioneer* newspaper, Mr. Justice Norris refused permission to Mr. Alston of the Allahabad Bar to appear before the Calcutta High Court Criminal Sessions. But the learned Judge did not assign any very cogent reason for the refusal. In the Bombay High Court, counsel from Calcutta has been allowed to appear with certain limitations. In the sedition trial of Bal Gangadhar Tilak, held in September 1897, the late Mr. L. P. Pugh, Mr. (now Sir) William Garth and Mr. J. Chaudhuri, asked for leave to appear on behalf of the accused at the Bombay High Court Criminal Sessions before Strachey, J. The question, we understand, was referred to the Hon'ble Judges of that Court and their Lordships gave permission to Mr. Pugh alone to appear. The reason assigned for giving leave to Mr. Pugh and refusal to his Calcutta juniors was that there was no counsel in Bombay who was of the same standing as Mr. Pugh and it was fair to the accused to allow him to avail himself of Mr. Pugh's services, but that as there were in Bombay plenty of juniors of the same standing as Mr. Garth and Mr. Chaudhuri, it would be unfair to the members of the Bombay Bar to allow them to appear with Mr. Pugh. Thereupon Mr. Davar (now on the Bombay Bench) alone appeared as junior to Mr. Pugh. We may mention in passing that the members of the Bombay Bar even objected to Mr. Garth and Mr. Chaudhuri sitting at the Bar with their robes on. But after they had unrobed, no objection was taken to their sitting at the Bar with Mr. Pugh and taking notes as private individuals.

We do not question that a counsel or an advocate of one High Court cannot appear in a case in another High Court as a matter of right. The grant of leave is discretionary with the judges and in special cases, by reason of seniority, or special circumstances of the case, the judges, as a matter of courtesy, may as a rule

allow a counsel or advocate of another High Court to appear before them. The course adopted by the Bombay High Court in the Tilak case would seem to be consistent with the English circuit practice. But when a Bombay junior was engaged with Mr. Pugh, we doubt, how far it was reasonable on the part of the Hon'ble Judges of the Bombay High Court not to allow the Calcutta juniors to appear with him. It is after all a matter of courtesy and if a party is desirous of availing himself of the services of any junior practising in another High Court along with a local junior, the interests of the local Bar cannot be said to suffer. Anyhow the Judges of the Allahabad High Court have acted with very commendable liberality and let us hope that the same reciprocity of courtesy will from now be observed by all the High Courts in India.

CURRENT INDIAN CASES.

(Criminal.)

Indian Penal Code, sec. 457.

Emperor *v.* Mulu, I. L. R. 37 All. 395.

Where the accused was found inside the house of the complainant at 2 A.M. and tried to escape when discovered and at that time made no statement as to why he came though subsequently alleged in Court the existence of intimacy with a widow in his house.

Held—That the circumstances pointed to the guilty intention of the accused and the onus was on him to prove that his intention was an innocent one.

Criminal Procedure Code, secs. 325, 345.

Emperor *v.* Rahmat, I. L. R. 37 All. 419.

Four persons inflicted serious injuries on another who died. The accused were committed to the Court of Sessions on a charge under sec. 325, I. P. C. The Sessions Judge allowed the case to be compounded upon an arrangement come to between the accused persons and the widow of the deceased and acquitted the accused without taking any evidence at all.

Held—That the order of the Sessions Judge was illegal. An offence under sec. 325, I. P. C., is no doubt compoundable with the permission of the Court but it is compoundable only by the person to whom the hurt was caused and the widow had no right to compound the case.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before the Master of the Rolls, Bankes, L. J. and Warrington, L. J. *Schaffenius* v. *Goldberg*. November 26th 1915.

A German interned in England is entitled to sue in British Courts.

Appeal from a decision of Younger, J., who held that a German interned in England had a right to maintain an action. It was contended for the Defendant that the Plaintiff was an alien enemy and a prisoner of war, and was therefore debarred from suing in the British Courts.

The Master of the Rolls in the course of his judgment dismissing the appeal said as follows :—

The Court must be very careful not to say anything inconsistent with the decision of the full Court of Appeal in *Porter* v. *Freudenberg* [(1915) 1 K. B. 857]. That case decided that for the purposes of trading the question whether a man was an alien enemy was not a question of nationality. It decided also upholding the decision of Mr. Justice Sargant in *Princess Thurn and Taxis* v. *Moffitt* [(1915) 1 Ch., 58] that registration operated as a licence of the Crown to remain in the country. It did not, however, decide that such a licence could not be revoked, but there was nothing here to suggest revocation, unless it were the internment of the Plaintiff in the Isle of Man.

A large number of cases had been cited to the Court most of which were discussed in *Porter* v. *Freudenberg (supra)*. A point, however, had been raised which was new. It was said that, although registration under the Aliens' Restriction Act and Order had the effect of a licence to remain commorant here, yet that the permission only lasted so long as the registered alien did not molest the Crown, and was not molested by it, and that the internment amounted to molestation by the Crown. There was no authority for that proposition. The only vestige of authority was in *Wells* v. *Williams*, 1 Lord Raym. 282, 1 Salk, 48, when, according to the report of the case in Lord Raymond's reports, the Judge said :—

"Though the Plaintiff came here since the war, yet if he has continued here by the King's leave and protection ever since, without molesting the Government or being molested by it, he may be allowed to sue, for that is consequent to his being in protection."

All that was meant by the words, molested by the Government, was that, if the licence previously given was withdrawn, that would be molestation by the Crown, and would take away the right to sue. In any case these words did not appear in the other report of the case in Salkeld, and he declined to assume that such an important proposition as this could be established by that one short sentence in Lord Raymond's report of the case.

Then it was said that there was no authority supporting the Plaintiff's claim to sue, but that there was authority against it. The Court had been referred to several cases including *Rex* v. *Superintendent of Vine-street Police Station*, 32 T. L. R. 3, which laid down that a writ of *habeas corpus* could not be taken out by a prisoner of war. It was perfectly right; but his Lordship said that speaking for himself he did not wish to be thought to assent to all the language used by the two learned Judges in that case.

Further, the matter was not so bare of authority as was suggested. In *Sparenburgh* v. *Bannatyne* (1 Bos. and P., 163) the following observation was made by Chief Justice Eyre :—

"A neutral, whether in or out of prison, cannot, for that reason, be an alien enemy; he can be alien enemy only with respect to what he is doing under a local or temporary allegiance to a Power at war with us. When the allegiance determines, the character determines. He can have no fixed character of alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us; it being only in respect of his being in a state of actual hostility that he was even for a time an enemy at all. As a prisoner of war, how does he differ from any other individual who is in custody for an offence which he has committed and for which he is answerable?"

Therefore a prisoner of war was not put outside the law any more than any other prisoner, but was entitled to assert his civil rights, and his Lordship thought that it would be shocking to say that the Plaintiff was, through being interned, deprived of all power to enforce his rights in respect of trading which he had carried on. So, too, Mr. Justice Heath in the same case said :—

"The pleas state that the Plaintiff was adhering to the King's enemies; they must be proved in all their parts; but a prisoner at war is not adhering to the King's enemies, for he is here under protection from the King. . . . It has been said that a prisoner at war cannot contract; his case would be hard, indeed, if that were true."

If authority was wanted in support of the proposition advanced on behalf of the Plaintiff in this case, it was to be found in that case. He did not, however, base his decision on that case, but on the general principle that the restraint imposed on the movements of an alien enemy by his internment did not deprive him of the civil rights which he had before the internment.

Mr. Elkin for the Appellant.

Messrs. J. B. Mathews, K. C., and *Samuel Duncan* for the Respondent.

B. D.

COURT OF CRIMINAL APPEAL.—Before THE LORD CHIEF JUSTICE, COLERIDGE and AVORY, JJ. *Rex* v. *Tonks*. 29th November 1915.

Plea of autrefois convict.

In September, the Appellant and her husband were convicted of neglecting their children, and were sentenced to terms of imprisonment. One of the children subsequently died in October and the Coroner's jury returned a verdict of manslaughter against the Appellant and her husband. Both were duly tried for the said offence and the Appellant was sentenced to 5 months' imprisonment in addition to the sentence for the first offence. The Appellant raised the plea of *autrefois convict* in that the conviction for manslaughter was bad, because she had been previously convicted on the same facts, for the offence of neglecting her children, including the child who died subsequently. Counsel for the Appellant relied upon the law laid down in Archbold's Criminal Pleadings, 24th Edit., p. 177. The Court dismissed the appeal. The Lord Chief Justice said :—

It had been urged that the Appellant had been in danger of being convicted twice for the same offence. But that left out of consideration the fact that death had ensued some days after the date of the first conviction. On the occasion of the first conviction it would have been impossible to have charged the Appellant with manslaughter because death had not then resulted. Later, it did, and the charge of manslaughter was then preferred.

No difficulty arose. The Judge could tell the jury that in the case before them they must come to the conclusion that the prisoner was either guilty or not guilty of manslaughter, and

could not do what he would do in a normal case under the section—namely, direct the jury that it was open to them if they thought right to find the prisoner guilty only of the lesser offence. He did not do that here because of the special facts of the case. It would be wrong to say that a person, indicted for the manslaughter of a child who had died after such person had been convicted for the neglect of that child, would be put upon trial the second time for the same offence.

He desired to draw attention to a passage on page 177 of the 24th edition of Archbold's Criminal Practice, where it was said :—

The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.

The authority given for that proposition was *Reg.* v. *Clark* (1 B. and B., 473), but on examination it was found that that was no authority to support the principle enunciated. The text-book was therefore wrong in this respect. They had also been referred to a statement at page 174 of Stephen's Digest of Criminal Procedure. It was not to be taken that the Court assented to that proposition.

Mr. Sherwood for the Appellant.

Mr. D. Cotes-Preedy for the Crown.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before NEWBOULD, J. APPEALS FROM APPELLATE DECREES Nos. 3576, 4106 to 4109 OF 1913. BINODE LAL CHAKRAVARTI AND ORS., Plaintiffs, Appellants *v.* PRIOMOHAN CHAKRAVARTI AND ORS., Defendants, Respondents. Heard 5th January. Judgment 12th January 1916.

Permanent tenancy—Inference—Land let out for business purposes—No variation of rent—Buildings on the land—Nazar *paid.*

These five appeals arose out of five suits in which the Plaintiffs-Appellants sued for recovery of *khas* possession of the lands in suit after declaration of their title. The suits were decreed in part, the Plaintiffs' title was declared but their claim to *khas* possession was dismissed. The Plaintiffs appealed to the District Judge against the dismissal of their claim for *khas* possession. These appeals were dismissed and the Plaintiffs preferred these second appeals.

The Plaintiffs claimed that the Defendants held their lands under *kabuliyats* executed on different dates in 1900 and 1901 A. D. and that the tenancies were terminated by a notice to quit which was served in accordance with the provisions of the Transfer of Property Act. In three of these suits there were concurrent findings of both Courts that the land in suit was agricultural land to which the provisions of the Bengal Tenancy Act applied. In the remaining two suits the learned District Judge held, differing from the Munsif, that the tenancies were not agricultural but land was let out for business purposes, but dismissed them on the findings that the *kabuliyats* on which the Plaintiffs relied were executed under undue influence and that the Defendants' tenancies were in their inception permanent.

Held—That whether the tenancies were permanent in their inception was a mixed question of fact and law.

An inference as to the nature of the tenancy from the facts found, can be attacked in second appeal.

That it was a legitimate inference that the tenancy in its inception was of a permanent character from the following facts—that the tenancies were held by the present tenants and their predecessors for at least three generations; that the rents were unchanged from the inception of the tenancies; that there were buildings on the land in each case; that at the inception of the tenancies, a *nazar* of ten or twelve times the annual rent was paid by the tenants in each case.

Moharam Chaprasi v. *Telamuddin Khan* (16 C. W. N. 567) followed.

Babus Dwarka Nath Chakrabarty and *Gopal Chunder Chakrabarty* for the Appellants.

Babus Mahendra Nath Ray and *Gopal Chandra Das* for the Respondents.

A. T. M. *Appeals dismissed.*

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this. We therefore set aside the order of acquittal passed by the learned Judge and convicting Monmohan Roy under sec. 420, I. P. C., sentence him to be rigorously imprisoned for one year.

We convict Janaki Nath Pal under sec. 420/109 and sentence him to be rigorously imprisoned for nine months.

As regards the charges under secs. 161 and 161/109 we do not think it necessary to come to any finding. The conduct of the two accused appears to be covered by the general charge of cheating and the illegal gratification was the consideration for the fraud. In any case no separate sentence would be necessary.

[In Appeal No. 5 their Lordships affirmed the acquittal of Dinanath Pal and set aside the acquittals of Janaki Nath Pal and Narain Chandra Dutt.]

[PRIVY COUNCIL.]

[APPEAL FROM BOMBAY.]

VISCOUNT HALDANE.
LORD PARMOOR.
SIR JOHN EDGE.
MR. AMEER ALI.

1915,
Heard, 2, 3, 4, 5 and 8, November.
Judgment, 22, November.

HAJI UMAR ABDUL RAHIMAN, Appellant,
v.
GUSTADJI MUNCHERJI COOPER, Respondent.

Pleading and proof, variance between, when fatal to suit—Variance not affecting cardinal points in issue—Nature of the principle—Question one of circumstances rather than of law—Application of the principle in an abstract way leading to error of decision on the merits—Trial Judge's appreciation of witnesses examined in his presence, value of.

When a sum of money due by A to B was entered in B's account-book as having been paid on 5th November 1907 in cash, but B's case was that it was liquidated by a promissory note which however bore date the 7th November 1907; and whilst A alleged that the payment was in fact made on 5th November in cash and the note of 7th November was a forgery, B and his witnesses throughout the trial insisted that the date of the transaction was the 7th and the note was signed then, but the evidence and circumstances of the case showed that there was no payment in cash and that the promissory note was genuine, but had been executed not on the 7th but on the 5th—the entry in the account-book to the effect that the payment was in cash being satisfactorily explained by the practice of entering payments by promissory notes as payments "in cash":

Held—*That the variance of the case established from the case pleaded in the plaint (as to the date of the note), was not fatal to B's suit to enforce the promissory note, in which the cardinal points to be decided were whether the debt had been paid in cash and whether the note was a forgery.*

That the High Court in relying for the dismissal of the suit on, amongst other grounds, that of variance between pleading and proof had applied that principle in an abstract and unsatisfactory way which had misled them in estimating the merits of the case.

That the question, in ultimate analysis, was one of circumstances and not of law.

That the evidence adduced in support of the transaction having been effected on the 7th November was not necessarily perjured or fabricated when it appeared that the statements of witnesses and entries in account-books might be due to bonâ fide *mistake.*

Appeal from a judgment of the Bombay High Court (Chandavarkar, J., Scott, C. J., concurring) which reversed a judgment of the Subordinate Judge of Poona. The following is the material part of the judgment under appeal:—

"The Respondent's case made in the

plaint and supported strenuously by the evidence led in proof of it in the Court below was that at 11 A.M. on the 7th of November 1907 at Poona the Respondent and the Appellant met in the former's shop; that in the presence of the Respondent, his son, and one Jamsetji Dhunjisha, an account was made of sums due from the Appellant to the Respondent on certain promissory notes; and that for the balance found (Rs. 14,000 principal and Rs. 332 interest) and a sum of Rs. 1,000 received then in cash, the Appellant executed the promissory note in dispute for Rs. 15,000, the amount of interest (Rs. 332) having been appropriated by the Respondent from the sum of Rs. 15,332.

"The Appellant denied execution of the note and pleaded that it was a forgery. His case was that on the 7th of November 1907 he was at Bombay, not at Poona; that there were no meeting and settlement of accounts on that date, as alleged by the Respondent; and that on the 5th of November 1907 he had settled the accounts and paid in cash the balance found due on the previous account.

"The evidence led by the Appellant in support of his case as to the *alibi* was of so unimpeachable a character that the Subordinate Judge had to come to the conclusion that the story that 'The Defendant executed the promissory note on the 7th of November 1907 and that too at 10 or 11 A.M. of that day necessarily falls to the ground and becomes an impossibility.' Before us in appeal Counsel for the Appellant has not challenged this finding of the Subordinate Judge. It is unnecessary, therefore, to examine the evidence in support of the *alibi*, as we concur with the Subordinate Judge in the reasons he has given in his judgment for holding it to be absolutely reliable. The Subordinate Judge was also of opinion that the Plaintiff (Respondent) had 'been guilty of fabricating his accounts and of perjury to enable himself to prove the date of the promissory note as the 7th of November 1907.'

"Nevertheless the Subordinate Judge held that the promissory note was genuine and 'must have been passed' by the Appellant on either the 5th or the 6th of November 1907. This conclusion of the Subordinate Judge rests mainly on two grounds:—(1) that on comparing the handwriting of the note and the signature thereon, purporting to be the Appellant's, with those of the promissory notes admitted to have been written and executed by the Appellant, 'it is impossible to avoid the conclusion that all the documents,' including the promissory note in dispute, 'were signed by one and the same hand;' and (2) that from the evidence recorded it is satisfactorily proved that on the 5th of November 1907 the Appellant was so heavily indebted that he was not in a position to satisfy his debt due to the Respondent by payment in cash.

"The finding of the Subordinate Judge that the promissory note in dispute was executed, not on the 7th, but either on the 5th or 6th of November, imports into the suit a case at variance with the pleadings and proof of the Plaintiff-Respondent and one which the Defendant-Appellant was not called on to meet at the trial. Throughout the Respondent alleged and sought to prove that the parties had met in his shop at Poona on the 7th of November 1907 and that it was at that meeting that the promissory note had been executed. In his plaint he averred that his cause of action on the note arose at Poona on the 7th of November. The first issue framed in the Court below involved that averment. The question of the date was treated as a material part of the proof as to the

genuineness of the note and the examination and cross-examination of the witnesses called by the Respondent in support of his averment in the plaint and issues proceeded on the sole basis that the note had been executed on the 7th of November at Poona, and on no other date. 'The Plaintiff's case,' observes the Subordinate Judge, 'from the beginning has been that the promissory note was executed on the 7th, and, as already remarked, he has attempted to support this case by the evidence of his witnesses and his books.'

"If that was so, and if that case failed, it is a serious question whether the Plaintiff, who is found by the Subordinate Judge to have fabricated his accounts and committed perjury for the purpose of proving his case that the disputed note was executed on the 7th of November and no other date, should be allowed to succeed on another ground never made part of his pleadings and proof but forming the basis of the Subordinate Judge's decree, *viz.*, that "It is not improbable that the promissory note was really executed on some other day than the 7th of November and that the Plaintiff and his witnesses have probably no recollection as to the exact date.' Such ground and probability became mere matters of speculation after the Plaintiff had deliberately gone to trial with the 7th of November as the only date. No mistake and want of recollection on the part of the Plaintiff and his witnesses as to the date were ever suggested except, as appears from the Subordinate Judge's judgment, in argument by Appellant's Solicitor in the Court below after the evidence had all been taken; the Defendant was never called upon to meet by evidence any cause of action other than that alleged in the plaint to have arisen on the 7th of November.

"This view is not a mere matter of technicality; it affects the merits of the case, because where, as here, a document is impugned as forgery, the time, place, and circumstance of its execution become more or less material for the purpose of deciding the question of its genuineness. It is an elementary principle of law that a Court should not allow variance between pleading and proof. As is put in *Gorakh Babaji* v. *Vithal Narayan Joshi* (1), citing *The 'Alice'* v. *The 'Rosita'* (2), 'the first rule of adjudication is that a Judge shall decide *secundum allegata et probata*.' There are no doubt cases where the Courts allow a Plaintiff, who has wrongly dated his cause of action in his plaint, to amend it, but that is only where he has misconceived his case and the misconception can be remedied by amendment without injustice to the Defendant and contradiction between the injury averred by the Plaintiff and that assumed by the Court as the ground of its judgment. (See per Melvill and West, JJ., in Small Cause Court Reference No. 28 of 1877, Printed judgments of this Court of 1877, page 133). That cannot be said here, where the Plaintiff never suggested any misconception on his part but deliberately stuck to the 7th of November as the date of his cause of action and attempted to support it by forgery and perjury. 'It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the Plaintiff has pleaded, and, by joining issue in the case, has undertaken to prove': [*Eshan Chunder Singh* v. *Shamachurn Bhutto* (3)].

"When we test the finding of the Subordinate Judge, that the promissory note

(1) I. L. R. 11 Bom. 435 at p. 438 (1887).
(2) L. R. 2 P. C. 314 (1868).
(3) 11 Moo. I. A 7 at p. 23 (1866).

must have been passed on the 5th or 6th of November, by the light of the evidence in the case, it is impossible to uphold his conclusion."

On the present appeal *Messrs. L. DeGruyther, K. C.* and *Raikes* for the Appellant submitted that the decision of the Subordinate Judge was right. The Respondent had failed to prove that he had paid off the admitted debt on the 5th November 1907. On the contrary the Appellant had established that the Respondent was not in a position to do so.

The real question at issue between the parties was whether the debt was paid off by the Respondent in cash, or whether it was settled by a further advance and the passing of the disputed note.

The note was in the handwriting of and signed by the Respondent. The date, *i.e.*, 7th November 1907, must be a mistake.

The cases relied upon by the High Court had no application.

Sir Erle Richards, K. C. and *Sir William Garth* for the Respondent submitted that the Appellant's case as to the execution of the note on the 7th November 1907 was proved to have been false and was supported by deliberate perjury. The Appellant ought not to be allowed to set up a new case, a case which was not made in his plaint nor raised in the issues and which was wholly inconsistent with the evidence produced by him, and which the Respondent had no opportunity to meet. If that case had been raised at the trial, the Defendant would have cross-examined the witnesses and met the case.

The Subordinate Judge ought not to have based his judgment upon surmise and inferences at variance with the case made in the plaint.

Reliance was placed on *Eshan Chunder Singh* v. *Shamachurn Bhutto* (3).

(3) 11 Moo. I. A. 7 at p. 28 (1866).

In any event the weight of evidence was in favour of the Respondent's case, that he paid the debt in full on the 5th November.

Mr. L. DeGruyther, replied.

Their Lordships' Judgment was delivered by

Viscount Haldane.—This an appeal on questions of fact from a judgment of the High Court of Bombay, reversing the judgment of the First Subordinate Judge of Poona, who tried the case. The principal issue is whether a promissory note for Rs. 15,000, on which the Appellant brought an action against the Respondent, was a forgery. A good deal of the oral evidence was taken, not by the Trial Judge, but before another Judge who acted for him. The case is, therefore, not one in which a Court of Appeal has the full assistance of the impressions of a Judge who in trying the case has seen all the witnesses in the box. The High Court and this Board have had to weigh the evidence as recorded for themselves, with the aid of the views of the Trial Judge on those occasions on which the witnesses were examined and cross-examined before him.

The Appellant was a furniture dealer and money-lender at Poona. The Respondent was a bookmaker on the turf, who also owned a fibre factory. The latter had frequent occasion to borrow money, and he borrowed from time to time from the Appellant among others. Between the Diwali day in November 1906, with which the native financial year commenced, and the 5th November 1907 which ended that year the Respondent had borrowed from the Appellant on promissory notes sums amounting to Rs. 19,000. Of this debt he had repaid Rs. 5,000 in August, and Rs. 14,000 for prin-

cipal remained unpaid on the Diwali day in 1907, the 5th November, together with Rs. 332 for interest. As to the security for this indebtedness there has been dispute. A good deal of the money had been advanced for the purposes of building a bungalow on some land at Poona belonging to the Respondent, and the evidence of the Appellant was that the title-deed to this land had been deposited with him as security for the advances, with a promise of a formal mortgage when his building was complete. However, on the 9th March 1907, the Respondent got the deed back for the purpose, as he stated in a letter of that date, of showing it to his pleader, and on a promise to return it. He either did not return it, or if he did so he managed to get possession of it again, and he used it to enable himself to mortgage the property in August for Rs. 15,000 to a Dr. Modi. The Appellant was not informed of this and after discovering it he brought the action in which this appeal arises to recover the amounts due for principal and interest, and for a declaration that these amounts were charged on the property. The contention of the Respondent was that he had never agreed to give the Appellant a mortgage, but had only negotiated about it. It is, however, difficult to reconcile this version of the transaction with the terms of the letter of 9th March in which he appears to treat the Appellant as entitled to have the deed.

It is clear that the Respondent had been borrowing on a large scale prior to November 1907 from other people as well as from the Appellant. Indeed his case is that he so borrowed in order to pay off the latter. But he appears to have been in circumstances of some difficulty. He had sometime previously been declared a defaulter by the local Turf Club, a circumstance which could not but cause him difficulty in borrowing. However, his case is that he succeeded in raising enough money to pay the Appellant in cash, two sums of Rs. 14,000 and Rs. 1,000 on the 5th of November, in small notes of Rs. 100 and less. An important question which has to be determined is whether he did this, or whether the Appellant merely closed the account for the year by taking a fresh promissory note from him for the balance carried into the new account.

Their Lordships have had before them a translation of the account kept in the books of the Appellant, relating to his transactions with the Respondent. From the translation it appears that the Rs. 14,000 were credited as "in cash in full settlement of the account up to this day," *i.e.*, the 5th November 1907. At first sight this would seem to mean that the money was actually paid. But an examination of the accounts made out in previous years, shows that the expression "in cash" is far from conclusive, inasmuch as it was the regular practice to enter as sums of cash received and credited the amounts of new promissory notes given by the Respondent to the Appellant in liquidation of earlier notes, just as though actual cash had been received. Their Lordships think that it must be taken that the practice was to close each yearly account entirely by treating any debit balance as paid off when there was credited as liquidating the cash balance due, a new promissory note which then became a debit item in the account for the ensuing year. They are confirmed in this view by what was said by the Trial Judge to the effect that he had had a long experience in which he had been familiar with the existence of this practice.

The Appellant and his witnesses swear that this was the course adopted when the account was closed on the Diwali day of

1907 and a new account opened for the ensuing year. The Respondent swears that he paid the Rs. 14,000 in cash, consisting of small notes which he got, not from his bank but from his house, where the money had been kept ready for three months. Their Lordships think that the probabilities are against the truth of this statement. The Respondent had been borrowing money during this period, including a large sum of Rs. 15,000, as late as August from a Dr. Modi, and he had had an execution issued against him for a judgment-debt of Rs. 8,000 in October. This debt he had paid, but he says in his evidence that in order to do so he had borrowed Rs. 5,000. Besides this he had incurred other debts. For instance he had borrowed Rs. 1,000 from the Appellant on 3rd September. This state of his affairs does not render it probable that he was in a position to keep Rs. 14,000 or any other considerable sum in his house during the three months antecedent to the alleged payment of cash to the Appellant. Again the body of the promissory note on which the Appellant sues is in the handwriting of the person who signed it, and the handwriting in the case both of the body of this note and its signature appear indistinguishable from the admitted handwriting of the Respondent. Indeed the Trial Judge came to the conclusion on a comparison of documents and after taking evidence, that the signature was genuine. Further, subject to one important discrepancy which their Lordships will presently deal with, the Appellant's books bear out his assertion that the balance was liquidated by means of the promissory note. The Respondent ought in the ordinary course to have in his turn produced his books to show the entries made by him at the time and so bear out the case of cash payment which he made. In addition to his business as a bookmaker he had, as already stated, a factory. His excuse for not producing the appropriate books was that they had been destroyed in a fire which took place at the factory on 10th and 11th November, just after the transaction in question. He said that two books only had escaped destruction, but it appears that the entries in neither of these related to the transactions in question. As against this testimony the Appellant called one Cawasji, who was agent for the insurance company from which the Respondent recovered the amount of the damage caused by the fire. Cawasji said that he had produced to him by the Respondent books other than the two referred to, including a cash book. The evidence taken renders it very doubtful whether the room in which the books were was destroyed at all by the fire. Their Lordships cannot accept the story told by the Respondent about the destruction of his books.

But on the other side the case made by the Appellant was in its turn unsatisfactory. The promissory note on which he sued was for Rs. 15,000, being made out for the balance of Rs. 14,000 and Rs. 332 for interest due, the remainder being stated to have been paid in cash. But the note was dated, not on the Diwali day, the 5th, but on the 7th November. The Appellant and the witnesses whom he called insisted throughout that the date of the transaction was the 7th, and that the note was signed then. They produced books which supported this statement. These books showed the Rs. 14,000 as paid in cash on the 5th November and the debit for Rs. 15,000 on the promissory note as made under date the 7th. But the Respondent succeeded beyond question in completely disproving the allegation that he had signed the note on the latter date. He established conclusively that he was in

Bombay and not in Poona on that day. It was not until this evidence had been given that the Appellant's solicitor suggested in his reply that the date of the disputed note and the date assigned by the Appellant for the transaction might have been a mistake, and that the note was post-dated and really signed on either the 5th or the 6th.

The Trial Judge took the view that the Appellant and his witnesses had perjured themselves about the date and that his books had been so fabricated as to support this story. But he held that the note was in fact signed by the Respondent, and that the transaction had in reality taken place in the form alleged by the Appellant, but on the 5th and not on the 7th. He considered that both parties had committed perjury, and to mark his sense of what had occurred, while deciding in favour of the Appellant he deprived him of his costs.

The learned Judges of the High Court took a different view. They were of opinion that the Trial Judge's finding that the disputed note was signed on a different date from that alleged by the Appellant in his plaint, and the evidence given, constituted a fatal variance from the case pleaded and made. They thought that the receipt in the Appellant's account on which the Respondent relied, and by which the Appellant purported to acknowledge receipt of cash in payment of the previous debt, was sufficient evidence of payment in cash as alleged by the Respondent. They considered that the destruction of the Respondent's books in the fire had been proved, and that there had been no suppression by him of facts. They thought that there was evidence that the Respondent was in a position to have made the cash payment set up. As to the finding of the Trial Judge that the note was signed by the Respondent, they thought that the handwriting was similar to the handwriting of the Respondent in other promissory notes produced for comparison and admitted by him, but that this circumstance was not sufficient to rebut what they regarded as the inference irresistibly arising from the other proved facts in the case, that the handwriting was the work of a clever forger. They laid great stress on the principle that it would "introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded on inferences at variance with the case that the Plaintiff has pleaded, and, by joining issue in the case, has undertaken to prove."

Their Lordships are of opinion that the High Court has applied this principle in an abstract and unsatisfactory way which has misled them in estimating the merits in the controversy before them. In applying such a principle the whole of the circumstances must be taken into account and carefully scrutinised. The question is in ultimate analysis one of circumstances and not of law. In the case which the Board has on the present occasion to consider the fundamental questions are whether the sum due was paid in cash, and whether the note was a forgery. No doubt the Appellant was quite wrong in saying that the note was signed on the day on which it was dated, the 7th November 1907. On that date it is proved that the Respondent was not in Poona, but he may have post-dated the note accidentally, or for some purpose, and have signed it on the 5th or 6th. It is going too far, in their Lordships' opinion, to infer, what the Trial Judge inferred, that the books must have been fabricated, and that deliberate perjury was committed. It is quite possible that all that happened

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was that the Appellant and his witnesses, whose testimony was given a year and a half after the event, had not made out the accounts until some interval had elapsed, and were then misled by the documents into making a serious but not conclusive slip. The accounts in the Appellant's books may quite naturally have been erroneously, but in good faith, based on the date of the note. The natural inference from the documents and the evidence appears to their Lordships to be that the signature was genuine and that the transaction, like the previous transactions, was not a closing of this account by the payment of cash, but was a liquidation by means of a fresh note. In the view that they take of the evidence what they have stated appears to them to be the proper inference from what is established by the evidence. They are unable to agree with the High Court either in their view of the evidence or in thinking that the general principle on which the learned Judges relied can be decisive of a case in which the cardinal issues are in reality those stated. Their Lordships are not called on to interfere with the discretion exercised by the Trial Judge as to costs, but they think that at all events on the main question he was right, and the High Court wrong.

They will, therefore, humbly advise His Majesty that the judgment of the Court of First Instance should be restored, and that Respondent should pay the costs of this appeal and of the proceedings in the High Court.

Solicitors: *Messrs. Latteys* and *Hart* for the Appellant.

Solicitors: *Messrs, Downer* and *Johnson* for the Respondent.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 20 OF 1915.

SANDERSON, C. J. WOODROFFE, J. MOOKERJEE, J. 1915, 24, November.	JOHUR LAL DEY, Plaintiff, Appellant, *v.* DHIRENDRA NATH DEY, Defendant, Respondent.

Will, revocation of, tearing—Indian Succession Act (X of 1865), sec. 57.

When a testator sent for his Will, wrote the word "cancelled" thereon and signed it and according to his Attorney's direction tore it partially:

Held—*That this showed the intention of the testator to revoke the Will and the partial tearing constituted a sufficient revocation of the Will within the meaning of sec. 57 of the Indian Succession Act.*

ELMS *v.* ELMS (1) *distinguished.*

BIBB *v.* THOMAS (2) *referred to.*

This was an appeal preferred on the 7th of August 1915 against the judgment of Mr. Justice Chaudhuri passed in the exercise of Testamentary and Intestate Jurisdiction, dated the 4th December 1914.

The facts of the case will appear from the following portion of Mr. Justice Chaudhuri's judgment:—

CHAUDHURI, J.—This is an application for probate. The Applicant Johar Lall Dey is the sister's daughter's husband of the testator and asks for the grant as the executor of his Will, dated the 7th April 1903. The testator died on the 17th October 1913. The application is opposed by the testator's son Dhirendra Nath Dey. There is no contest that the Will of the

(1) 1 Sw. & Tr 155 (1858).
(2) 2 W Bl. 1043 (1749).

7th April 1903 was duly made. The Defendant, however, alleges that it was revoked by the testator on the 29th August 1913. I held that the onus for establishing the revocation was upon the Defendant. The matter has now been heard and evidence has been given on both sides. It appears that the firm of Bonnerjee and Bonnerjee were, for a considerable number of years attorneys for the testator. Originally the firm consisted of Jotindra Nath Bonnerjee and his father now dead. Jotindra is the surviving member of that firm and has been examined on behalf of the Defendant. It appears that the Will after it was made remained in the custody of that firm at the instance of the testator. Johur Lall says he made it over to them at the testator's desire. It appears that Fakir Chand Dey fell ill in or about August 1913 when he went to Karmatar for a change; he returned to Calcutta and died on the 17th October 1913. The evidence of Jotindra Nath Bonnerjee shortly is this :—that he was informed of the return of the testator from Karmatar by Johar Lall Dey; Johar told him that the testator had expressed a desire to revoke his Will and had asked that the Will should be taken to him. Jotindra thereupon went to the house of the testator on the 29th August 1913 with the Will. There were present in the room the testator, his son Dhirendra Nath Dey and one Nibaran Chandra Pal a partner of the testator. That on a sign made by the testator which he understood to mean that nothing was to be done until Nibaran left, Nibaran was asked by the attorney to leave the room. Nibaran then left and the Will was made over to the testator who asked the attorney what was to be done in order to revoke the Will. The attorney said that the testator should write on the Will the word "cancelled," strike out his signature, sign the cancellation and tear the Will partially. The testator carried out these directions and then made over the document to the attorney.

[After discussing the evidence Mr. Justice Chaudhuri came to the following findings of fact and law.]

I believe the statement of Jotindra as to what took place on the 29th August when he says the Will was revoked. I hold that the Will was cancelled and torn by the testator with the intention of revoking it and that he signed the cancellation. The revocation is however attacked on various grounds; principally that no material portion of the Will has been torn and that as it is torn to the extent of a few inches only along its width, the tearing cannot be taken to amount to revocation. I am asked to hold that the "tearing" referred to in sec. 57 of the Succession Act must be equivalent to destruction. Several English cases were cited and a passage in Brown's Probate Practice (Ed. 1881), p. 93 where some of these cases are summarized has been strongly relied upon. According to the learned author the result of the cases is (1) that some material portions or portion of the Will must be torn or destroyed, such as the signatures of the testator and the attesting witnesses, (2) that the act or acts must be done with the intention of revoking, (3) that the testator must have completed the acts or act he intended to do for the purpose of revocation. In this case the document is torn in the middle to the extent of 3 or 4 inches. It is a clear tear. It has not the appearance of an accidental tear and according to the evidence it was deliberately torn "partially" according to the attorney's instructions. The signatures have not been torn but if the evidence is accepted—and I accept it as true—the tear was made with the intention

of revoking the Will. I am asked to hold that inasmuch as no material portion seems to have been torn there has been no revocation in law. I do not think the cases show that it is necessary that the documents should be torn up so as to amount to total destruction. This question came up before Sir C. Cresswell in *Elms* v. *Elms* (1). That was a case in which the testator intended to revoke his Will. He began tearing it with the intention of tearing it up. He very nearly completely tore it up but owing to certain exclamations made by persons in the room as to the danger of tearing it up before making another Will, he stopped short and did not completely tear it up as he had originally intended. He put the torn document by and nothing further was done by him. On the facts it was held that the intention in that case was originally to tear it up completely, but that the testator did not give effect to his intention and that tearing could not therefore be taken as a complete act. The testator had given up the idea of tearing it up and had put by the document. The learned Judge held that in order to make the revocation effectual the act should have been completed as originally intended. The learned Judge's comment is "it may be said that he tore the Will with the intention of revoking it, for no doubt he had that intention when he began to tear and as soon as he had torn a quarter of an inch he had torn it with the intention of revoking; he did not intend to revoke it by that tearing only, but intended to tear further." I think that in this case it is quite clear that the testator intended to revoke the Will. He never inended to tear it up altogether. His intention was only to tear it partially as suggested by his attorney. He completely carried out the instructions of his attorney. He was not told to do anything more and did not intend to do anything more. It was argued that the writing of the word "cancelled" and the signature thereto and the penning through of his original signature did not amount to revocation and the case of *Stephens* v. *Taprel* (6) was relied upon as also the judgment of Lord Denman, C. J., in *Doe on the Demise of Gratrex* v. *Homfray* (7). Taking the facts of this case I hold that there has been an effective revocation by "tearing" within the meaning of the section.

On appeal from Mr. Justice Chaudhuri's judgment:

Messrs. S. P. Ghosh and *C. C. Ghosh* for the Appellant.

Messrs. Jackson, Langford James and *P. N. Dutt* for the Respondent.

The JUDMENTS OF THE COURT were as follows:—

SANDERSON, C. J.—In this case the question arises in connection with the Will of a man called Fakir Chand Dey. The Appellant is the sister's daughter's husband, and the Respondent is the son of the testator.

The Will was made on the 7th of April 1903 and under it the Appellant took a substantial interest. The Will is alleged to have been revoked on the 29th of August 1913. The testator, apparently, was taken ill in August 1913: he went to a place called Karmatar and returned from there some time in August, and, according to the endorsement in the Will, he cancelled his Will on the 29th of August 1913.

The Appellant puts his case in two ways. He says first of all that the whole of the cancellation was not genuine. He

(1) 1 Sw. & Tr. 155 (1858).

(6) 2 Curt. 453 (1840).
(7) 6 Ad. & El. 206 (1837).

alleges that the handwriting on the Will which purports to be the cancellation is not in the handwriting of the testator. That the signature which purports to be the signature of the testator in respect of the cancellation is not the signature of the testator, and he goes on to say that the date was originally the 9th of August but was altered, at some time or other, to the 29th of August. He also says, though his learned Counsel did not seem to lay so much stress on this part of his case—that although the words of the cancellation may have been written upon the Will by the testator himself and although the signature may have been his, still there was no tearing at the time the word "cancelled" was written, and that the tearing was done by somebody after the testator's death.

There is an alternative point which the Appellant takes. He further says that even if the cancellation in every sense of the word was a genuine cancellation, it is not effective in law, because the cancellation was not attested by the witnesses in accordance with the provisions of the Act, and *secondly*, that the tearing is not a sufficient tearing in compliance with the provisions of the Act.

On the other hand, on behalf of the Respondent it was contended in the Court of first instance that the cancellation was absolutely genuine, that the testator consulted his solicitors Messrs. Bonnerjee and Bonnerjee of whom Jotindra Bonnerjee was the surviving partner, that Mr. Bonnerjee was summoned to the house of the testator, that he took the Will with him to the testator's room, that after requesting the testator's partner to leave the room, and in the presence of the testator's son, the testator wrote the word which appears on the Will, "cancelled," and signed his name and dated it the 29th of August.

[His Lordship after discussing the evidence on the first contention that the cancellation of the Will was not genuine came to the following conclusion] :—

I may justify my judgment upon this ground that the question is a question of fact, and Mr. Justice Chaudhuri had the evidence which, in my opinion, if believed justified him in coming to the conclusion to which he did. I have considered the whole of the evidence, and the learned Counsel for the Appellant has not satisfied me that the opinion of the learned Judge is wrong. This is quite sufficient to say with regard to the first point.

With regard to the second point, it raises a very interesting question of law and it is this :—Assuming that the cancellation upon the Will was a genuine cancellation, still it is not such as complies with the provisions of section 57 of the Indian Succession Act.

Now, that section, no doubt, requires two things—first of all, an intention to revoke, and *secondly*, the cancellation to be executed in the same way as a Will ought to be executed, or there must be a burning, tearing or otherwise destroying the Will. The section says, "No unprivileged Will or codicil nor any part thereof shall be revoked otherwise than by marriage or by another Will or codicil or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is hereinbefore required to be executed." I may pause here for one moment to say that it is admitted in this case that the alleged revocation or cancellation was not executed in the manner in which a Will ought to be executed. Then the section goes on to say, "or by the burning, tearing or otherwise destroying the same by

the testator . . . with the intention of revoking the same." Therefore, we have got to consider whether there was first of all the burning, tearing or otherwise destroying, and *secondly*, if there was such burning, tearing or otherwise destroying, whether that was done with the intention of revoking the Will. Now, the only thing that is alleged here is tearing. Therefore, all we have got to consider is whether such tearing comes within this section, and *secondly*, whether this was done with the intention of revoking the Will.

Now, it seems to me that if Mr. Justice Chaudhuri's judgment be upheld upon the first point—as in my opinion it must be—namely, that the cancellation was genuine, then it is obvious that the testator had the intention of revoking his Will. Therefore, the only question which is left to be considered is whether there was a tearing of the Will in such a way as to comply with the provisions of the section. In my opinion there was. It is to be noted in this case that according to the evidence which Mr. Justice Chaudhuri has accepted, the testator did all that he was told to do. The learned Judge says, "He never intended to tear it up altogether. His intention was only to tear it partially as suggested by his attorney. He completely carried out the instructions of his attorney. He was not told to do anything more and did not intend to do anything more." I draw attention to that, because that seems to me to entirely distinguish this case from the case of *Elms* v. *Elms* (1) to which the learned Judge of the Court of first instance drew attention, and the report of which Mr. Justice Mookerjee has handed to me this morning. In that case there was a tearing of the Will, a tearing across all the pages of the Will, but no one of them was completely torn through, and it came about in this way: The testator when he began to tear them intended to revoke the Will. Before he completely tore them he was prevented by the exclamations of those who were in the room from completing the tearing by tearing it right through, and therefore he never actually completed that which he set out to do. In this case, if we accept the finding of fact—which I have said we ought to do—that what the testator was told by his attorney to do was to tear the Will partially, and Mr. Justice Chaudhuri has found on the evidence that he carried out those instructions, the testator did complete that which he set out to do. It is pretty clear to my mind upon the authority of the learned Judge who gave judgment in that case, and I adopt what he says, that the Legislature does not mean that the testator must rend the Will into more pieces than it originally consisted of. The learned Judge adds "and, therefore, although no one sheet of paper was completely divided I think the tearing might be sufficient to revoke if done with that intention. But in order to make it effectual he must have intended to revoke by so tearing it: by which I mean that he must have intended that which he actually did of itself to have that effect without more." Mr. Justice Chaudhuri has found quite clearly on the evidence—and I do not intend to interfere with that finding—that when the testator did tear the Will in the way he did, he did intend to revoke it by so tearing and he did not intend to do any more tearing. That being so, I think the tearing comes sufficiently within the meaning of the section. I have to refer to one other case which the learned Counsel has cited this morning in the course of his argument, *Bibb* v. *Thomas* (2).

(1) 1 Sw & Tr. 155 (1858).

(2) 2 W. Bl. 1043 (1749).

In that case the testator being in bed one day near the fire ordered a person to fetch his Will; the Will was fetched, and then he opened it and gave it a rip with his hands and then rumpled it together and threw it on the fire, but it fell off and was not burnt. The person who was in the room picked it up and kept it without his notice. It was left to the jury to consider whether that was sufficient revocation and the jury found that it was and that the testator intended to revoke it: and when it went to the Court, Chief Justice Grey observed "that this case fell within two of the specific acts described by the statute; it was both a burning and tearing," although as a matter of fact in that case the Will had got only a rip with the hands and had fallen off the fire being slightly burnt without being seriously injured. I think upon the authority of those two cases, it is clear that a tearing which is such a tearing as to evidence a man's intention to revoke a Will, and is all the tearing that he intends to do and then stops as he has done in this case, a tearing which he was directed to do on the evidence of his attorney, and this added to the fact that he writes the word "Cancelled," and signs his name, would, in my opinion, be a sufficient compliance with the provisions of the section and, on those grounds I think Mr. Justice Chaudhuri's judgment was right upon the second point.

For these reasons I think Mr. Justice Chaudhuri's judgment and decree must be upheld and this appeal must be dismissed with costs.

WOODROFFE, J.—I am of opinion that the facts of this case establish that what was alleged to be done constituted an effective revocation in law. The rest of the question is one of simple fact. The Appellant has shown no ground for disturbing the judgment of the Court of first instance, the accuracy of which in the main depends on the value, which the learned Judge attached to the witnesses whom he had an opportunity, which we have not, of seeing. I agree, therefore, that the appeal should be dismissed.

MOOKERJEE, J.—I agree that Mr. Justice Chaudhuri arrived at the correct conclusion upon each of the two fundamental points in the case, namely, *first*, was there a genuine act of cancellation by the testator? and *secondly*, was the act operative as a valid cancellation in law?

The answer to the first of these questions depends upon the evidence. Notwithstanding the careful criticisms of the counsel for the Appellants, I can see no good ground to differ from Mr. Justice Chaudhuri in his estimate of the evidence on the record, which conclusively establishes that the endorsement of cancellation was made by the testator. There is also satisfactory evidence to show that the Will was torn by the testator. There is an entry to this effect in the day-book of the attorney, and I see no reason to doubt the genuineness of that entry. We have consequently the two facts that the Will was torn by the testator and that he made an endorsement to show that he intended to cancel the Will thereby.

The second question is, whether the act of tearing was operative as a valid cancellation in law. The answer depends upon the true construction of sec. 57 of the Indian Succession Act. That section, as I read it, lays down that revocation consists of two elements: intention of the testator and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient. Neither is the intention, the *animo revocandi*, sufficient, unless some act of obliteration or destruc-

tion is done. What acts of tearing, burning, cancelling or obliterating are sufficient to constitute a total or partial revocation, must depend, to a considerable extent, upon the circumstances of each case. Reference may, in this connection be made to a passage in the judgment in the case of *Price* v. *Powell* (3): "If the document should be entirely burnt up, entirely obliterated or torn into scraps or covered with cross-lines, there would be no doubt as to the intent of the testator. But it is not necessary to go to that extent in any of the modes, in order to answer the requirements of the statute, and, the slightest degree of either mode is effectual as to such revocation, provided it appears that the act was done with the intent to have it constitute a revocation." The conclusion consequently follows that by tearing is not meant a literal tearing to pieces; the slightest act of tearing with intent to revoke the whole Will thereby is sufficient for the purpose. This view is in agreement with the principle deducible from *Bibb* v. *Thomas* (2), *Clarke* v. *Scripps* (4), *Elms* v. *Elms* (1), *Price* v. *Powell* (3) and *Williams* v. *Tyley* (5). On these grounds, I agree with the learned Chief Justice that the judgment of Mr. Justice Chaudhuri must be affirmed.

Babu Satyendra Chandra Mitter, Attorney, for the Appellant.

Messrs. Bonnerjee and *Bonnerjee*, Attorneys, for the Respondent.

Appeal dismissed.

(1) 1 Sw. & Tr. 155 (1858).
(2) 2 W. Bl. 1043 (1749)
(3) 3 H. & N. 341; 117 R. R. 719 (1858).
(4) 2 Rob. Ecc. 568.
(5) Johnson 530; 128 R R 228 (1858).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 211 OF 1912.

MOOKERJEE, J.
ROE, J.
1915,
9, June.

MOTILAL PODDAR, Plaintiff, Appellant,
v.
JUDHISTIR DAS THEOR and ors., Defendants, Respondents.

Pleading—Plaint what should state—Omission to state facts necessary for Defendants to meet at the trial, effect of—Reliance by Plaintiff on inconsistent rights alternately—Plaintiff is can allege facts destructive of each other—Partition suit—Preliminary decree - Costs.

The Plaintiff commenced an action for partition on the allegation that he was entitled to fourteen and a half annas share of the property in suit while the Defendants contended that they had acquired a good title to a two annas share. The plaint did not narrate the history of the title of the Plaintiff nor did it mention the deeds whereby the title had devolved on him. The Plaintiff did not make a definite case in the plaint but sought at the trial to develop two inconsistent cases on the testimony of two different sets of witnesses. Objection was taken by the Defendants on the ground of defect in the plaint but the Subordinate Judge proceeded with the trial. He found in favour of the Defendants and allowed them the full amount of costs on the value of the suit. Against the preliminary decree the Plaintiff appealed.

Held—*That in the plaint the Plaintiff was bound to state the nature of the deeds on which he relied in deducing his title from the person under whom he claimed and to show the devolution of the estate to himself.*

PHILIPPS *v.* PHILIPPS (1), DERBYSHIRE *v.* LEIGH (2) *and* DAVIS *v.* JAMES (3).

(1) 4 Q. B. D. 127 (1878).
(2) [1896] 1 Q. B. 554.
(3) 26 Ch. D. 778 (1884).

MOTILAL PODDAR *v.* JUDHISTIR DAS THOR.

It is absolutely essential that the pleading, not to be embarrassing to the Defendants, should state those facts which will put the Defendants on their guard and tell them what they will have to meet when the case comes on for trial. This much the Plaintiff is bound to do though he need not set out the evidence whereby he proposes to prove the facts which give him the title.

WILLIAMS *v.* WILCOX (4) *and* GAUTRET *v.* EGERTON (5).

A Plaintiff may in certain circumstances rely upon several different rights alternately though they may be inconsistent.

NARENDRA NATH *v.* ABHOY CHURN (6), PHILLIPS *v.* PHILLIPS (1), BERDAN *v.* GREENWOOD (7), HAWKESLEY *v.* BRADSHAW (8) *and* IN RE MORGAN (9).

But the Plaintiff cannot be permitted to allege two absolutely inconsistent state of facts each of which is destructive of the other.

MAHAMUD BUX *v.* HOSSEIN BIBI (10).

That in the present case the Plaintiff should not have been allowed to proceed on the plaint as framed but should have been called upon to specify in his statement of claim the nature of the deeds and transactions from which he deduced his title.

That the order for costs on the full value of the suit could not properly be made at the stage of the preliminary enquiry when the matter in controversy related only to a half anna share in the property.

(4) 8 A. & E. 331 (1883).
(5) L. R. 2 C. P. 371 (1867).
(6) I. L. R. 34 Cal. 51 : s. c 11 C. W. N. 20 ; 4 C. L. J. 487 (1906).
(1) 4 Q. B. D. 127 (1878).
(7) 3 Ex. D. 255 (1878).
(8) 5 Q. B. D. 303 (1880).
(9) 35 Ch. D. 496 (1887).
(10) I. L. R. 15 Cal. 688 (1888).

This was an appeal from a decision of Babu Asutosh Ghose, Subordinate Judge, Dacca, dated 6th May 1912.

The material facts will appear from the judgment.

Babu Gopal Chandra Das for the Appellant.

Babus Joges Chandra Roy and *Upendra Lal Roy* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff against the preliminary decree in a suit for partition of joint property. The decree has been assailed on two grounds, namely, *first*, that the lower Court has erroneously determined the share of the Plaintiff; and *secondly*, that the lower Court has made an incorrect order for costs in favour of the Defendants.

As regards the first ground, it appears that the disputed property was, on the 10th September 1898, purchased at an auction sale for Rs. 6,130 by a person whom we shall call X. X had a brother Y who had four sons A, B, C and D. On the 7th November 1900, X conveyed a six annas share of the property to his three nephews A, B and C. On the 14th June 1910, A transferred a two annas share to the Defendants on the assumption that he was competent to deal with that share as one of the three brothers in whose favour the conveyance had been executed by X. On the 6th October 1910, X, B, C and D conveyed fourteen and a half annas share to the Plaintiff, namely, a ten annas share held by X, and four and a half annas share claimed by B, C and D, on the hypothesis that the conveyance by X, though nominally in favour of A, B and C, had really benefited A, B, C and D. On the 23rd January 1911, the Plaintiff commenced this action for partition on the allegation

that he was entitled to fourteen and a half annas share of the property while the Defendants were entitled to the remaining one and a half annas share. The Defendants answered that they had acquired a good title to a two annas share by their purchase from A, and that the Plaintiff was entitled to only fourteen annas share.

The plaint, it may be observed at the outset, is singularly meagre, it does not narrate the history of the title of the Plaintiff, nor does it mention the deeds whereby the title had devolved on him. The Defendants accordingly urged in their written statements that the Plaintiff was not entitled to relief on a plaint so framed and was bound to disclose the details of his title. This contention was well-founded, as the Plaintiff was bound to state the nature of the deeds on which he relies in deducing his title from the person under whom he claims and to show the devolution of the estate to himself. [*Philipps* v. *Philipps* (1), *Derbyshire* v. *Leigh* (2) and *Davis* v. *James* (3)]; for as Cotton, L. J., said in *Philipps* v. *Philipps* (1), it is absolutely essential that the pleading, not to be embarrassing to the Defendants, should state those facts which will put the Defendants on their guard and tell them what they will have to meet when the case comes on for trial. This much the Plaintiff is bound to do, though he need not set out the evidence whereby he proposes to prove the facts which give him the title [*Williams* v. *Wilcox* (4) and *Gautret* v. *Egerton* (5)]. The Court, however, took no notice of the objection, and raised a comprehensive issue in these terms: "What is the share of the Plaintiff in the property in suit." The Plaintiff was thus left free to nullify the salutary rule enunciated by Brett, L. J., in *Philipps* v. *Philipps* (1) that the parties should be held strictly to their pleadings and should not be allowed to prove at the trial any fact which is not stated in the pleadings. What the consequence has been, we realise when we come to examine the case on the merits. We find that the title alleged by the Plaintiff is contrary to the tenor of the admitted deeds. On the face of the sale-certificate, X became the sole owner by purchase of the property in dispute. Under the conveyance executed by X in favour of A, B and C, they became jointly interested in a six annas share; after this transaction, a ten annas share was left to X. Consequently, A was *primâ facie* entitled to a two annas share which he transferred to the Defendant. B and C were entitled to a four annas while their uncle X had a ten annas share; this they conveyed to the Plaintiff, who thereby obtained a fourteen annas share. D was apparently not entitled to any share at all. The claim of the Plaintiff to a fourteen and half annas share cannot consequently be sustained, unless it is established that these deeds do not represent the true state of facts. The Plaintiff in his plaint has furnished no indication of the source of his title, nor does he afford a clue to the ground, if any, upon which he challenges the admitted deeds. When we turn to the evidence, however, we find that he has attempted to develop two inconsistent cases. He called one of his vendors, namely, X to prove that X and Y, who were separate in food and estate, became joint owners of the property by purchase at the execution sale; and that the consideration was furnished by them in the proportion of ten to six, though the purchase was made in the name of X alone.

(1) 4 Q. B. D. 127 (1878).
(2) [1896] 1 Q. B. 554.
(3) 26 Ch. D. 778 (1884).
(4) 8 A. & E. 331 (1838).
(5) L. R. 2 C. P. 371 (1867).

(1) 4 Q. B. D. 127 (1878).

The witness added that thereafter Y took a conveyance from him in respect of a six annas share in the name of his three major sons. X in substance repudiated the allegations he had solemnly made in the conveyance in favour of his nephews. On this basis, the Plaintiff can succeed only if he proves that what purports to be a conveyance to A, B and C is in reality a deed of relinquishment in favour of their father Y, and that upon the death of the latter, his four sons A, B, C and D have taken equal shares by right of inheritance. The Plaintiff then called another set of witnesses, namely, his vendors B, C and D, to contradict the allegations of X, on the hypothesis that the property was acquired by X alone and was transferred by him for consideration, under the conveyance in the names of A, B and C, either to Y or to A, B, C and D. The Defendants found themselves in a position of embarrassment, when these contradictory allegations were sprung upon them, without any indication afforded in the plaint, but fortunately, the testimony of one set of witnesses neutralised that of the other, and the Subordinate Judge held that the Plaintiff had failed to prove his title to any share in excess of fourteen annas. In our opinion, the Plaintiff should not have been allowed to proceed on the plaint as framed, he should have been called upon to specify in his statement of claim the nature of the deeds and transactions from which he deduced his title. The Plaintiff, deliberately and for obvious reasons, departed from the well-recognised rule applicable to the matter; when the plaint was filed, he could not make up his mind which alternative to choose, and consequently left his case to be developed by his witnesses. Now, it may be conceded that a Plaintiff may, in certain circumstances, rely upon several different rights alternatively though they may be inconsistent. This was recognised by the Full Bench in *Narendra Nath* v. *Abhoy Churn* (6) and is in conformity with the rule recognised in *Philipps* v. *Philipps* (1), *Berdan* v. *Greenwood* (7), *Hawkesley* v. *Bradshaw* (8) and *In re Morgan* (9). But as pointed out by the Judicial Committee in *Mahamud Bux* v. *Hosscin Bibi* (10), the Plaintiff cannnot be permitted to allege two absolutely inconsistent state of facts each of which is destructive of the other. In the case before us, the Plaintiff, it is true, did not make a definite case in the plaint, but sought at the trial to develop two inconsistent cases, on the testimony of two different sets of witnesses. The Subordinate Judge rightly held that the evidence was not reliable enough to establish either the one case or the other. He has pointed out that the evidence to show that the execution purchase, though made in the name of X, was for the benefit of both X and Y, is utterly untrustworthy. The two brothers at the time were separate. There is no independent evidence to corroborate the assertion of X, that a proportionate part of the consideration was furnished by Y. Nor is there any trustworthy evidence to show that, after this purchase, Y obtained joint possession of the property along with X. There is, on the other hand, no tangible evidence to prove that the conveyance executed by X in favour of A, B and C was really a conveyance in favour of Y or of A, B, C and D. It was suggested at one stage of the argument in the Court below, and that suggestion has been re-

(1) 4 Q. B. D. 127 (1878).
(6) I. L. R. 34 Cal. 51: s. c. 11 C. W. N. 20; 4 C. L. J. 437 (1906).
(7) 3 Ex D. 255 (1878).
(8) 5 Q. B D. 302 (1880).
(9) 35 Ch. D. 492 (1887).
(10) I. L. R. 15 Cal. 688 (1888).

peated in this Court, that the conveyance might possibly be treated as a deed of relinquishment. This theory is extremely improbable. If the parties really intended the document to operate as a deed of release, there is no conceivable reason why it should not have been described as such, it is inexplicable why recitals untrue in fact should have been deliberately inserted in the deed, and why a large amount should have been paid as stamp duty on the conveyance while a smaller amount would have sufficed for a deed of release. We are clearly of opinion that the Plaintiff has failed to prove that the deed of conveyance by X in favour of A, B and C was in reality other than what it purported to be. But the Appellant has argued that as the parties in a suit for partition, occupy the position of counter claimants, it was incumbent upon the Defendants to set up and establish their special case. There is plainly no force in this contention. The Defendants had no occasion to meet any case alleged in the plaint, while the two alternative cases developed in the evidence were destructive of each other. The first ground consequently fails.

As regards the second ground, it has not been seriously disputed by the Respondents that the order for costs is erroneous. The Subordinate Judge has allowed the Defendants the full amount of pleader's fees on the value of the suit. This order could not properly be made at the stage of the preliminary decree, when the matter in controversy related only to a half anna share in the property valued at Rs. 320. We hold accordingly that the pleader's fee in the Court below should have been assessed at one gold mohur only, and that the total costs allowed to the Defendants should have been fixed at Rs. 42-1-9 pies instead of Rs. 376-1-9 pies. Subject to this variation, the decree of the Subordinate Judge will be affirmed. The Respondents are entitled to their costs in this Court. We assess the hearing fee at two gold mohurs.

Decree modified.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 283 OF 1912.

MOOKERJEE, J. RICHARDSON, J. 1915, Heard, 28 and 29, July. Judgment, 30, August.	KUNJAMANI DASSI, Defendant, Appellant, *v.* NIKUNJA BIHARI DAS, Plaintiff, Respondent.

Shebaitship, *devolution of, to heirs in the absence of directions by founder, on the death of last* shebait *duly appointed by him—Will giving estate to idol and appointing successive executors*—De facto *appointment of* shebait—*Vested interest, principle of*—Shebait's *office and rights, nature of.*

A Hindu testator had two sons by his first wife and four sons by his second wife. In his Will he provided that all his properties would devolve on his family Deity and his second wife and two of her sons J and B would successively be executrix and executors and that his two sons by his first wife would not be appointed executors. After the death of the second wife and her sons J and B, her other two sons died, one leaving a widow Defendant No. 1. Of the two sons of the testator by his first wife one (Defendant No. 2) was living and the other had died leaving a son the Plaintiff who brought the present action for a declaration that he had a four annas share in the shebaitship *of the Deity.*

Held—*That the effect of the Will was to constitute the second wife and her sons J and B successive* shebaits *of the endowments though they were described as*

KUNJAMANI DASSI *v.* NIKUNJA BIHARI DAS.

executors in respect of the endowed property.

That the testator did not prescribe how the shebaitship *would devolve after the death of his son B. In the circumstances the devolution of the office of* shebait *follows the line of inheritance from the founder, in other words, it passes to his heirs unless there has been some usage or course of dealing which points to a different mode of devolution.*

That on the death of B the last shebait *named by the founder the office vested in the four sons of the founder then alive, namely, the two uterine brothers of B and the two sons of the founder by his first wife; and this notwithstanding the fact that the founder intended to exclude his sons by his first wife, for the heir-at-law though in terms excluded from benefit under the Will cannot be excluded from his general right of inheritance without a valid devise to some other person.*

TAGORE *v.* TAGORE (11).

That the Plaintiff had a four annas share in the shebaitship.

That the principle of vested interest while the actual enjoyment of the expected interest is postponed till the termination of the life-estate has no application to cases of the present description.

That a shebait *holds his office for life but this does not signify that he has a life-interest in the office with the remainder presently vested in the next taker. The entire office is vested in him, though his powers of alienation are qualified and restricted. The position of a* shebait *is analogous to that of a Hindu female in possession of the estate of the last full owner rather than to that of the holder of a life-estate and when a founder has given valid directions as to the devolution of the* shebaitship *as in the present case upon the death of the last* shebait *the office vests in persons who at the time constitute the heirs of the founder provided the last* shebait *has not taken it absolutely; when the office has so vested in them upon the death of each member of the group it passes by succession to his heir, subject to the important qualification that the rule —that when a worship of* thakoor *has been founded the* shebaitship *is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing or some circumstances to show a different mode of devolution—cannot be applied so as to vest the* shebaitship *in persons who according to the usages of the worship cannot perform the rights of the office.*

This was an appeal preferred on the 19th August 1912, against the decree of Babu Sripati Chatterjee, Subordinate Judge of Zilla Sylhet, dated the 1st of April 1912.

The facts of the case fully appear from the judgment.

Babus Tarakishore Choudhury and *Gopal Chundra Das* for the Appellant.

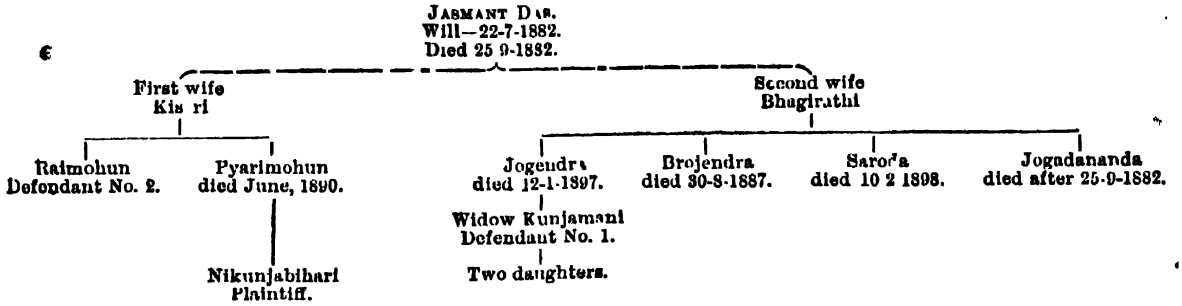
Babus Dwarka Nath Chukerbutty and *Kalikinkar Chukerbutty* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the first Defendant in a suit for declaration that the Plaintiff has a four annas share in the *shebaitship* of a deity Shyamsunder established by his paternal grandfather and for confirmation or recovery of possession of the corresponding share of the properties of the endowment. The claim was contested by the widow of the step-brother of the father of the Plaintiff. The Subordinate Judge held

(11) L. R. I. A. (Sup. Vol.) 47 (66) (1872).

that the title of the Plaintiff to the *shebaitship* was established and made a decree accordingly. On the present appeal, that decision has been assailed as founded on an erroneous construction of the Will of the founder. The relationship between the parties may be elucidated by the annexed Genealogical Table.



Jasmant Das died on the 25th September 1882 and the question in controversy turns upon the true construction of the Will he executed on the 22nd July 1882. The testator provided that all his properties would devolve on his family deity Shyamsundar and his widow Bhagirathi would be executrix in respect of the same. He further laid down that on the death of his widow, his youngest son Jagadananda, and on the death of the latter, his son Brojendra would be successively installed in the office of executor, and all acts would be done under their management. The Will concluded that his sons by his first wife were disobedient and accordingly would not be appointed executors. On the death of the testator, Bhagirathi proved his Will, but died before she could take out probate. Meanwhile, Jagadananda also died. Probate was accordingly granted to Brojendra, who himself died not many years later on the 30th August 1887. Jogendra then took out letters of administration with copy of the Will annexed, but he died on the 12th January 1897, leaving a widow Kunjamani, the first Defendant in the present suit, as also two daughters by her. Saroda died on the 10th February 1898, unmarried, like his brothers Jagadananda and Brojendra. Pyarimohun died in June 1890, leaving an infant son Nikunjabihari, who is Plaintiff in this suit.. Saroda had applied for letters of administration after the death of Jogendra, but he died before orders were passed. After this, applications were made for the same purpose by Raimohun, Kunjamani and others, but on the 3rd September 1902 this Court held that no letters of administration could be issued as the estate had been completely administered, and the only object of the rival applicants was to secure indirectly a decision upon the question of title to the *shebaitship*. In 1906, a suit was instituted by Kunjamani against Raimohun and some of the kinsmen of his father for declaration that she was *shebait* of the deity Syamsundar. The Court held that she was *shebait* to the extent of an eight annas share and made a decree accordingly. Nikunjabihari had not been made a party in that suit and he consequently instituted the present litigation on the 26th September 1910 for declaration that he himself was interested to the extent of a four annas share in the *shebaitship*. This claim was unsuccessfully contested by Kunjamani in the Court below and the substantial question in controversy now is, whether the Plaintiff has the title claimed.

We are of opinion that the effect of the Will was to constitute Bhagirathi, Jagadananda and Brojendra successive *shebaits* of

the endowment, though they are described as executors in respect of the endowed property, the testator did not prescribe how the *shebaitship* would devolve after the death of Brojendra. In these circumstances, the devolution of the office of *shebait* follows the line of inheritance from the founder, in other words, it passes to his heirs unless there has been some usage or course of dealing which points to a different mode of devolution. *Rajah Muttu* v. *Periyana* (1), *Rajah Varma* v. *Ravi Varma* (2), *Janoki* v. *Sri Gopal* (3), *Goswami Giridhari* v. *Raman Lalji* (4), *Gnanasamadha* v. *Velu* (5), *Jagadindra* v. *Hemanta Kumari* (6), *Mohan Lalji* v. *Gordhan Lalji* (7), *Sitaldas* v. *Pratap Chundra* (8), *Seoprosad* v. *Ayaram* (9) and *Mohan* v. *Madhsudan* (10). In this connection, we must bear in mind the observation of Sir Richard Couch in *Gnansamadha* v. *Velu* (5) that the rule in *Tagore* v. *Tagore* (11) is applicable to an hereditary office and endowment quite as much as to other immovable property and that the Hindu Law of inheritance does not permit the creation of successive life-estates in an endowment [see also *Monoroma* v. *Kalicharan* (12), and *Gopal Chundra* v. *Kartick Chundra* (13)]. What then is the result of the application of these principles to the case before us? The founder had nominated Bhagirathi, Jogadananda and Brojendra as successive *shebaits* and had given no further directions as to the devolution of the office thereafter. Consequently, upon the death of Brojendra the *shebaitship* vested in Raimohun, Pyarimohun, Jogendra and Saroda who were the heirs of the founder at the time. On the death of Pyarimohun the interest in the *shebaitship* vested in him passed to his son Nikunjabehari. Upon the death of Jogendra his interest devolved upon his widow Kunjamani. Upon the death of Saroda his interest in the office passed to his step-brother Raimohun. Consequently, at the date of the institution of the suit, Raimohun had a half share in the office, while Nikunjabihari and Kunjamani had one-fourth share each. But it has been argued for the Appellant that Bhagirathi, Jagadananda and Brojendra took successive life-estates in the office, with the result that the remainder at the death of the founder constituted a vested interest in the hands of his six sons. In this view, Nikunjabihari would get through his father Pyarimohun one-sixth share, while Jogendra would ultimately receive a half share by transmission to him of the interests vested in Jogadananda and Brojendra; Raimohun would thus have a third share by absorption of the interest of Saroda. We are of opinion that this contention is unsound and that the principle of vested interest while the actual enjoyment of the expected interest is postponed till the termination of the life-estate, as expounded by their Lordships of the Judicial Committee in *Rewan Prosad* v.

(1) L. R. 1 I. A. 209 (1874).
(2) L. R 4 I. A. 76: s c. I L. R. 1 Mad. 235 (1876).
(3) L R. 10 I. A. 32: s. c. I L. R 9 Cal. 766 (1882).
(4) L. R. 16 I. A. 137: s c. I. L. R. 17 Cal 3 (1889).
(5) L. R. 27 I. A. 69: s. c I. L. R. 23 Mad. 271; 4 C. W. N 329 (1899).
(6) L. R. 31 I. A. 203: s c I. L. R. 32 Cal. 129; 8 C. W N 809 (1904).
(7) L R. 40 I A. 97: s. c I. L R. 35 All. 283; 17 C. W. N. 741 (1913).
(8) 11 C. L. J. 2 (1909).
(9) I. L. R. 29 All 668 (1907).
(10) I. L. R. 32 All. 461 (1910).
(11) L. R. I. A. (Sup. Vol.) 47 (66) (1872).
(12) I L. R. 31 Cal. 166: s. c. 8 C. W. N. 278 (1903).
(13) I. L. R. 29 Cal. 716 (1902).

Radha Bibi (14) has no application to cases of the description now before us. No doubt, a *shebait* holds his office for life [*Rajeswar* v. *Gopeswar* (15)] but this does not signify that he has a life-interest in the office with the remainder presently vested in the next taker. The entire office is vested in him, though his powers of alienation are qualified and restricted. [Cf. *Vidyapurna* v. *Bidyanidhi* (16) where Ayyar, J., describes the spiritual head of a Mutt as a "corporation sole."] The position of a *shebait* is analogous to that of a Hindu female (widow, daughter or mother) in possession of the estate of the last full owner rather than to that of the holder of a life-estate. When a Hindu female is thus in possession she represents the estate completely and though her powers of disposition may be of a restricted character, no one else has a vested interest in the estate during her life-time. Similarly, when a founder has given valid directions as to the devolution of the *shebaitship*, as in the present case upon the death of the last *shebait*, the office vests in persons who at the time constitute the heirs of the founder; provided the last *shebait* has not taken it absolutely; when the office has so vested in them, upon the death of each member of the group, it passes by succession to his heir, subject to the important qualification formulated by the Judicial Committee in *Mohan Lalji* v. *Gordhan Lalji* (7), namely, that the rule that when a worship of a *thakoor* has been founded, the *shebaitship* is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or there being some evidence of usage, course of dealing or some circumstances to show a different mode of devolution cannot be applied so as to vest the *shebaitship* in persons, who according to the usages of the worship, cannot perform the rights of the office. We hold accordingly that on the death of Brojendra, the last *shebait* named by the founder, the office vested in the four sons of the founder then alive; and this, notwithstanding the fact that the founder intended to exclude his sons by his first wife for as Willes, J., said in *Tagore* v. *Tagore* (11), the heir-at-law, though in terms excluded from benefit under the Will cannot be excluded from his general right of inheritance without a valid devise to some other person. We may add that precisely the same result follows, if we hold, on the authority of the decision of the Judicial Committee in *Tripurari* v. *Jagat Tarini* (17) that the *shebaitship* vested absolutely in Brojendra, and, on his death, devolved on his heirs, namely, his four surviving brothers, Raimohun, Pyarimohun, Jogendra and Saroda. The decree made by the Subordinate Judge correctly determines the rights of the parties and as no question of limitation really arises on the evidence, that decree must be affirmed.

The result is that the appeal is dismissed with costs. We assess the hearing-fee at ten gold mohurs.

Appeal dismissed.

(7) L. R. 40 I. A. 97 : s. c. I. L. R. 35 All. 283 ; 17 C. W. N. 741 (1913).
(11) L. R. I. A. (Sup. Vol.) 47 (66) (1872).
(14) 4 M. I. A. 137 (1846).
(15) I. L. R. 35 Cal. 266 : s. c. 12 C. W. N. 323 (1908).
(16) I. L. R. 27 Mad. 435 (442) (1903).
(17) L. R. 40 I. A. 37 : s. c. I. L. R. 40 Cal. 274 ; 17 C. W. N. 145 (1912).

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 3841 OF 1912.

MOOKERJEE, J.
CHAPMAN, J.
1914,
Heard,
4, December.
1915,
Judgment,
28, April.

NAGENDRA MOHON ROY and anr., Plaintiffs, Appellants,
v.
PYARI MOHON SAHA and ors., Defendants, Respondents.

[*Estates Partition Act (V, B. C., of 1897), sec. 99—Section reproducing provision of old Act already interpreted by Courts in a particular sense—Interpretation to be taken as approved by legislature—Lease granted of share held in severalty by private partition if may be avoided by another co sharer to whom lands allotted on partition by Collector—"Common tenancy," what is—Pleadings and proof variance between.*

Sec. 99 of the Estates Partition Act applies only where the lands are held jointly by the proprietors and not in severalty in pursuance of a private arrangement between the parties.

The decision in AHMEDOOLLAH v. ASRUFF HOSSAIN (4) *which was followed in* HRIDOYNATH *v.* MAHABATANESSA (3), *is not, as is assumed in* JAY SANKARI GUPTA *v.* BHARAT CHANDRA BARDHAN (1), *inconsistent with and has not been overruled in effect by the decision of the Judicial Committee in* BAIJNATH *v.* RAMOODEEN (11). *The lands in* AHMEDOOLLAH *v.* ASRUFF HOSSAIN (4) *were held in severalty, while the lands in* BAIJNATH *v.* RAMOODEEN (11) *as in* JAY SANKARI *v.* BHARAT CHANDRA (1) *were held in common tenancy.*

Where a section of an Act, which has received a judicial construction, is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of the construction.

(1) I. L. R. 26 Cal. 434: s. c. 3 C. W. N. 209 (1899).
(3) I. L. R. 20 Cal. 285 (1892).
(4) 13 W. R. 447 (1870).
(11) L. R. 1 I. A. 105 (1874).

IN EXP CAMPBELL (8) *followed.*

The fact that the allegations of the Defendants in a suit for ejectment were found to be not true does not prevent them from contending that on the facts found, the Plaintiff's claim for ejectment must fail, when it appeared that each party had failed to realise the legal effect of the facts alleged by him.

This was an appeal from a decree of Babu Tarak Chandra Das, Subordinate Judge, Dacca, dated 31st August 1912, reversing that of Babu Kedar Nath Choudhuri, Munsif, Manikgunj, dated 9th June 1911.

The facts of the case appear sufficiently from the judgment.

Sir S. P. Sinha, and *Babus Dwarka Nath Chakerburtty* and *Debendra Nath Bagchi* for the Appellants.

Sir Rash Behari Ghosh and *Babu Ramani Mohon Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff in a suit for declaration of title to land and for ejectment of the Defendants therefrom. The case for the Plaintiffs is that the disputed lands were included in a revenue paying estate owned by themselves and by their co-sharers and that the Defendants held them as a tenure under the co-sharers to whose exclusive share they had been assigned by private partition. Thereafter, on a partition of the entire estate by the Collector under the Estates Partition Act, these lands were allotted to the Plaintiffs, but they were unable to obtain possession thereof, as the Defendants set up their right to hold them as their tenure. The Plaintiffs accordingly instituted this suit to establish their title and to eject the Defendants on the ground that their

(8) L. R. 5 Ch. App 703 (1870).

tenure was operative, not upon the lands assigned to the Plaintiffs, but upon those assigned to their grantors. The Defendants denied the truth of the allegation of a prior private partition amongst the proprietors, and asserted that as their tenure was held under all the co-sharers, the Plaintiffs were not competent to avoid it. On these pleadings, the issue was raised, whether there was a private settlement among the proprietors as regards the possession of the lands of the original estate as stated in the plaint. The trial Court found on the evidence that there was a private settlement among the co-sharers of the estate whereby each of them came to be in separate possession of distinct parcels of land. The Court also found that the tenure was held not under the entire body of co-sharers but under some of them only, and that of the share owned by the Plaintiffs, one-twelfth had been derived from the grantors of the tenure. The Court thereupon held that the Plaintiffs were entitled to eject the Defendants from the remaining share of the lands. On appeal by the Defendants, the Subordinate Judge affirmed the findings of the first Court that there was a private division of the lands to which all the joint proprietors had agreed and upon which they had all acted. In this view, the Subordinate Judge held that the partition by the Collector had not affected the tenure, as the Defendants were not and could not be parties to the partition proceedings and that the Plaintiffs had taken the lands allotted to them subject to the tenure held by the Defendants. The Plaintiffs have appealed to this Court against the decree of dismissal made by the Subordinate Judge, and have contended that under sec. 99 of Act V of 1897 B. C., the lands in their hands are not subject to the tenure set up by the Defendants. In support of this view, reliance has been placed upon the decision in *Jay Sankari Gupta* v. *Bharat Chandra Bardhan* (1).

Sec. 99 of the Estates Partition Act is in these terms :—"If any proprietor of an estate held in common tenancy and brought under partition in accordance with this Act, has given his share or a portion thereof in putni or other tenure or on lease or has created any other encumbrance thereon, such tenure, lease or encumbrance shall hold good as regards the land finally allotted to the share of such proprietor and only as to such lands." It is hence essential, to make the section applicable, that the estate should be held in common tenancy. On behalf of the Appellants, it has been contended that an estate must be deemed held in common tenancy so long as any incident thereof, for example, the liability to pay government revenue, continues joint, although the lands may have been divided and are held in severalty. This contention is opposed to the decision in *Abdul Latif* v. *Amanuddi* (2), where it was held that the words "estate held in common tenancy" are used in contradistinction to an estate held in severalty among the proprietors themselves by private arrangement, as is clear from an examination of secs. 5, 7, 63, 76 and 79 of the Estates Partition Act. This decision is in conformity with the earlier case of *Hridoynath* v. *Mahabatanessa* (3), which interpreted the corresponding section of an earlier Statute. (Sec. 128 of Act VIII of 1876 B. C.). An examination of the decision in *Hridoynath* v. *Mahabatanessa* (3) shows, again, that the view there taken was in accord with a long line of authorities decided under the

(1) I. L. R. 26 Cal. 434 : s c. 3 C. W. N. 209 (1899).
(2) 15 C. W. N. 426 (1911).
(3) I. L R. 20 Cal. 285 (1892).

corresponding provisions of Reg. XIX of 1814 : *Ahmedoollah* v. *Asruff Hossain* (4), *Abhoy Charan* v. *Hurinath* (5) and *Jogeswar* v. *Bisweswar* (6). The position therefore, is that under the Estates Partition Act, 1876, this Court, on an elaborate review of the previous state of the law, came to the conclusion, in *Hridoynath* v. *Mahabatanessa* (3) that the principle embodied in sec. 128 was applicable, only where the lands of the estate were not held in severalty. The legislature, in 1897, proceeded, presumably with full knowledge of the judicial interpretation of sec. 128, to reproduce its provision without any variation as sec. 99 of Act V of 1897. The inference seems irresistible that the judicial interpretation of sec. 128, to which we have referred, correctly represented the intention of the Legislature; for it is a well-settled principle of construction that the Legislature is presumed to know not only the general principles of law but the construction which the Courts have put upon particular statutes. In the words of Lord Campbell, C. J., in *Mansell* v. *Queen* (7) and James, L. J., in *Exp. Campbell* (8), "where a section of an Act which has received a judicial construction, is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of that construction." The inference is, therefore, perfectly legitimate that the Legislature has, in the new Act of 1897, adopted the settled judicial construction which is thereby sanctioned and intended to be continued in force. *Jogendra Chandra* v. *Shyamdas* (9). We hold accordingly, on the authority of the decision in *Hridoynath* v. *Mahabatanessa* (3), which has been accepted as good law applicable to Act V of 1897, in *Aimanuddin* v *Nabin Chandra* (10) and *Abdul Latif* v. *Amanuddi* (2), that sec. 99 applies only where the lands are held jointly by the proprietors and not in severalty in pursuance of a private arrangement between the parties. This view is not opposed to the decision in *Jay Sankari* v. *Bharat Chandra* (1), where the lands were held not in severalty but in common tenancy. In these circumstances, it was ruled, on the authority of the decision of the Judicial Committee in *Baijnath* v. *Ramoodeen* (11), that when on partition by the Collector, any land of an undivided joint estate which had been encumbered by any co-sharer was allotted to any other co-sharer, the latter took it free from the encumbrance so created. But we may observe that the decision in *Ahmedoollah* v. *Asruff Hossain* (4) which was followed in *Hridoynath* v. *Mahabatanessa* (3), is not, as is assumed in *Jay Sankari* v. *Bharat Chandra* (1), inconsistent with and has not consequently been overruled in effect by the decision of the Judicial Committee in *Baijnath* v. *Ramoodeen* (11). As explained in *Hridoynath* v. *Mahabatanessa* (3) which was not brought to the notice of the Court in *Jay Sankari* v. *Bharat Chandra* (1), the lands in *Ahmedoollah* v. *Asruff* (4) were held in severalty, while the lands in *Baijnath* v. *Ramoodeen* (11) were held in common tenancy. This distinction explains the cases of *Venkatarama* v. *Esumsa* (12), *Baikuntha Nath* v. *Sheikh Nura* (13),

(1) I. L. R. 26 Cal. 434 : s. c. 3 C. W. N. 209 (1899).
(2) 15 C. W. N. 426 (1911)
(3) I. L. R. 20 Cal. 285 (1892).
(4) 13 W. R 447 (1870).
(5) I. L. R. 8 Cal. 72 (1881).
(6) 12 C L. R. 281 (1883).
(7) 8 E. & B. 54 (73) (1857).
(8) L. R. 5 Ch. App. 703 (1870).
(9) I. L. R. 36 Cal. 543 (546) (1909).
(10) 11 C. L. J. 95 (1909).
(11) L R. 1 I. A. 106 (1874).
(12) I. L. R. 33 Mad. 429 (1909).
(13) 6 L. C. 199 (1913).

Brojonath v. *Dinesh Chandra* (14) and *Tarini Kanta* v. *Ishur Chunder* (15) where the decision in *Jay Sankari* v. *Bharat Chandra* (1) was followed. In the case before us, the Courts below have concurrently held that the lands were, under private arrangement, held in severalty and not in tenancy in common, consequently sec. 99 of Act V of 1897 has no application. The inference follows that the Plaintiffs have taken the disputed lands subject to the tenure of the Defendants and are not entitled to eject them.

It has finally been argued that the Defendants should not be allowed to defeat the claim of the Plaintiffs when it has been found that their allegation is untrue on the facts. In our opinion there is no force in this contention. No doubt as was laid down in the cases of *Sibkrishna* v. *Abdul* (16), *Ramdoyal* v. *Junmenjoy* (17) and *Balmukund* v. *Bhagvandas* (18) a Plaintiff cannot be allowed to abandon his own case, adopt that of the Defendant and claim relief on that footing. Here however what has happened is that each party failed to realise the legal effect of the facts alleged by him; the parties went to trial on the substantial issue in the case, namely, whether or not there had been a private partition of the lands prior to the partition by the revenue authorities and whether the tenure of the Defendants was created by the entire body of landlords or by some alone of the share-holders in respect of specific lands allotted to them. This question has been answered against the Defendants and in favour of the Plaintiffs, but that does not prevent the Defendants from contending that even on the facts found the claim for ejectment cannot be sustained.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) I. L. R 26 Cal. 434: 3 C. W. N. 209 (1899).
(14) 9 I. C. 67 (1910).
(15) 18 I. C. 240 (1912).
(16) I. L. R. 5 Cal. 602 (1879).
(17) I. L. R. 14 Cal 791 (1887).
(18) 15 Bom L. R 209 (1912).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 780 AND 894 TO 896 OF 1912.

N. R. CHATTERJEA, J.	ANANDA MOHAN SAHA and anr., Defendants Nos. 1 and 2, Appellants,
MULLICK, J.	
1915,	
Heard,	*v.*
29, April.	GOBINDA CHANDRA RAY CHUDHURY and ors., Plaintiffs, Respondents.
Judgment,	
2, September.	

Transfer of Property Act (IV of 1882, secs. 2 (c) and 108 (j)—Lease from year to year in existence from before 1882—Transferability—Custom—Onus—Sub-lease, transfer by way of—Landlord if may recover khas possession.

A lease of homestead land from year to year which was in existence before the passing of the Transfer of Property Act is not governed by that Act and sec. 108, cl. (j) of that Act does not make it transferable absolutely or by way of sub-lease.

Such leases are not transferable except by custom, the burden of proving which is on the party who sets it up.

Whether a tenant from year to year had power before the Transfer of Property Act to transfer the holding by way of sub-lease or not, where it appeared that the tenant had abandoned the lands without arranging for payment of rent, and no rent had been paid by him since the ijara, *and that the transaction was in substance though not in form an assignment.*

Held—*That the landlord was entitled to recover* khas *possession of the land.*

ANANDA MOHAN SAHA *v.* GOBINDA CHANDRA RAY CHOUDHURY.

This was an appeal preferred on the 10th April 1912 against the decree of A. H. Cuming, Esq., District Judge of Zilla Tipperah, dated 3rd January 1912, affirming the decree of Babu Shyama Charan Chakrabarty, Munsif, 3rd Court, Brahmanberia, dated the 16th March 1911.

The facts of the case will appear from the judgment.

Sir Rash Behary Ghosh and *Babus Gobinda Chandra Dey Roy* and *Jotindra Mohon Ghose* for the Appellant.

Mr. B. Chakrabarty and *Babus Dwarka Nath Chakravartty* and *Gopal Chandra Das* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

These appeals arise out of suits for ejectment of the Defendants from certain homestead lands in the town of Brahmanberia. The suits were decreed by the Court of first instance, and the decrees were confirmed on appeal by the lower Appellate Court. The Defendants Nos. 2 and 3 have appealed to this Court.

The Plaintiffs alleged that they acquired a right to the lands in suit by purchase from one Kamini Kumar Das who had obtained two *mokurari* leases from one Chanu Mia and others, the owners of the ⅓rd share of the *taluks* Manik Bibi and Asadulla Bibi Somera within which the lands were situate. The Defendants denied that the lands appertained to the *taluks* Manik Bibi and Asadulla Bibi Somera as alleged by the Plaintiffs, and asserted that they appertained to the ⅔rd share of *taluk* Asadulla Bibi Somera owned by Haidar Ali and others, the lands of which share are found to be distinctly demarcated from the ⅓rd share and to form a separate estate. They further pleaded that the persons who granted the *mokurari* leases were not the sole owners of the *taluks* to which the lands were alleged by the Plaintiffs to appertain. Those questions however have been decided by the Courts below in favour of the Plaintiffs and we agree with the Courts below on these points.

The Defendants Ananda Mohan Saha purchased the lands in dispute in suits Nos. 141 and 143 in his own name and took leases in the other two cases in the *benami* of the Defendant Bepin from the former tenants. The defence substantially was that the former tenants had permanent and transferable right to these lands, and that in any case, a 15 days' notice to quit was not sufficient in law to determine the tenancies. Some other pleas were taken in defence, but they were overruled, and the findings on these points have not been challenged in appeal.

The questions for consideration in these appeals are, *first*, whether the tenancies were permanent, *second*, even if not permanent whether they are transferable, *third*, even if they are transferable whether a 15 days' notice to quit is sufficient in law to determine the tenancies, and *lastly*, whether disclaimer of title amounts to waiver of notice.

The first question should be dealt with in each of the cases separately. In Appeal No. 780 (Suit No. 141) the land was purchased by Ananda from one Chandra Mohon, the Defendant No. 2, in 1904. The land was described as a raiyati *jote* appertaining to *taluk* Asadulla Bibi Somera (without mentioning the name of the landlord) and bearing a rent of Rs. 1-12. The Court of first instance after a full discussion of the evidence found that the land did not appertain to any *jama* of Rs. 1-12, nor was it held under Haidar Ali and others the owners of ⅔rd share of *taluk* Asadulla as stated by the Defendants, but appertained to a *jama* of Rs. 2-12 held

under *taluk* Manik Bibi, and that although the tenancy had been the subject of inheritance from father to son, it was not proved that it was held at an uniform rent or that it had been the subject of transfers, or that there were any substantial structures on the land, there being only a tin-shed on the land before the purchase by Ananda. Ananda erected two other tin-sheds and a pucca room after his purchase in 1904, but this was not to the knowledge of the Plaintiff's lessors. The Defendant is said to have obtained permission to erect the structures on the land from Haidar Ali the owner of the ⅔rd share of the *taluks*, which had nothing to do with the ⅓rd share of the *taluks* to which the lands really appertain. The Court of appeal below though it did not discuss the questions fully, agreed with the conclusions arrived at by the Court of first instance on the points. The learned Judge, it is true, refers to the fact of the origin of the tenancy not being known, as if it was against the permanency of the tenancy, but having regard to the other facts found by the Courts below, we are unable to hold that the Courts below were wrong in holding that the tenancy of Chandra Nath was not a permanent one.

In Appeal No. 894 (Suit No. 142) the land was held by one Sohagi for about 30 years, and Ananda obtained an *ijara* lease for 100 years from her in the name of the Defendant No. 4 Bepin. The Court of first instance held that it was practically a sale, there being no rent reserved and no mention of any reversion of the land to her at any time. It was said that one Chandrakala the paternal aunt of Sohagi made a gift of the land to her in 1901. But it has been found against the Defendants. It has also been found that there are no circumstances justifying the presumption that the tenancy was a permanent one.

In Appeal No. 896 (Suit No. 144) also, the land was taken in *ijara* lease for 100 years from the heirs of one Ram Prosad. The holding is described as *raiyati basat bhita*, no rent is reserved and no reversion is mentioned. The grantors of the *pottah* abandoned the homesteads immediately after the grant making no provision for the landlord's rent and as in the last case the *pottah* is virtually a deed of conveyance. The holding was inherited by the heirs of Ram Prosad, but no other circumstance has been found which may lead to a presumption of permanency.

In Appeal No. 895 (Suit No. 143) the land was held by Ram Prosad and was purchased from his son and nephew in 1907 by the Defendant Ananda Mohan. The *kobala* states that it was a *mourasi mokurari jama* standing in the name of Ram Prosad bearing a rent of 14 as. payable to one Chandra Nath Saha. Some rent-receipts were filed to show that Ram Prosad held the land as a *mokurari jama*. The rent-receipts were missing from the record, and *secondly*, evidence was adduced with regard to these receipts. The receipts were filed only from the year 1295 and none of them granted by the *malik* Channu Miah and others. The Munsif discussed these receipts and the collection papers and disbelieved them. He further found that there was a *mandir* on the land but it was a dilapidated structure and there was no satisfactory evidence that the tenants built the *mandir*, and came to the conclusion that the tenancy had not been proved to be a permanent one.

The Munsif found on a detailed consideration of the evidence that the defendants failed to prove that the tenancies were permanent. The learned District Judge did not discuss the evidence fully, but agreed with the findings arrived at by the Munsif. The judgment being one

of affirmance, we are not disposed to remand the case. The Defendants, it is to be observed, not only denied the title of the Plaintiffs and their lessors (the true owners), but set up tenancies under Haidar Ali and others who are found to have no connection with the lands, and actually produced false receipts to show payment of rent to them.

The tenancies not being permanent, the next question is whether they are transferable. If the tenancies are governed by the Transfer of Property Act, then there is no doubt that the interest of the lessee can be transferred absolutely or by way of sub-lease as laid down by sec. 108, cl. (j) of that Act. The tenancies however were created before the passing of the Transfer of Property Act. Sec. 2, cl. (c) of that Act lays down that nothing in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force or any relief in respect of such right or liability. We think that in the present cases, the legal relation between the Plaintiffs' lessors and the Defendants' vendors was constituted before the passing of the Transfer of Property Act. The provisions of that Act therefore do not apply to the present case, and sec. 108, cl. (j) of the Act does not affect the rights and obligations of the parties. See *Madhu Sudhan Sen* v. *Kamini Kant Sen* (1) and *Hiramoti* v. *Annoda Prosad* (2). The tenancies in the present cases were tenancies from year to year before the passing of the Act and it is contended on behalf of the Appellant that they are tenancies from year to year subsequent to the passing of the Act. In the first of the two cases cited above the tenancy was also from year to year, and in the second it was a non-permanent tenure and therefore appears to have been from year to year. It was held in those cases that the provisions of the Transfer of Property Act did not apply. That being so, the rights of the lessee have to be determined with reference to the law as it stood before the passing of the Transfer of Property Act. Now, previous to the Transfer of Property Act tenancies from year to year of homestead lands were not transferable except by custom. In the case of *Madhu Sudhan Sen* v. *Kamini Kant Sen* (1) cited above Maclean, C. J., observed (Mitra, J. concurring): "That the incident of non-transferability was common to ordinary tenancies of agricultural lands and tenancies from year to year of homestead land before the passing of the Transfer of Property Act, was held in *Hari Nath* v. *Raj Chandra* (3); and we have taken the same view in Second Appeals Nos. 339, 448, 449 and 450 of 1903 decided on the 3rd April 1905. The party alleging transferability had to prove a custom." The same view was taken in *Hanuman Prasad Singh* v. *Deo Charan Singh* (4) and *Hiramoti* v. *Annoda Prasad* (2) referred to above.

The tenancies therefore were not transferable except by custom. The Court of first instance found that the custom of transferability was not proved. The learned District Judge holding that the onus was upon the Plaintiffs to prove a custom of non-transferability found that the Plaintiffs failed to prove a custom that such tenancies are not transferable. The learned Judge is obviously wrong as the onus is upon the Defendants who set up

(1) I. L. R. 32 Cal. 1028: s. c. 9 C. W. N. 895 (1905).
(2) 7 C. L. J. 558 (1908).
(3) 2 C. W. N. 128 (1897).
(4) 7 C. L. J. 306 (1903).

the custom of transferability to prove that it existed and it is found by the Munsif that the evidence on both sides negatived the existence of such custom before 1882 in respect of homestead land. It is unnecessary therefore to remand the cases for a finding on the point by the lower Appellate Court.

It is contended that in two of the cases there were no transfers by way of sales, the Defendants in those two cases having obtained *ijara* leases, and that there was nothing in the law previous to the Transfer of Property Act to show that a tenant could not sub-let. But assuming that homestead lands held from year to year could be transferred by way of sub-letting before the passing of the Transfer of Property Act, we think the so-called leases are really sales of the lease-hold interest. The *ijaras*, we have seen, are stated to be for one hundred years, for a large amount of consideration, no rent is reserved and there is no mention of reversion of the land to the grantors at any time. There is no provisions for payment of rent to the landlord. It may be said that a term being mentioned there was no absolute transfer of the tenant's interest. But the Munsif has found (and the finding has not been displaced on appeal) not only that the so-called *ijara* leases are really sales out and out from the terms of the documents, but that the tenants have abandoned the lands without arranging for payment of rent and no rent has been paid by the tenants (grantors of the *ijaras*) ever since the *ijaras*. Upon the facts found and looking at the substance of the transactions, we are of opinion that the *ijaras* were a mere device that they were really assignments, and that in any case there has been abandonment of the lands by the tenants.

We are accordingly of opinion that the Defendants did not acquire any right under the conveyances in two of the cases or under the so-called *ijara* leases in the two others.

That being so, they are liable to be ejected as trespassers and in this view it is unnecessary to consider the question raised on behalf of the Appellants, *viz.*, whether a 15 days' notice to quit is sufficient, or the question whether a disclaimer of title amounts to waiver of notice raised on behalf of the Respondents.

The result is that the appeals are dismissed with costs.

Appeals dismissed.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 921 OF 1915.

CHITTY, J. WALMSLEY, J. 1915, Heard, 14 and 15, December. Judgmentt, 20, December.	P. L. CAUSLEY, Appellant, *v.* KING-EMPEROR, Respondent.

Indian Penal Code (Act XLV of 1860), sec. 465 —Forgery—Giving a false name and address in a certificate of purchase at the time of purchasing arms.

The accused purchased revolvers and cartridges from three firms in Calcutta and on each occasion signed the certificate (which according to the usual procedure in respect of the sale of arms and ammunition a purchaser is required to sign at the time of purchase) in a false name and giving a false address. These certificates are required for the identification of the purchaser and the weapons purchased. The accused purported to purchase the revolvers and cartridges for his own use. It was admitted that if he had given his real name and address he would have had no difficulty in purchasing the arms and ammunition :

Held—*That it may be that the action of the accused was not dishonest within*

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the meaning of secs. 23 and 24, I. P. C., but he acted fraudulently and the signing of the certificates in a false name and giving a false address amounted to forgery on the part of the accused within the meaning of secs. 463 and 464, I. P. C.

This was an appeal preferred on the 1st November 1915, against the order of J. Camell, Esq., Officiating Presidency Magistrate, Calcutta, dated the 16th September 1915.

The facts will appear from the judgment of the Magistrate, the material portion of which is as follows :—

"The accused who resided at 7, Marsden Street was originally charged under secs. 465, 471 and 417, I. P. C., with committing forgery on April 1st at Calcutta in respect of a certain certificate of purchase from Rodda & Co., of a revolver and cartridges and at the same time and place with fraudulently or dishonestly using the said forged document as genuine and with cheating Rodda & Co., by deceiving them and fraudulently or dishonestly inducing them to accept the said certificate.

"There were three further similar charges in respect of dealings with Walter Locke & Co. and Lyon & Lyon, both of Calcutta, on July 1st and July 8th respectively.

"During the argument on the case, an objection was raised by the defence to the joinder of the charges under sec. 471, I. P. C., and the prosecution rightly abandoned those charges.

"As I had grave doubts in view of the ruling in *Raman Bahari Das* v. *Emperor* (4) whether the three charges under sec. 465, I. P. C., and the three charges under sec. 417, I. P. C., could be joined in one trial, before passing judgment I intimated that I intended striking out the charges under sec. 417, I. P. C., and enquired of the defence whether they had any objection to my doing so. Learned Pleaders for the defence replied in the negative and that they did not desire any of the prosecution witnesses to be recalled for cross-examination, or to call any witnesses for defence.

"I proceed to deal with the three charges under sec. 465, I. P. C. The case for the prosecution is that on April 1st 1915, the accused purchased a revolver and 50 cartridges from Rodda & Co. and at the time of the purchase the accused signed a certificate of purchase (Ex. 3) in the name of C. Owtwaite, giving the address 24/1, Ripon Street [Ex. 3 (1)]. This signature and address were inserted by the accused in the upper form of the certificate, which is filled when a purchaser purchases arms and ammunitions for his own use : on July 1st the accused purchased a revolver and 100 cartridges from Walter Locke & Co. and similarly signed the upper form of the certificate (Ex. 1) in the name of P. L. Monnier, 56, Ripon Street, [Ex. 1 (1)] : on the 8th July the accused purchased a revolver and 25 cartridges from Lyon & Lyon and similarly signed the upper form of the certificate (Ex. 6) in the name of R. Shillingford, Banwali Indigo Factory, Bhagalpore; [Ex. 6 (1)]. All three firms understood that the accused purchased the arms and ammunition for his own use—further there was a verbal representation to Rodda & Co. and Lyon & Lyon that the purchases were for his own use. All three firms say that if they knew the purchases were not for the personal use of the accused, they would not have sold the arms and ammunition to him on those certificates, and would have required a letter of authority from the true purchaser, and that in fact they were deceived. On the other hand the firms

(4) I. L. R. 41 Cal. 722 : s. c. 18 C. W. N. 1152 (1913).

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admit that if the accused had given his real name and address he would have had no difficulty in purchasing the arms and ammunition from them.

"It is in respect of the entries [Exs. 3 (1), (1) and 6 (1)] that the accused is now charged with forgery under sec. 466, I. P. C.

"The accused has pleaded not guilty. The prosecution has established beyond doubt that the accused purchased the several revolvers and lots of ammunition mentioned above and made the entries [Exs. 3 (1), (1) and 6 (1)] on the said dates. C. Owtwaite of 24/1, Ripon Street and Emile Monnier of 59, Ripon Street (there being no Monnier at 56, Ripon Street) have been called and prove that they never authorised the accused to purchase the revolvers or cartridges in question or sign their names, and that they never received the said goods. R. Shillingford of Bhagalpore has not been called and there is nothing to shew whether there is any such real person.

"The procedure followed in respect of the sales of arms and ammunition is shortly as follows: a purchaser is required to sign a certificate of purchase, giving his address in one of the two forms appearing in the certificate—if the arm or ammunition is for his own use, in the upper one, if for the use of another in the lower one. The sale is then entered in the books of the firm and transcripts of all sales are sent monthly to the Arms Act Department of the Police. The Police then proceed to verify the sale. If the verification is satisfactory, they notify the Customs authorities and thereupon the firm is entitled to a remission of the deposit made in respect of the particular arm on importation (15— for each revolver) less an *ad valorem* import duty—if the verification is unsatisfactory the whole deposit is forfeited. The said firms have received intimation that the deposits in respect of the revolvers in question have been forfeited. I accept the evidence for the prosecution as correct, nor has it been seriously challenged.

* * * * *

"I convict the accused under sec. 465, I. P. C., in respect of each of the said three charges and sentence him to eight months' rigorous imprisonment in respect of each charge to run consecutively, making two years' rigorous imprisonment in the aggregate.

Mr. Norton and *Babu Santosh Kumar Bosu* for the Appellant.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows:—

In this case the Appellant P. L. Causley was found guilty on three charges under sec. 465, I. P. C., and sentenced to two years' rigorous imprisonment, *i.e.*, 8 months on each charge. The Appellant is stated in the Magistrate's judgment to be a lad of 16 or 17 years of age. We are told by his mother that he is only 15. The appeal was admitted on the question of sentence, but has been argued before us also on the question of law arising in the case. The facts are not in dispute. They are fully set out in the judgment of the Magistrate and need not be re-stated here. The question is whether the signing of the certificates in a false name, and giving in each case an address, which was not his, amounts to forgery on the part of the Appellant. It may be that the action of the Appellant was not "dishonest" taking that word in the sense ascribed to it by the Indian Penal Code, secs. 23 and 24. There can however be no doubt he acted "fraudulently." His intention was undoubtedly to deceive both the firms, who sold him these revolvers and ammunition,

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Opening of the Patna High Court Building.

The Patna High Court building was formally opened on the 3rd instant by His Excellency the Viceroy in the presence of a distinguished gathering. It is intended that the new High Court will commence its sittings on the 1st March next. It was about two years ago that the Viceroy laid the foundation stone of this building and it has been completed inspite of the abnormal conditions consequent on the war. The people of Bihar owe much to Lord Hardinge who has not only given it the status of a separate province but has also equipped it with a separate High Court which, as His Excellency puts it, has always been regarded as the outward and visible sign of the full development of a Province. His Excellency hopes that the duplication of Courts will enable both (the Calcutta and the Patna High Courts) to keep in the most intimate touch with the local conditions that prevail within their respective jurisdictions and also to exercise a close supervision and control over the proceedings of the subordinate judiciary. We also earnestly hope that the new Court in the sister province will fully maintain the traditions of the parent Court in Bengal and will command the confidence of the people amongst whom its work will be done and that the work of the new Court will be inspired with wisdom, justice and mercy. Elsewhere we publish the text of His Excellency the Viceroy's speech. We also publish a notice of the Registrar on the Appellate Side regarding the transfer of cases pending in the Calcutta High Court to the Patna High Court.

Court of Appeal and findings of fact.

The case of *Lalljee Mahomed* v. *Jivanji Gazdar* reported in this issue at p. 335 is of importance on the question of the competence of the Court of Appeal to reverse findings of fact. It has never been questioned that a Court of Appeal is both a judge of facts and law. But His Lordship the Chief Justice very rightly points out that the Court of Appeal would be reluctant to reverse the findings of the Trial Judge unless it was of opinion that the Court below was clearly wrong in its findings of fact. So there is practically no difference of opinion between His Lordship the Chief Justice and his learned colleagues regarding the propositions of law. Their Lordships differed only with regard to the question whether the finding of fact by the learned Trial Judge which went to the root of the case was supported by the evidence on the record or not. His Lordship the Chief Justice was of opinion that he was not prepared to hold that it was not, while Mr. Justice Woodroffe and Mr. Justice Mookerjee took a contrary view. Mr. Justice Mookerjee has reviewed a long series of cases in support of the proposition that it is always within the competence of the Appellate Court to interfere as much on a question of fact as on one of law. But the limitations within which a Court of Appeal would ordinarily interfere have been very well put by Sir George Farwell in the recent judgment of the Judicial Committee in the case of *Bombay Cotton Manufacturing Company* v. *Matilal Shivlal*, 19 C. W. N. 617 at p. 620 : s. c. I. L. R. 39 Bom. 386 at p. 397.

The following extract so very lucidly states the law on the subject that it would always be

useful to refer to it. "The Judge of first instance has heard the evidence which depends on the credit to be attached to the two sons of Dwarkadas, on the Appellant's side, and Dani on the Respondent's; he has stated that he has seldom seen in the box 'such serviceable, clear-headed and absolutely truthful witnesses' as the two sons or a more 'thoroughly unscrupulous, untrustworthy, and untruthful man' than Dani, and he finds that the transaction was a deliberate fraud on the Appellants. The Appellate Court refused to accept as conclusive the judgment of the lower Court as to the veracity of the witnesses. It is doubtless true that on appeal the whole case, *including the facts*, is within the jurisdiction of the Appeal Court. But generally speaking it is undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases when the issue is simple and depends on the credit to be attached to one or other of conflicting witnesses. Nor should his pronouncement with regard to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. In making these observations their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of the evidence. They only wish to point out that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the verdict of a judge trying the case should not be lightly disregarded."

Enrolment of legal practitioners in the Patna High Court.

The provisions in the rules of procedure for the Patna High Court in regard to the admission of Advocates, Attorneys, Vakils and Mukhtears will be practically the same as the rules at present in force in the Calcutta High Court. In addition they will also provide that any Advocate, Attorney, Vakil or Mukhtear whose name is entered on the rolls of the Calcutta High Court and who is entitled to practise there at the time when the High Court at Patna opens will be entitled to practise in and have his name entered on the rolls of the High Court at Patna. Before being allowed to practise in the latter High Court an Advocate, Attorney, Vakil or Mukhtear entitled to practise in the Calcutta High Court must present an application in writing to the Registrar of the Patna High Court accompanied by any certificates necessary to show that his name is on the rolls of the Calcutta High Court and that he is entitled to practise there.

It will further be provided in the rules of the Patna High Court that before the long vacation of 1917 any Advocate, Attorney, Vakil or Mukhtear of the Calcutta High Court whose name has been entered on the rolls of the Patna High Court must, if he wishes to continue to practise there, have his name removed from the rolls of the Calcutta High Court.

Memo. No. 56 H. C.

Dated Bankipore, the 29th January 1916.

The above communique regarding the admission of Advocates, Attorneys, Vakils and Mukhtears to practise in the High Court at Patna is forwarded to the Editor of the *Calcutta Weekly Notes* with the compliments of the undersigned.

W. Coutts,
Officer on special duty in connection with the Patna High Court.

Counsel of one High Court appearing in another.

Regarding the observations from the Bench of the Allahabad High Court that the Calcutta High Court has been reluctant to allow counsel from other High Courts to appear before the Hon'ble Judges here we have made further enquiries and we may state that such refusal has been rather an exception than a rule in the Calcutta High Court. The refusal of Mr. Alston was an individual act of Mr. Justice Norris. No doubt the Judge or the Judges presiding over a Court have an absolute discretion in either allowing or refusing leave to counsel not on the rolls of the Court to appear. But precedents in this respect in the Calcutta High Court have rather been in favour of granting such leave than otherwise. We mentioned last week that Mr. Rattigan of the Punjab Bar had thrown up his junior brief in the Hyderabad diamond (Jacob's) case apprehending opposition from the local Bar. We have looked up the records in this connection and we find that the Calcutta Bar far from opposing his proposal to appear with Mr. Inverarity as his junior gave him an assurance that he was equally welcome with his leader from Bombay to appear in the case. It is to be noted that several well-known members of the Calcutta Bar such as the late Mr. Manamohun Ghose, Mr. C. P. Hill and Mr. W. C. Bonerjee were also engaged to appear with Mr. Inverarity to

lefend Jacob. Still we find that the Calcutta Bar welcomed a junior from the Punjab and a senior rom the Bombay Bar to appear in the Calcutta High Court Sessions along with the members of the Calcutta Bar. Mr. Rattigan's own letter has been preserved which not only gives the lie o the reports in circulation but is full of appreciation of the generous treatment that he received at the Calcutta Bar. In the Bombay High Court, the members of the Calcutta Bar, however, received a very different treatment in *Tilak's* sedition trial. In a still more recent case Mr. Mc-Inerny of the Karachi Bar was allowed o appear in 1911 in the Calcutta High Court nstructed by a Calcutta solicitor even in the bsence of any local senior or junior member of he Calcutta Bar with him (see *McInerny* v. *Secretary of State for India*, I. L. R. 38 Cal. 97). This we are sure will sufficiently dispel he erroneous impression that has got abroad rom the one unfortunate instance of Mr. Alston, hat in the Calcutta High Court members of the Bar from other provinces are apt to receive unenerous treatment.

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n Civil action for conspiracy, is malice essential?

In an action for conspiracy to procure a breach f contract is malice an essential ingredient of he cause of action? This question has been ery exhaustively dealt with by Beaman, J., in case recently decided by him (*Khimji assonji* v. *Narsi Dhanji*, I. L. R. 39 Bom. 682). he judgment delivered by his Lordship is in any respects interesting and instructive though he conclusion arrived at by him seems to be pposed to the accepted view on the subject. t is said that it is now settled law that procuring the breach of a contract is a good cause of ction and in civil actions for conspiracy malice s not but damage is the gist of the action. This tatement of the law is founded on the dictum f Erle, J., in *Lumley* v. *Gye*, 22 L. J. Q. B. 63, which has been made the foundation of the ater law which may now be taken to govern in England all cases of the kind whether put on he ground of conspiracy in the old sense or nerely upon the ground of procuring the breach of a contract.

As Beaman, J., observes, surveying the history of the law of conspiracy since its origin in the first writ which ever issued on such an event in the Civil Courts at the end of the thirteenth century up to such cases as those of *Allen* v. *Flood* (1898 A. C. 1) and *Quinn* v. *Leathem* (1901) A. C. 495, it might be doubted whether any action for conspiracy could have been maintained consistently with its historical development and theoretical origin without an ingredient of malice. But ever since *Lumley* v. *Gye*, mere knowledge of the existence of a contract which it was the object of the individual or of a body of conspirators to get broken has been held in law to be tantamount to malice. His Lordship has put it very happily that the term "malice" in law has long been the despair of all clear thinkers and it is probably too late now to attempt to clarify the fog which has gathered about this legal concept. On a review of the important decisions on the subject the learned Judge has sought to prove that *Lumley* v. *Gye* was wrongly decided. He says that the English Law on the subject is extremely interesting and the judgments of the numerous great Judges who took part in the decisions of such cases as *Lumley* v. *Gye* (1852, 22 L. J. Q. B. 463), *Mogul Steamship Company* v. *McGregor Gow & Co.*, 1892 A. C. 25, *Flood* v. *Jackson*, 1895 2 Q. B. 21, *Allen* v. *Flood*, 1898, A. C. 1 and *Quinn* v. *Leathem* (1901) A. C. 495, seem to invite the closest analytical scrutiny. For, it can hardly be denied that they are full of dicta which are in conflict and in no case can any of the broader generalisations to which some of our greatest Judges have committed themselves be considered as having really settled any one definite and consistent principle. The learned Judge concludes, one thing is clear and that is that *Lumley* v. *Gye* was wrongly decided. This cannot be argued now since it was explicitly approved by the House of Lords in the later cases of *Allen* v. *Flood* and *Quinn* v. *Leathem*. This much at least may be hazarded without disrespect that the universality of the rule which appears to have been established by *Lumley* v. *Gye* is questionable and that it ought not to be applied to any new set of facts without a Court being satisfied that it exactly fits them.

Coming now to the facts of the present case: The Plaintiff betrothed his son to a particular girl. The girl's father however married her to somebody else. The Plaintiff sued the husband of the girl and his sisters for damages, the case being laid in conspiracy. No malice was alleged on the part of the Defendants. The conspiracy alleged was not proved nor the fact that

the husband knew at the time of marriage of the previous betrothal.

His Lordship in holding that *Lumley* v. *Gye* did not apply, expressed himself as follows :— "It would appear from a perusal of the leading text-books that it is accepted as axiomatic that procuring the breach of a contract gives a good cause of action. I shall never be able to bring myself to believe that without the addition of other elements it does. I assume that the word procuring in this compendious phrase connotes knowledge of the existence of the contract which the defendant procures to be broken. Even so in the absence of express malice I do not think that looking at the development of the doctrine historically and theoretically that as an universal proposition is good law and true."

Government Advocate in the Patna High Court.

We understand that Mr. Manuk, Bar.-at-law, has been appointed Government Advocate in the Patna High Court. Mr. Manuk occupies a prominent position at the Patna Bar and his appointment will be welcomed by the public.

Conditions of Enrolment in the Patna High Court.

We publish in another column a communique from the Registrar of the Patna High Court about the conditions of enrolment of advocates, vakils, pleaders and muktears in the Patna High Court. It is no doubt reasonable that the new High Court should make its own rules for the enrolment of lawyers who intend to practise there. It is also desirable that lawyers in the rolls of the Patna High Court should ordinarily practise there. This object might, however, have been secured by taking a declaration from the applicants for enrolment that they would ordinarily practise in that Court. No self-respecting lawyer would have made such a declaration if he did not intend ordinarily to practise in the new Province. But to make it a condition precedent that before the Long Vacation of 1917 he must remove his name from the rolls of the Calcutta High Court to be entitled to continue on the rolls of the Patna High Court, reads as a sort of reflection on the Calcutta High Court. The United Provinces adjoin the Province of Bihar and Orissa and so do the Presidency of Madras and the Central Provinces. It is not unlikely that Advocates and Vakils of High Courts other than those of Calcutta may also apply for enrolment in the Patna High Court; in their case the communique does not state that the same condition with regard to the removal of their names from the rolls of the Allahabad High Court, the Madras High Court or the Judicial Commissioner's Court at Nagpur will be insisted on.

The High Court of Calcutta has always admitted on its rolls without any objection advocates who have been on the rolls of the Madras and Bombay High Courts without requiring them to take off their names from the High Courts where they were previously enrolled. In the High Court of Calcutta an Advocate seeking admission states in his application that he intends to practise there. The requirement that lawyers desiring to continue their practice in the Patna High Court will have to remove their names from the Calcutta or any of the other High Courts will also operate to the great prejudice especially of the junior members of the profession. It is mostly the junior Barristers and Vakils from the Calcutta High Court who will enrol themselves in the Patna High Court for improving their chances in life. If after joining the new High Court they have to take off their names after eighteen months from the High Courts where they were previously enrolled, and after two years or more they might revert to the High Courts from where they find that they were not getting on in Bihar they went. But if their names were removed from the rolls of such High Courts, they would have to pay pecuniary penalties in various ways for rejoining such Courts and joining the Bar Libraries. We are, therefore, of opinion that if the judges of the new High Court would from the Long Vacation of 1917, only take a declaration with their applications on the lines we suggest, that will answer the purpose they have in view. No senior member of the Calcutta Bar will seek enrolment by declaring that he would "ordinarily" practice in the Patna High Court unless he seriously intends doing so. We are quite sure that the Hon'ble Judges of the Patna High Court will be able to trust to the honour of the advocates and vakils of the Calcutta High Court and in framing the rules for enrolment will omit the provision for removal of names from the rolls of other High Courts and replace it by taking a declaration on the lines indicated by us. If on any occasion any special permission is sought by any member of the Calcutta Bar or Vakils, their Lordships

may in their discretion give or refuse leave as is done in the other High Courts.

VICEROY'S SPEECH.

ON THE OCCASION OF THE OPENING OF THE PATNA HIGH COURT BUILDING.

In opening the building, in which the new Court created by His Majesty for this province will begin its work within the next few weeks, I am about to perform an almost unique duty and one which I do not think has fallen to the lot of any previous Viceroy. The chartered Courts of the presidency towns are the children of the old Supreme Courts and, as such, have been sitting continuously from the days of Warren Hastings. So we can hardly look for a precedent in their case for the present ceremony. The only other existing Court established by His Majesty's Letters Patent is the High Court of Judicature for the North Western Provinces and as far as I have been able to ascertain no public ceremony marked the inauguration of that Court in the year 1866, or at any rate, if there was one, it was not performed by the Viceroy of that day. It is, therefore, my peculiar privilege to stand alone among those who have represented the Crown in the Indian Empire in presiding at the opening ceremony of a building which is to house a new chartered High Court. This is particularly gratifying to me as it permits me to witness the final steps, I may say the placing of the coping stone, of a great administrative reform which I am happy to say has been brought to its fruition before the close of my term of office and which I believe to be full of hope and promise for the future and tending towards the steady and progressive development of India in accordance with the legitimate aspirations of her people.

The new province of Bihar and Orissa, at whose birth I assisted when the announcement of its creation was made by His Majesty the King-Emperor at the Delhi Coronation Durbar, is now to receive what has always been regarded as the outward and visible sign of the full development of a province, a development to which other provinces of India has aspirations but which you are now about to see realised. I think when I look at this fine building that the people of this province may congratulate themselves in many ways on their new institution. It will be adequately and even magnificently housed and the building itself is an emblem of the great functions the Court has to discharge—great functions not only in its decrees as between man and man but as great, and perhaps even weightier, in its decision as between the individual and the State. You are also greatly to be congratulated on the personnel of the Judges of your new Court which is such as I am sure will create confidence amongst all classes. You are indeed fortunate in your future Chief Justice as Sir Edward Chamier is a lawyer of great reputation and of the ripest experience, who has won his spurs both in the Courts and on the Bench. You have in Mr. Atkinson a Judge fresh from the traditions of the Home Courts. The civilian element includes officers of wide experience of the province while in Mr. Justice Sharfuddin and Mr. Jwala Pershad you have men who were born amongst those to whom they will administer justice. The Court then will commence its work under the most favourable auspices. In one sense it reaches back in historical connection through the High Court of Calcutta to the days of Sir Elijah Impey and in another sense it is a new Court which will have its own traditions and reputation to establish and I trust and have no doubt that the traditions and reputation it will create will be such as to make it respected and honoured by the people amongst whom its work will be done.

I should like to take this opportunity of expressing my pleasure at seeing here on this occasion the Chief Justice of the Calcutta High Court, for I feel that it is a fitting occasion to acknowledge very warmly the assistance and sympathy which the Judges of that Court have so unsparingly given in solving the problems and the difficulties that have arisen in the establishment of this new Court. These difficulties have now, I hope, been successfully surmounted and we can rest assured that the duplication of Courts will enable both alike to keep in the most intimate touch with the local conditions that prevail within their respective jurisdictions and also to exercise a close supervision and control over the proceedings of the Subordinate judiciary.

His Honour the Lieutenant-Governor has referred in his speech to the fact that even under the shadow of the great war this building has been proceeded with in order to enable the new Court to come into existence at the earliest possible date. I think there is something in this which might give our enemies ground for reflection. It seems to me that they might find a lesson in the fact that the British Government, even under the distractions of this troubled time, pursues, with unfailing vigour, the aim which

it has always proposed to itself as one of the fundamental objects of all good Government, the desire to facilitate the administration of justice to all its subjects. The greatest credit is due to those members of the Public Works Department and others who have helped to raise the building within so short a space of time. It seems only the other day that I was laying the foundation-stone and now the state'y fabric is completed. This happy result is very largely due to the energy and ability of those entrusted with the construction of the building and I wish to associate myself most heartily with what Sir Edward Gait has said regarding Mr. Searight and the officers who worked under him and regarding the contractors, Messrs. Martin & Co., whose distinguished senior partner, Sir Rajendra Nath Mookerjee, I am very glad to see here to-day. My only regret is that my old friend, Sir Charles Bayley, to whose tact and determination the completion of this building owes so much, is not present to-day to see the fruition of his labour.

"Anxious as your province has been to possess her own High Court I am aware that you also look forward eagerly to the time when you will have your own University and your own Engineering and Medical Colleges. These are very proper aspirations and will no doubt be fulfilled in due course of time and you need have no fear that your ambition will suffer from lack of sympathy on the part of the Government of India. But in the meanwhile I would ask you to remember that though the war has not been permitted to interfere with the steps necessary to the foundation of this Court, yet many other excellent schemes have had to be suspended on account of their cost and all of us have had to make sacrifices to try and ensure the ultimate triumph of our Empire and of our ideals. The noble edifice of our great Empire is founded on justice and cemented with mercy and I am proud to think that during my Viceroyalty this fresh contribution to its stability has been completed and to feel that I am here to-day to bear witness to it. With my most earnest wishes that the labours of this Court may be inspired with wisdom, justice and mercy I will now proceed to open the building."

Reviews.

THE HINDU WILLS ACT (Act XXI of 1870), with which is incorporated the Probate and Administration Act, with notes and commentaries. *By Mahendra Chandra Majumdar, Pleader. Second Edition. Revised by Dwarka Nath Chakraburty, M.A., B.L., Vakil, High Court, Calcutta. R. Cambray & Co., Law Booksellers and Publishers. 9, Hastings Street. 1916. Price Rs. 12.*

The late lamented Mr. Mahendra Chandra Majumdar's Commentary on the Law of Wills of the Hindus is one of the few books which have leapt into fame, almost at the moment of their appearance, by force of sheer merit. We were amongst the first to recognise the sterling merits of these Commentaries which embrace not merely those sections of the Succession Act which have been extended to Hindus (in certain parts of India) by the Hindu Wills Act of 1870, but the other provisions of the same statute which with modifications have been re-enacted for the benefit of Hindus amongst others in the Probate and Administration Act of 1881.

The high opinion which we were able to form of the author's capacity for research, soundness of reasoning and grasp of principles from our acquaintance with the book was still further enhanced by our subsequent acquaintance with the author himself. It is a matter for keen regret to us that he should not have lived to see this second edition of his life's work. It is, however, some consolation to be able to say that the whole of the manuscript and a considerable portion of the printed matter was ready when death overtook him. That the second edition has at length appeared in its present completed form is due to the author's friend Mr. Dwarka Nath Chakraburty, Vakil of the Calcutta High Court. Mr. Mahendra Chandra Majumdar's knowledge of the law of Wills and his acquaintance with the literature of that law was cyclopedeic, and no more need be said of the present edition than that it is the mature product of that knowledge. This edition, we feel sure, will more than fulfil the object, modestly put forward by the author in his foreward to the first edition, of "placing the law of Hindu Wills in its entirety within the easy reach of all, specially the mofussil practitioners and those members of the profession who are still in their early struggles," for the demand for the book is by no means nor ever will be confined to mofussil practitioners and "early strugglers." Its place as one of the standard works of legal literature in India is assured.

THE LAWYER'S COMPANION DIARY, 1916. *Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row, Madras. The Law Printing House, Mount Road.*

In this second year of its issue, this handy diary supplies, besides an official directory and a comparative calender, a fairly large amount of legal information to which constant reference is necessary in the course of practice. The diary ends with the page for the last day of March 1917, a present of a quarter's writing space, and is followed by pages suitable for notes and memoranda. The quality of the paper and the flexible binding are additional attractions and the only thing which seems to be needed to make it completely handy is to exclude the pages for 1917, in this way reducing both size and weight, and to round off the edges, pointed edges being distinctly unsuitable for books which one must carry most of the time on one's person.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before D. CHATTERJEE and BEACHCROFT, JJ. APPEAL FROM APPELLATE DECREE NO. 603 OF 1914. RAMU PAL AND ORS., Defendants Nos. 1, 2 and 8, Appellants *v.* PROKASH CHANDRA SARMA PURKAYESTHA, Plaintiff, Respondent. 20th January 1916.

Estoppel—Non-transferable occupancy holding—Purchasers of the holding—Execution sale—No objection—Bengal Act (VIII of 1869), sec. 27.

Two persons of the name of Nepal and Gopal owned an occupancy holding consisting of the disputed lands in this case. These two persons had also a proprietary right in the mouza in which these lands were situated. In execution of a money decree against these two persons, their occupancy-holding was brought to sale and was purchased by the Plaintiff. In the execution case Nepal and Gopal did not take any objection that the property was not saleable and could not therefore be sold. They kept silent and the property was sold and purchased by the Plaintiff in 1896. The occupancy-holdings were found not saleable by the custom of the locality in which the disputed lands were situated.

Defendant No. 8 who was the purchaser of the proprietary share of Nepal and Gopal contended that she was entitled to object to the sale to the Plaintiff on the ground that the property was not saleable.

Held, that Defendant No. 8 was estopped from saying that the property was not saleable as her vendors did not object to the sale in the execution proceeding.

That the suit brought within seven years from 1904, when the Plaintiff was dispossessed, was not barred by sec. 27 of the Bengal Act VIII of 1869; that section applied only to a case where dispossession had been made by the whole body of landlords.

Brojo Mohon De Sircar v. *Sheik Denga* (7 C. L. R. 141) and *Kishori Patuni* v. *Sharat Patuni* (S. A. Nos. 1122, 1298 and 1299 of 1912 decided by Woodroffe and Coxe, JJ., on the 19th August 1914) followed.

Babu Sasadhar Roy for the Appellants.

Dr. Sarat Chunder Basak and *Babu Bepin Chunder Bose* for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before D. CHATTERJEE and BEACHCROFT, JJ. APPEAL FROM APPELLATE DECREE NO. 3502 OF 1913. SHEIKH DAULATUDDIN, Plaintiff, Appellant *v.* DHANIRAM CHUTIA, represented by his guardian *ad litem* ANIRAM CHUTIA AND ORS., Defendants, Respondents. 12th January 1916.

Contract, by lunatic, if void—Lunatic, if liable to refund consideration money with compensation—Indian Contract Act (IX of 1872), sec. 65—Specific Relief Act (I of 1877), secs. 38 and 41.

Plaintiff-Appellant brought this suit out of which this appeal arose aganist Dhaniram, a lunatic, represnted by his guardian *ad litem* on the allegation that the latter had executed a deed in his favour conveying some lands and had received Rs. 200 as the consideration money. Plaintiff presented the document for registration but it was refused on the ground that the deed was not properly drawn up. Plaintiff then asked the Defendant Dhaniram to execute a valid conveyance which the latter declined to do. Plaintiff therefore brought the present suit to compel Dhaniram to execute a valid conveyance or in the alternative to compel him to refund the consideration money with compensation. The defence was that Dhaniram was insane when he was made to execute the deed.

The Munsif held that Dhaniram was not insane at the time of the execution of the sale-deed and that Plaintiff had paid to Dhaniram Rs. 100 previously for the land which had been mortgaged to him and paid Rs. 100 more on the day of sale; and he granted a decree to the Plaintiff declaring that the sale-deed was valid

and directed that the land transferred by it be registered in the name of the Plaintiff.

On appeal the District Judge held that Defendant Dhaniram was of unsound mind at the time of the alleged sale and as such the transaction was wholly void; and so Plaintiff was not entitled to any relief and he therefore dismissed the suit *in toto*.

It was contended in second appeal that a contract by a lunatic was not void but voidable and *secondly* that under the provisions of sec. 65 of the Contract Act and secs. 38 and 41 of the Specific Relief Act as also on general grounds of equity the Defendant was bound to refund the consideration money of Rs. 200.

Held, that a contract by a lunatic is void and as such sec. 65 of the Contract Act or secs. 38 and 41 of the Specific Relief Act have no application to the facts of the case.

Mohori Bibi v. *Dharmadas Ghose*, I. L. R. 30 Cal. 539 (P. C.) relied upon.

Held also, that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which against that person the legislature has declared to be void and hence the Plaintiff was not entitled to restitution even on general grounds of equity.

Thurston v. *Nottingham Permanent Building Society*, (1902) 1 Ch. 1 followed.

Babu Probodh Chandra Rai for the Appellant.

Babu Hemendra Kumar Das for the Respondent.

H. C. S. *Appeal dismissed.*

NOTICES.

Transfer of cases to Patna High Court.

1. It is intended to include the following clause in the Letters Patent constituting the High Court of Judicature at Patna, relating to the transfer of cases to that High Court on its establishment :—

"And we do further ordain that the Jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents, and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court.

"Provided first that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

"(*a*) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order other than an order of an interlocutory nature has been passed or made by that Court or in which the validity of any such decree or order is directly in question, and

"(*b*) in all proceedings not being proceedings referred to in paragraph (*a*) of this clause pending in that Court on the date of the publication of these presents under the 13th, 15th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th, 35th, clauses of the Letters Patent bearing date at Westminster 28th December in the year of our Lord 1865 relating to that Court, and

"(*c*) in all proceedings instituted in that Court on or after the date of the publication of these presents with reference to any decree or order passed or made by that Court; provided secondly that if any question arises as to whether any case is covered by the first proviso to this clause the matter shall referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final."

2. It is the intention that the new Patna High Court will commence its sittings on the 1st March 1916.

High Court : Calcutta, *2nd February, 1916.*

By order,
H. M. VEITCH.
Registrar

and also the Government, which has prescribed the formalities to be observed in such sales. He must be taken to have known that the certificate was required for the identification of the purchaser and the weapons purchased. This purpose he deliberately defeated by his action in making out false certificates. His acts came directly within the definition of forgery as contained in secs. 463 and 464, I. P. C. The cases of *Regina* v. *Toshack* (1), *Queen-Empress* v. *Dhunum Kazee* (2) and *Queen-Empress* v. *Abbas Ali* (3), are in point, and support the view which we take in this case. The conviction must therefore be upheld.

With regard to the sentence, we take into consideration the extreme youth of the Appellant. On the other hand the offence is a very serious one, and it has been aggravated in his case by the fact that he has declined to give any information regarding the revolvers purchased by him or the use to which they have been put. We think, however, that he will be sufficiently punished if he be kept in jail for one year, that is to say, for 4 months on each charge, and we reduce the term of imprisonment accordingly.

Sentence reduced.

(1) 1 Den. C. C. R 492 (1849).
(2) I. L. R. 9 Cal. 53 (1882).
(3) I. L. R. 25 Cal. 512: s. c 1 C. W. N. 255 (1897).

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

VISCOUNT HALDANE.
LORD WRENBURY.
SIR JOHN EDGE.
MR. AMEER ALI.
1915,
Heard, 16 and 17, November.
Judgment, 16, December.

THE BANK OF BENGAL, Plaintiff, Appellant,
v.
RAMANATHAN CHETTY and ors., Defendants, Respondents.

Principal and agent—Business of money-lenders and financiers—Agent's authority to guarantee advances to constituents by others—Pledging security for principal—Construction of power—Necessary implications arising from nature o business—Nature and extent of authority, practice among money-lenders, as evidence of—Benefit from the transaction, if essential—Onus.

Where an agent of a firm carrying on a general money-lending business, who had express authority "to borrow money from any bank or banks, firm or firms, person or pesons, either with or without pledge of securities for moneys advanced to various persons," guaranteed a loan made to a constituent of the firm by a third party:

Held, *in a suit by the latter against the firm, that the firm was bound by the act of the agent.*

That the authority of the agent to enter into the transaction was to be found in the document itself by necessary implication from the nature of the business, with the general management of which he was entrusted.

BRYANT *v.* LA BANQUE ON PEUPLE (1) *followed.*

That the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents.

Held, *further, that if authority is estab-*

(1) [1893] A. C. 170, 177.

THE BANK OF BENGAL *v.* RAMANATHAN CHETTY.

lished, the mere fact that the principal did not receive any benefit does not rid him of his liability.

Appeal from a decree, dated the 26th March 1914, of the Chief Court of Lower Burma, (Ormond and Parlett, JJ.), which reversed a decree of Robinson, J., of the same Court.

The facts of the case sufficiently appear from their Lordships' judgment. The case raised the question of an agent's authority to stand as a guarantor for a certain person, and thereby make his principal liable for the money. The trial Judge held that the principal was liable, but his judgment was reversed on appeal. Mr. Justice Ormond, in whose judgment Parlett, J., concurred, said as follows :—

"The agent therefore had a general authority to carry on the business of a Chetty banker and money-lender on behalf of his principal as the sole proprietor of the business and an express power to borrow money and to endorse Promissory notes for the purposes of that business. He would not be authorised (without an express power to that effect), to enter into any transaction under which his principal incurred a liability, unless such transaction was a necessary incident in the carrying on of a Chetty banking and money-lending business. If the transaction entered into by the agent is, on the face of it, authorized by the power-of-attorney, the Bank need not look to the application of the money by the agent; but if it is shown that the Bank had notice of the real nature of the transaction and such transaction is not within the scope of the agent's authority, the principal would not be liable. In this case the agent endorsed a promissory note in favour of the Bank in the name of his principal, and he has an express power to do so; but at the same time he signed for his principal on a letter of guarantee in favour of the Bank on behalf of Hashim Ebrahim for the whole amount for which the promissory note was given. The Bank therefore knew that none of the money was being taken by the agent as a loan to his principal. The agent was given certain specified or express powers, but they do not include a power to make his principal a surety for another's loan; and they do not include a power to borrow money in his principal's name for another, or to sign promissory notes for his principal jointly with another principal. If he had been given such a power as the last, an authority to guarantee the debt of another might well be inferred :—because since he clearly has no power to thrust a partner upon his principal;—if he had the power to sign promissory notes for his principal jointly with another, the manifest effect of such a transaction would be that, as between the two makers of the note each is a surety for the other as to the amount taken by that other. The sole question then is—is it a necessary incident of the business to guarantee the loans of others? If such transactions are entered into for a commission, the business would not be so much a money-lending business as an insurance business. If such transactions are merely mutual accommodations, it must be shown that such mutual accommodations are necessary. Loans can be raised on security without sureties, and the fact that the Presidency Banks Act requires two independent signatures for a loan on a promissory note, is not sufficient to show that such mutual accommodations are necessary for the business.

* * * * *

"Mr. Giles contends that inasmuch as the Presidency Banks Act requires the signatures of two persons (who are not partners) for a loan on a promissory note,

that the Defendant must have known from the cash credit account at the Bank of Bengal that other persons had stood guarantee for him and that therefore he must have assumed that his agent was standing guarantee for others, and that it is a normal feature to mutually guarantee, in Chetty banking business. It is not shown that the Defendant would know of the cash credit account at the Bank of Bengal; and I do not think it is made out that it is a necessary incident in a Chetty banking and money-lending business that the Chetty must nece[illegible] guarantee another Chetty. It is certainly not made out in this case that it is part of the Chetty business to stand guarantee for others who are not Chetties. Powers-of-attorney must be construed strictly and unless there is an express power given to the agent to enter into contracts of guarantee on behalf of others or to execute negotiable instruments jointly with others, it rests on the bank or other person lending the money to show that the agent had in fact authority to enter into such a transaction."

Hence this appeal.

Sir Erle Richards, K. C., and *Mr. Coltman* for the Appellant, submitted that the terms of the general power-of-attorney in favour of the agent were very wide. The agent was to conduct his principal's general money-lending business. He had express authority to borrow money for his firm presumably for lending money to his clients. The authority to borrow necessarily implied an authority to pledge the credit of his principal. The effect of the transaction in question was that instead of the agent receiving the money himself, and lending it to the firm's client, he authorised the Appellant Bank on the pledge of the firm's credit—to advance money to the client. The Presidency Banks Act, XI of 1876, sec. 37, required the signatures of two persons, who are not partners, for a loan on a promissory note. The agent's principal must have known that money-lending firms in Rangoon stood guarantee for one another, in opening cash and credit accounts.

The Appellate Court had failed to appreciate the nature of the money-lending business of the Chetty firm in question.

That business necessarily involved the transaction now impeached by the Respondent. Even the Appellate Court had held that the agent had power to endorse the promissory note. The guarantee given by the agent amounted practically to the same. Nay, it was a little less, inasmuch as it cut down the liability of the principal. The Respondent did not produce his books of account, and it ought to be presumed under sec. 114 of the Indian Evidence Act, that the books of account which were withheld by the Respondents would, if produced, have shewn that the guaranteeing of loans and overdrafts was part of the firm's business, and that the firm derived profit therefrom. The guarantee in question was within the scope of the agent's authority, and the Respondents were liable therefor.

Mr. Newbolt, K. C., and *Mr. Sanders* for the Respondents, submitted that the Respondents were not liable for the guarantee. Chetty's business was an ordinary money-lending business—to lend money on security or interest. There was no suggestion that mutual accommodation was a part of the business of money-lending. The Appellants raised the plea of ratification, but that plea could only be on the assumption that the agent had no authority to enter into the transaction. Reference was made to *Jacobs* v. *Morris* (2).

(2) [1901] 1 Ch. 261 affirmed on appeal: [1902] 1 Ch. 816.

THE BANK OF BENGAL *v.* RAMANATHAN CHETTY.

The general words used in the power-of-attorney did not authorise the agent to give the guarantee. These words were restricted by the object of the power. Powers-of-attorney should be construed strictly. *Bryant & Co.* v. *La Banque on Peuple* (1). There was nothing in the books of account which could have helped the Appellant, nor was it necessary to examine the agent. The onus lay on the Appellant to establish conclusively that the execution of the guarantee was within the scope of the agent's authority. The agent could not do anything not within the scope of the business on which he was employed. *Re Dowson and Jenkins' Contract* (3).

Reference was made to the following authorities :—*Ode* v. *Ness* (4), *Cooper* v. *Gibbons* (5).

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This is an appeal from the Chief Court of Lower Burmah, and the sole question for determination is whether the agent in Rangoon of the original Defendant to the action, Lutchumanan Chetty, since deceased, now represented by the respondents, had authority to enter into the transaction with the Plaintiff bank on the basis of which it seeks to enforce the present claim against the principal.

Lutchumanan Chetty was a native of Madras, and ordinarily resided there. He belonged to the well-known Chetty money-lending caste, and had a large and apparently lucrative money-lending business in Rangoon, which he carried on by agents, under the name and style of "Ana Roona Laina," or shortly "A. R. L. Chetty." Previous to 1904 he had two partners, but after the death of one and the retirement of the other in that year, he was the sole owner of the business.

By a power-of-attorney dated the 24th of October 1904, he appointed one Ramaswamy Chetty, described in the document as "at present of Rangoon," as his attorney under "the style or firm of Ana "Roona Laina or A. R. L. Ramaswamy Chetty." On the 15th of May 1905 Ramaswamy, by the power reserved to him in his appointment, substituted in his place one Chockalingam Chetty "as "the attorney and agent" of the Defendant. And since his appointment Chockalingam admittedly has managed the entire money-lending business of the Defendant's firm in Rangoon.

The transaction which forms the basis of the present claim was entered into in May 1908. It appears that about this time one Hassum (or Hashim) Ebrahim, with whom Chokalingam has previous dealings and who was evidently a constituent of the firm, applied to him for financial assistance. He acceded to the request, and the arrangement that was come to between them was in substance this, that Chockalingam should pledge the firm's credit with the Plaintiff bank to enable Ebrahim to have a cash credit account opened in his name and obtain from the bank advances not exceeding in the aggregate Rs. 50,000 and that to secure the due repayment of this amount with interest thereon he should execute a promissory note in favour of the Defendant's firm which Chockalingam on his side should endorse over to the bank.

It is to be observed in this connection that under the provisions of The Presidency Banks Act (XI of 1876), sec. 37, cl. (*c*), the Bank is precluded from opening

(1) [1893] A. C. 170, 177.
(3) [1904] 2 Ch. 219.
(4) 33 L. J. Ch. 155 (1841).
(5) 3 Camp. 363 (1813).

cash credits on the security of any negotiable instrument of :—

"any individual or partnership firm . . . which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership."

It was in view of this provision of the law, and the practice of the bank in conformity therewith, that the promissory note for Rs. 50,000, bearing the usual bank rate of interest, was executed on the 23rd May 1908, by Ebrahim in favour of "A. R. L. Chockalingam Chetty" the name under which the defendant's firm admittedly carried on business in Rangoon. This note was endorsed over by Chockalingam to the bank. Thus both Ebrahim and the Chetty firm became severally liable on the note, one as the drawer, the other as the endorser, for advances to Ebrahim on his cash credit account.

At the same time and on the same date Chockalingam gave to the Plaintiff bank a letter of guarantee on behalf of his firm. It stated the nature of the transaction and the character of the obligation undertaken by the Chetty firm in these terms :—

"In consideration of the Bank of Bengal having agreed at our request to grant to Hassum Ebrahim (who is hereinafter referred to as the Borrower) accommodation by way of Cash Credit to such an amount from time to time as the Bank in its discretion shall think proper upon condition that such Cash Credit shall to the extent of Rs. 50,000 and interest be secured by the Promissory Note hereinafter mentioned we the undersigned A. R. L. Chockalingam Chetty (Guarantor) have delivered to the Bank of Bengal a Promissory Note dated 23rd May 1908 for Rs. 50,000 and interest payable on demand made by the said Borrower in favour of us and endorsed by us to the said Bank or order (the said Promissory Note being intended as a guarantee to the extent of Rs. 50,000 and interest of the balance from time to time due to the said Bank from the said Borrower on account of the said Cash Credit) on the understanding that the Bank shall be at liberty to take steps to enforce payment of the said Promissory Note at any time after notice in writing demanding payment thereof posted to us at our usual or last known address and default being made in payment for three days after the posting of such notice."

Ebrahim appears to have drawn considerable sums of money on the cash credit account thus opened. He was adjudicated an insolvent shortly after, and his assets passed to the official assignee. He himself is said to have absconded.

The Plaintiff bank thereupon called upon the Defendant to pay the amount due from Ebrahim, and on his failure to do so, brought the present action in the Chief Court of Lower Burmah in its Original Civil Jurisdiction. The defence to the action in the main is the denial of authority on the part of Chockalingam to enter into the transaction so as to bind the Defendant's firm.

The case was at first heard *ex parte*, owing to the default of the Defendant to enter appearance, but the *ex parte* decree was set aside, and the suit came on for trial as a contentious cause on the 17th January 1912, before Ormond, J., who framed the issues and took part of the evidence. It was heard subsequently by Robinson, J. The Defendant, besides putting in the power-of-attorney and the instrument substituting Chockalingam in place of Ramaswamy, adduced no edivence; and Robinson, J., held in substance that, although there was no express authority to the agent to enter into a transaction of this nature the Defendant subsequently ratified and confirmed the act, and was therefore clearly liable. He accordingly decreed the Plaintiffs' claim. The Appellate Court did not agree with this view. The learned Judges further considered that if guaranteeing the loans of others was to be

regarded as "a necessary incident of the business, it would not be so much a money-lending business as an insurance business."

They accordingly dismissed the suit.

In their Lordships' opinion this judgment cannot be supported. The learned Judge on Privy to have missed the real point at issue. They do not appear to have correctly apprehended the character and extent of the powers entrusted to the agent, or the nature of the business which he conducted and managed on behalf of the Defendant in Rangoon.

Their Lordships desire to refer shortly to the principal provisions of the power directly bearing on the question raised in the case. After setting out that he was formerly carrying on the business of "bankers and money-lenders in Rangoon" in co-partnership with two other persons, and that owing to the death of one partner and the retirement of the other, he was then "solely carrying on the same business" under the style of A. R. L. Chettty, and that he was desirous of appointing Ramaswamy Chetty as his attorney for the general management of his said business, the Defendant (Lutchmanan Chetty) proceeds to state the duties with which he charges the agent and the powers he entrusts him with :—

"To transact, conduct, and manage all and every or any of the affairs, concerns, matters, and things in which I, the said L. A. R. L. Lutchmanan Chetty, now am or hereafter may be in any wise interested and concerned, and for that purpose to use or sign my name to all and every or any documents or document writings or writing whatsoever. To borrow money from any bank or banks, firm or firms, person or persons, either with or without pledge of securities for moneys advanced to various persons."

The authority to borrow is given in explicit and the broadest terms, "either with or without pledge of the securities" lodged with the agent by constituents for moneys advanced to them.

The power then goes on to declare :—

"To make draw sign accept endorse negotiate and transfer all and every or any Bills of Exchange Promissory Notes Hundis Cheques Drafts Bills of Lading and all and every other negotiable securities whatsoever to which my signature or endorsement may be required or which my said attorney may in his absolute discretion think fit, to make draw sign accept endorse negotiate and transfer in my name and on my behalf."

It is to be borne in mind that the Defendant's agent was a general money-lending business, in the course of which he financed both Chetties and non-Chetties. The agent had express authority to borrow. For what purpose? To lend to others. It was an essential incident of the business; and the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents. It was a matter of convenience that, instead of receiving the money directly himself and lending it to the borrower, he authorised the lender, in this case the bank, on the pledge of the firm's credit, to advance the money to the borrower.

Applying to the power in the present case the canon of construction laid down in *Bryant & Co.* v. *La Banque on Peuple* (1), *viz.*—"that where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication," their Lordships consider that the authority to enter into transac-

(1) [1893] A. C. 170, 177.

tions of the nature in dispute is to be found in the document itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted. Without such authority it would hardly have been possible to carry on the business of a money-lender and financier.

It is clear from the facts proved in the case that for three years it was accepted, and business was transacted on the basis, that the agent was invested with full authority in that behalf. Between May 1905 and [redacted] Chockalingam entered into twenty-three identical transactions without, so far as appears on the record, any question being raised that they were in excess of his authority. Besides, there is evidence that among these Chetty money-lending firms it is the practice for the agent to pledge the credit of the principal in this manner.

It was urged on behalf of the Defendant that it was not shown he had received any benefit from the transaction in question. Their Lordships think that if authority is established the mere fact that the principal did not receive any benefit does not rid him of his liability. But it is to be observed that the case of the Plaintiff bank was that the Defendant's books of accounts would show receipt of commission on the transaction. It called upon the Defendant to produce those books, which he failed to do; nor was Chockalingam called to support his allegation in respect of the non-receipt of commission.

Their Lordships are of opinion that the decree of the Chief Court should be set aside, and that of Robinson, J., should be restored. The Respondents must pay the costs of this appeal and of the appeal in the Chief Court.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Arnould & Son* for the Appellant.

Solicitors: *Messrs. Bramall* and *White* for the Respondents.

B. D. *Appeal allowed with costs.*

[redacted]

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 39 OF 1915.

SANDERSON, C. J.
WOODROFFE, J.
MOOKERJEE, J.
1915,
14, December.

LALLJEE MAHOMED, Defendant, Appellant,
v.
DADABHAI JIVANJI GUZDAR, Plaintiff, Respondent.

Findings of fact, reversal of, on appeal—Brokerage on sale within time limit, meaning of.

Where the owner of an oil mill gave the following letter to a broker "I agree to allow you to sell my mill at Rs. 40,000 only. You will get brokerage 5 per cent. on the same when the mill will be sold through you. This condition is to be in force till a fortnight (15 days) from date."

Held—*That the broker would be entitled to the commission if he introduced to the seller a purchaser within 15 days who was ready and willing to purchase the mill for Rs. 40,000.*

SANDERSON, C. J.—*When the trial Judge has had to deal with conflicting verbal evidence on a question of fact and after seeing and hearing the witnesses has come to the conclusion that the truth lies on one side and not on the other, the Court of Appeal should not interfere unless it is clear that the Court below has come to a wrong conclusion, which in this case, his Lordship was not prepared to hold that the Court below had.*

LALLJEE MAHOMED *v.* DADABHAI JIVANJI GUZDAR.

WOODROFFE, J.—*If after argument, the Court of Appeal has a conviction that the judgment under appeal is erroneous it should not be affirmed and this is not the less so because the judgment raised a question of fact.*

MOOKERJEE, J., *on review of authorities, held that the Appellate Court was entitled to reverse findings of fact and allow an appeal if it was convinced that the trial Judge came to an erroneous conclusion on the evidence, the burden lying on the Appellant to satisfy the Court that the finding he assails is not supported by the evidence.*

WOODROFFE *and* MOOKERJEE, JJ., *held on the evidence that the broker had not introduced a purchaser within the time limit of the agreement and was not entitled to recover brokerage thereunder.*

This was an appeal preferred by the Defendant on the 17th May 1915 against the judgment of Mr. Justice Greaves, dated 25th February 1915, passed in the exercise of Original Civil Jurisdiction.

The material facts of the case fully appear from the judgments of the Court.

Messrs. S. C. Mukerjee and *S. K. Ray* for the Appellant.

Mr. Langford James for the Respondent.

The JUDGMENTS OF THE COURT were as follows :—

SANDERSON, C. J.—In this case the Plaintiff, as assignee, claims Rs. 2,000 which is alleged to have been due by way of commission to Moses Judah who has died since the suit was instituted.

The Defendant being the owner of certain oil mills was anxious to sell them. They were mortgaged to a Bank for Rs. 35,000, and at the end of May or the beginning of June 1911, the mills were advertised for sale in the Exchange Gazette. On the 13th June 1911, the Defendant gave Moses Judah a letter in the following terms and signed by the Defendant. "I agree to allow you to sell my above oil mill at rupees forty thousand only. You will get brokerage 5 per cent. on the same when the mill will be sold through you. This condition to be in force till a fortnight (15 days) from date." Then there were certain words which it was agreed between the parties, were [illegible] at the time that letter was written, in Guzrati, his [illegible] correct translation was in these terms, "on the sale proceeds being received in hand, brokerage will be paid."

The first question is as to the meaning of the letter. To my mind, the meaning is pretty plain. In order to earn his brokerage Moses Judah was to introduce a purchaser who would be willing to give Rs. 40,000. He had the opportunity of introducing such a purchaser and thus qualifying for his brokerage, for 15 days only. I do not think that the letter means that the sale had to be completed within 15 days, but it was essential for Moses Judah, if he was to earn his commission, that he was to introduce within 15 days a person who would be ready and willing to purchase for Rs. 40,000. In other words, if he did so introduce a purchaser, the mere fact that the purchase was not completed until September would not deprive the broker of his commission.

Now, there is no question as to the law which governs such a matter as this. In my judgment, it is correctly stated by Mr. Justice Greaves at the bottom of page 75 of the paper book. There he says, quoting from Lord Halsbury's Laws of England, "In order to entitle an agent to receive his remuneration, he must have carried out that which he bargained to do or at any rate must have substantially done

so and all conditions imposed by the contract must have been fulfilled."

The main question, therefore, in this case is whether Mr. Judah substantially carried out what he had bargained to do. This is a question of fact mainly dependent upon the evidence of the witnesses. The case was evidently tried with great care, and the learned Judge reserved his judgment. After due consideration he has accepted the evidence of Batuknath, the purchaser, and rejected that of the Defendant: and in a case such as this, where the matter depends to a great extent upon the verbal evidence of the witnesses, in my judgment this Court ought not to interfere with the decision of the learned Judge save on very clear grounds; in other words, unless it is clear that a miscarriage of justice has taken place. The Judge who tried the case has had the advantage, which we have not had, of seeing and hearing the witnesses—an advantage which in my experience it is almost impossible to overestimate. In this case I am not prepared to say that the learned Judge has decided wrongly: on the contrary I think there is sufficient evidence to justify the decision at which he arrived. On the material points he has accepted the evidence of Batuknath and rejected that of the Defendant: and, in passing, I may say that the comments made upon the evidence of the Defendant by the learned Counsel for the Plaintiff were not without justification. Batuknath's evidence was to the effect that it was Moses Judah who introduced him to the Defendant, and his evidence on one point is very significant: he says he did not want to pay more than Rs. 35,000, but he was persuaded by Moses Judah to offer Rs. 40,000 which was the price eventually agreed upon. Some of the passages in his evidence are at pages 36 and 37 of the paper book; as for instance, where he says in cross-examination "*Q.* Do you say it was Judah who introduced you to Lalji Mahomed? *A.* Yes, that is true. *Q.* You wanted to pay Rs. 35,000 not Rs. 40,000. *A.* Yes, that is true. I first offered Rs. 35,000 and Judah used to come and see me often and [illegible] me into this scrape." Then he is asked what is the scrape. *A.* What could I do, I did not. I am telling you the truth, it was Judah who introduced me to the Defendant. It was Judah through whom every thing was settled in respect of this matter, and it was Judah who got me into this trouble. The trouble is this:—I was made to agree to pay Rs. 40,000 for the mill; I did not want to buy it, but Judah persuaded me to take it. He introduced me to the Defendant, pressed me to take it, and at last got me into this trouble." That being so, the Plaintiff's case is proved on one of the material points, namely, that it was through the instrumentality of Moses Judah that the purchase price, Rs. 40,000 was obtained. But it is said that there is nothing to show that Moses Judah introduced the purchaser and performed his part of the contract within the specified time, 15 days. In my judgment, if Batuknath's evidence is accepted, as it was by the learned Judge, that it was through Moses Judah that he was persuaded to offer Rs. 40,000, there is evidence that this must have been done within the time limit, because we find that on the 26th June, 13 days from the date of the broker's letter, Batuknath wrote to the Defendant in the following terms, "As per our conversation with your Mr. Lalljee Mahomed we intend to purchase the above mills together with the land connected with it at a cash price of Rs. 35,000 on the following condition." Then he set out the condition. The letter closed as "the alternative arrangement for

payment is as follows :—Rs. 10,000 in cash at the time of sale. Rs. 30,000 to be paid after one year," containing an offer, though it was an alternative offer, of Rs. 40,000, which he said he would never have made but for the instrumentality of Moses Judah. He must have seen the Defendant [illegible] day, and such letter contains an offer [illegible] Rs. 40,000. It is true that the payment of [illegible] was to be deferred for one year, but that [illegible] was the one which with a slight variation of [illegible] was eventually accepted in August. Subsequently, Batuknath's evidence having been accepted by the learned Judge, the performance of the contract by Moses Judah was within the time.

I am aware that the letters in the case provide matter for comment on Batuknath's evidence, as for instance, the letter of the 25th of June refers to his having seen the advertisement in the Exchange Gazette. This is a legitimate comment, but it is not conclusive that Moses Judah did not introduce the purchaser. The matter had been advertised and it is quite possible that it was Moses Judah who brought the advertisement to the attention of the purchaser in the first instance. Again, the receipt for Rs. 200 where the payment is stated to be "brokerage" is a legitimate subject of comment, but I think the learned Judge's remarks on that transaction are not unreasonable, and in any event, as between vendor and purchaser, the use of the word "brokerage" is quite unsuitable, whatever the nature of the transaction was. The main reason, however, which weighs with me is that the learned Judge has had to deal with conflicting verbal evidence on a question of fact: and after seeing and hearing the witnesses he has come to the conclusion that the truth lies on the side of Batuknath and not on the side of the Defendant: and in such a case, in my judgment, this Court should not interfere, unless it is clear that he has come to a wrong conclusion. This I am not prepared to say.

A further point has been raised, namely, that the Plaintiff in any event cannot recover more than the commission on the amount actually received by the Defendant in cash. In my judgment, this is not correct. The brokerage was to be paid when the "sale proceeds" were received. The purchase was completed on the 27th of September 1911, when the purchaser [illegible] Rs. 10,000 in cash and gave Hundis for Rs. 30,000. I agree with the learned Judge that the words in Guzrati added to the letter of the 13th June 1911 do not mean that the commission was only to be payable if and when the whole Rs. 40,000 were received in cash; and, if the Defendant chose to agree with the purchaser that the "sale proceeds" should be partly cash and partly Hundis, I do not think that can affect the Plaintiff's right to commission.

In my judgment this appeal should be dismissed.

Woodroffe, J.—The Plaintiffs as the assignees of one Judah sue to recover commission alleged to be due to him under a written agreement, dated 13th June 1911, for having effected through his agency the sale of certain oil mills. It must be shewn that the conditions of the contract have been complied with. The onus of proving this is on the Plaintiffs. This is of importance in the present case for in regard to the particular question on which I mainly rest my judgment, *viz.*, whether it has been shewn that Judah obtained the purchaser within fifteen days of and in terms of the agreement, it has been argued by Mr. Langford James for the Appellant that this was not at issue in the lower Court. There is no finding on this

particular point. It was however not necessary to put this specifically in issue since the onus of proving all facts necessary to establish the claim was on the Plaintiffs and the Defendant put in issue the allegation that the purchase was effected by Judah in terms of the agreement according to the conditions of which alone he was entitled to a commission.

Several questions arise upon the construction of the agreement. It has been argued for the Respondent that it is sufficient if a purchaser was secured within fifteen days even if the actual purchase was completed later. This the Appellant denies contending that commission was payable only in the event of the transaction being completed (which it was not) within fifteen days; and nextly that brokerage was only payable on the sale-proceeds being received in cash (which was not the case) within this period.

The Appellant's contention is not without force on both these grounds but it is not necessary to go into this matter for whatever be the true construction of the document on these points it is clear and is indeed conceded that whenever or in what way the sale was concluded the purchaser at such sale must have been secured by the broker within fifteen days of the agreement: Now the agreement was dated the 13th June 1911 and admittedly the first proved date at which vendor and purchaser were in communication was the 25th June when twelve days under the agreement had already run by.

It must be shewn then that within the remaining three days Judah found the purchaser. Has this been shewn? In cross-examination the purchaser was asked whether his letter of the 25th June was written before or after his introduction to the Defendant and whether Judah asked him to write to the Defendant or not. He was again asked about this matter in re-examination and he replied that he did not remember the date nor even the month when Judah spoke to him about this letter and that he could not say whether it was before or after this letter that [illegible] to him. Had it been [illegible] due to Judah's inter[illegible]act that it was letter was writ[illegible]tion that the first possibl[illegible] it does not seem to me [illegible] the witness could have forseen it. His answer must have been in that case that he must have seen Judah first for before seeing him he had known nothing of the Defendant or of his property. He will not commit himself to this and I think for the reason that he had not then seen Judah but had learnt about the property through an advertisement in the Exchange Gazette. This is indicated by the words in the letter of the 25th, "I see in the Exchange Gazette that you are going to sell." The purchaser also in his evidence says "I saw the Exchange Gazette and then I wrote that letter," not that he had seen Judah meanwhile or at all. Though the omission of Judah's name from the letter may not be conclusive it is certainly evidence against the Plaintiffs for a reference to the broker through whom it is suggested that the purchaser came to know of the property might have been expected. There is no specific evidence that Judah secured the purchaser between the 26th and 28th or the conclusion of the period allowed to him. There is some general evidence that he introduced the purchaser which in any case is scarcely accurate if the first communication of the 25th to which I have referred was without his intervention. The evidence however is not such as I can accept. Doubtless, in a case of this kind great weight must be attached to the judgment of the learned Judge who heard the case; but, in the

present instance, we have no finding on the specific point and the uncorroborated evidence of the purchaser on which the learned Judge has relied is, upon the most favourable view, consistent with the fact of work done after the limited period and is in opinion in conflict with and unsupported by the documentary evidence in the case and the inferences to be derived therefrom. As stated, the first letter of the 25th indicates that it was the advertisement which first put the parties in communication. There is no mention of Judah as broker in any of the letters until we get to the letter of 15th November 1911 which is of doubtful admissibility against the Appellant. But on the merits the letter comes too late to be of value and is open to the suspicion that evidence was then being made for the claim by Judah which followed it in January.

It is remarkable also that there is no letter or other document by the broker which establishes his claim. Had he earned his commission in terms of the agreement I think he would have been careful to put it on record. The solicitor Mr. E. O. Moses who acted in the sale as attorney for the vendor states that he never heard that Judah was the broker in the transaction. The purchaser also in his evidence says he never mentioned the matter to any one. Finally, there is evidence that the purchaser Batuknath took a commission of ½ per cent. on the entire sale-proceeds of Rs. 40,000 on the ground that there had been no broker in the sale. He further granted a receipt for the same in which express reference is made to "Amount of brokerage." The purchaser knows some English and though asked to give an explanation of this circumstance was unable to do so. Mr. Justice Greaves has held that this was a rebate, an explanation which the witness himself has not ventured to give. But, assuming that it was, the point is that it was allowed because no broker had been employed. If so, then this directly contradicts the purchaser-witness when he says that Judah was to his knowledge the broker. Nor is it likely that the Defendant would have agreed to make a further payment for "brokerage" if he was already indebted for considerable brokerage to Judah. For these reasons, I would allow this appeal. It is possible that what may have happened is that the Defendant advertised his property and then Judah coming in this way to know of it got the agreement of agency from the Defendant. After that, and independently of Judah, the purchaser learnt from the Gazette that the property was for sale and entered into communication with the vendor. Judah, who may have heard of this—may, sometime between June and August (for it is to be observed that the sale was not concluded till the latter date) have pressed the purchaser to buy in the hopes of putting forward a claim for commission. But this would not be sufficient. It is, however, not necessary for me to hold anything more than that the Plaintiffs have not established that Judah earned his commission within the terms of the agreement, and, I would, therefore, decree this appeal with costs and dismiss this suit with costs.

As regards the question whether we should interfere in appeal with questions of fact, I will only say this that if after argument the Court has a conviction that the judgment under appeal is erroneous it should not be affirmed and this is not the less so because the judgment raised a question of fact. The mode in which that conviction is brought about in matters of law and fact is a question into which I do not enter, it being difficult in the present case to say that in my opinion the Ap-

pellant has shown circumstances under which the judgment under appeal should be reversed.

MOOKERJEE, J.—This is an appeal by the Defendant in an action by an agent against his principal for recovery of commission. The Defendant employed the Plaintiff to sell his oil mill; the agreement was made on the 13th June 1911, and was embodied in a letter in the following terms: "I agree to allow you to sell my above oil mill at Rs. 40,000 only; you will get brokerage 5 per cent. on same, when the mill will be sold through you; this condition in force till fortnight (15 days) from this date." There was a postcript to the effect that "on the sale-proceeds being received in hand brokerage will be paid." On the 25th June 1911, one Batuknath Boodhnath wrote to the Defendant: "I see in the Exchange Gazette that you (are) going to sell your oil mill at Narikeldanga. I went thrice to your office, but unfortunately could not find you there. I shall, however, call at your oil mill to-morrow, with an expert Engineer's opinion, and will give you offer for the same. I may buy for myself or sell to my friends." On the next day, the intending purchaser again wrote to the Defendant. The letter referred to a conversation which the writer had with the Defendant and contained two alternative offers. The first alternative was the purchase of the mill for Rs. 35,000 cash, Rs. 1,000 to be deposited thereout as earnest money, and the balance to be paid after one month, if on trial working meanwhile, the mill turned out to be satisfactory. The second alternative was the purchase of the mill on payment of Rs. 10,000 in cash at the time of sale, and Rs. 30,000 to be paid after one year. It may be observed parenthetically that neither of these offers accorded with what the seller expected, namely, Rs. 40,000 in cash. What followed does not transpire from the correspondence, but we find that on the 8th August 1911, the purchaser wrote to the Defendant and confirmed an arrangement made on the day previous for the sale of the mill for [redacted] Rs. 10,000 to be paid in cash on registration of the conveyance, Rs. 20,000 by a Hundi payable one year after that date, and the balance of Rs. 10,000 by another Hundi payable 18 months after the date of the registration of the conveyance. On the 15th November 1911, nearly two months after the sale had been completed on the 27th September, the purchaser is said to have written a letter to the Plaintiff and authorised him to negotiate for the appointment of managing agents of the mill, which is described as "purchased through you." On the 26th January 1912, the Solicitors of the Plaintiff wrote to the Defendant and demanded immediate payment of Rs. 2,000 as brokerage due on the sale of the mill, which was alleged to have been effected through their client. The Solicitor of the Defendant promptly replied on the next day. He pointed out that the letter of authority of the 13th June 1911 was limited to 15 days from the date thereof. He asserted that the Plaintiff had failed to secure a purchaser within the prescribed time and that the mill had been sold without any concern with him; and he added that the seller had already paid brokerage on the transaction. This referred to a payment of Rs. 200 by the Defendant to the purchaser, who had granted a receipt therefor as paid on account of brokerage. The Plaintiff thereupon instituted this suit on the 13th June 1912. The Defendant asserted that the sale had taken place without the intervention of the Plaintiff as broker and repudiated the claim as entirely

unfounded. Mr. Justice Greaves has held on the evidence that the sale was effected through the instrumentality of the Plaintiff and has decreed the suit. On the present appeal, the Defendant has contended that this finding is not supported by the evidence on the record, and that even if the finding is maintained, it is not sufficient to justify the decree.

It is an elementary principle that where an agent has been appointed for a term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently, where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended. It is thus plain that the Plaintiff could be entitled to the commission, only if he found a purchaser on or before the 28th June 1911. I do not hold that the Plaintiff was bound to complete the transaction within this period; in my view of the contract, the Plaintiff would be entitled to the commission, if, within the time prescribed, he produced a person able, ready and willing to enter into the transaction with the Defendant on the terms prescribed by the latter, and the Plaintiff must within that period notify his principal that he had secured such a person. It is also indisputable, I think, that the burden lies upon the Plaintiff to establish that he has earned the commission he claims. If these principles are borne in mind, there is no escape from the conclusion that the Plaintiff cannot be awarded a decree, merely on the finding that the sale was effected through his instrumentality. If the case were before a jury, the Court would have to instruct them that to find a verdict for Plaintiff, they must find that Plaintiff procured a purchaser, able and willing to buy on the terms stated in the writing, that he notified Defendant of the fact and that this was done within the 15 days prescribed. The vital question, consequently, is, did the Plaintiff bring the purchaser to the Defendant on or before the 28th June 1911? There is no trace in the correspondence already summarised that he had done so. The first letter of the purchaser to the Defendant mentions that he had learnt from the Exchange Gazette about the proposed sale of the mill. This, no doubt, is not conclusive proof that he had not seen the broker on or before the 25th June; but there is no specific evidence upon which I can act that the two had met before that date. The letter of the 26th June also, taken by itself, does not assist the Plaintiff. No doubt, it recites a conversation between the Defendant and the purchaser but it does not show that the Plaintiff was present at that interview. I do not overlook that the purchaser asserts that he was introduced to the Defendant by the broker, and his version has been accepted as true by Mr. Justice Greaves; but this does not carry matters far enough. The purchaser could not pledge his oath that his first letter was written after the broker had informed him of the proposed sale of the mill. I am not unmindful that the purchaser assents that he first offered Rs. 35,000 and that the broker Judah used to come and see him often and got him into the scrape, that is, induced him to pay Rs. 40,000. This statement, even if accepted and taken along with the letter of the 26th June, does not conclusively prove that Judah introduced the purchaser to the Defendant on or before the 26th. There can be no dispute that if such introduction did not take place on or before the 26th June, the evidence does not show that it was brought about either on the 27th or 28th June; indeed, the

evidence is entirely silent with regard to these two dates.

Mr. Langford James, in the course of his able argument for the Respondent, properly emphasised the fact that Mr. Justice Greaves, who had the opportunity to see the witnesses, which we have not, has believed the purchaser in preference to the Defendant; and he has argued that in a case of this description, where there is a conflict of oral testimony, the Court of Appeal should not reverse the finding of the primary Court. This contention raises a question of considerable importance as to the duty and functions of a Court of Appeal in this country. As was stated by White, J., in *Protab Chandra* v. *Empress* (1) and by Trevelyan, J., in *Milan Khan* v. *Sagai Bepari* (2), the sound rule to apply in trying an appeal in a civil case is that the Court must be convinced, before reversing a finding of fact by a lower Court that the finding is wrong; in other words, the burden lies upon the Appellant to satisfy the Court that the finding he assails is not supported by the evidence on the record: *Wise* v. *Sunduloonnessa* (3), *Tayubunissa Bibi* v. *Sham Kishore* (4), *Shitabdee* v. *Molamdee* (5), *Gopeenath* v. *Buddhumunt* (6), *Anund* v. *Rutneswar* (7), *Nobin* v. *Bungo* (8), *Hoymabutty* v. *Srikrishen* (9) and *Munsoob* v. *Ali Meah* (10). When such evidence consists entirely or even principally of the oral testimony of witnesses, the Appellant is at a special disadvantage. Reference may in this connection be made to the observation of Lord Collins in *Shunmugaroya Mudaliar* v. *Manikka Mudaliar* (11): "no doubt, it is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have, but that difficulty is greatly aggravated where the Judge who heard the witnesses has formed the opinion, not only that their inferences are unsound or that the balance of probability against their story, but they are not witnesses of truth." The reasons for this rule of practice are too obvious to require elucidation. But it is worthy of note that Lord Collins refers with approval to the judgment delivered by Lindley, M. R., in the Court of Appeal in the case of *Coghlan* v. *Cumberland* (12), which sets out the limitations of the rule: "even where the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the materials before the Judge, with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it, if, on full consideration, the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than

(1) 11 C. L. R. 25 (1882).
(2) I. L. R. 28 Cal. 347 (1895).
(3) 11 M. I. A 177, 181 (1867)
(4) 15 W. R. 228: s. c. 7 B. L. R 621 (1871)
(5) 25 W. R 30 (1875).
(6) 25 W. R. 26 (1875).
(7) 25 W. R. 50 (1875).
(8) 25 W. R. 363 (1876).
(9) 14 W. R. 58 (1870).
(10) 17 W. R. 358 (1872).
(11) L. R. 36 I. A. 185: s. c. I. L. R. 32 Mad. 400 (1909).
(12) [1898] 1 Ch. 704.

another, and that question turns on manner and demeanour, the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show [illegible] statement is credible or not; and these circumstances may warrant the Court in differing from the Judge even on a question of fact turning [illegible] credibility of witnesses whom the Court [illegible] not seen." In the case in which the above observations were made, the Court of Appeal (Lindley, M. R., Rigby, L. J., and Collins, L. J.), allowed the appeal, although the appeal turned on a question of fact. It is obviously impossible to frame a formula to define the impression which must be produced on the minds of the Judges of the Court of Appeal, so that they may not shrink, in the words of Lindley, M. R., from overruling the judgment of the trial Court; and the cases in the books employ various expressions which are really of little assistance, such as that the judgment is 'clearly wrong' [*Khoorshedjee* v. *Mehrwanjee* (13)], that the decision is 'irresistibly erroneous' [*Gray* v. *Turnbull* (14) followed in *Pandurang* v. *Anant* (15) and in *Bai Gulabbai* v. *Shri Datgarji* (16)], that 'a Court of Appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong' [*Bandon* v. *Becher* (17)] followed in *Yemuna Bai* v. *Balshet* (18)], that the Court will not reverse the decision 'except in cases of extreme and overwhelming pressure' [*The Julia* (19); *The Alice* (20)], that 'a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony' [*Khoo Sit* v. *Lim Thean* (21)], or that the finding 'is so clearly against the weight of the testimony as to amount to a manifest defeat of justice' [*The Gairloch* (22)]. We may also bear in mind the observation of Lord Chelmsford in *Tayammaul* v. *Sashachalla* (23); "the advantage the Judge of the Primary Court possesses in forming a correct opinion of the credit due to the witnesses, does not relieve the Court of Appeal from the duty of [illegible] examining the whole evidence and forming e [illegible]for itself an opinion upon the whole case[illegible]lf." To the same effect are the observations of Baggallay, J. A., in *The Glannibanta* (24). Indeed, if the conclusion of the trial Court in a case of conflict of oral testimony were held practically unassailable, that Court would in essence be constituted the final Court on questions of fact. But the parties to the cause, are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, though, as James, L. J., said in *Bigsby* v. *Dickinson* (25), "if we are to accept as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened." The matter is obviously simpler where the conclusion is merely an inference of fact [Lord Blackburn in *Smith* v. *Chadwick* (26)] or where the evidence whereon the decision of the

(13) 1 M. I. A. 431, 442 (1837).
(14) L. R. 2 H. L. Sc. 53 (1870).
(15) 5 Bom. L. R. 956 (903).
(16) 9 Bom. L. R. 393 (1907).
(17) 3 Cl. & F. 479, 512 (1835).
(18) 5 Bom. L. R. 584 (1903).
(19) 14 Moo. P. C. 210 (1860).
(20) L. R. 2 P. C. 245 (1868).
(21) [1912] A. C. 323.
(22) [1899] 2 I. R. 1, 18.
(23) 10 M. I. A. 429, 436 1865).
(24) 1 P. D. 283, 289 (1876).
(25) 4 Ch. D. 24, 29 (1876).
(26) 9 A. C. 187, 194 (1884).

trial Judge is based, has been taken on Commission [Lord Collins in *Imdad* v. *Pateswari* (27)]. But, even in other cases, it is undoubtedly the duty of the Court of Appeal to weigh conflicting evidence and to draw its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. Cases are by no means rare where an Indian Appellate Court has reversed the decision of the Primary Court based on conflicting oral testimony and the conclusions of the Appellate Court has been ultimately affirmed by the Judicial Committee. *Rashmohini* v. *Umesh Chandra* (28), *Gangamoyi* v. *Trailukhyanath* (29), *Bulli Kunwar* v. *Bhagirathi* (30), *Chotey Narayan* v. *Ratan Koer* (31), *Secretary of State* v. *I. G. S. N. Co.* (32) and *Jeolal Mahto* v. *Loknarayan* (33). I am not unmindful that there are other instances where the Judicial Committee has reversed the decision of the local Appellate Court and restored the decree of the trial Judge; but that has been done because their Lordships were satisfied, upon a scrutiny of the entire evidence, that the view of the latter was more consistent therewith than that of the former [*Romeschandra* v. *Rajanikanta* (34), *Sajid Ali* v. *Ibad Ali* (35), *Syamacharan* v. *Kshetramani* (36), *Khoo Sit* v. *Lien Thean* (21) and *Nawab Shah Ara Begam* v. *Nanhi Begam* (37)]. We may also bear in mind the fact that although as an ordinary rule the Judicial Committee does not interfere with concurrent judgments of the Courts below, on [redacted] of fact, instances are by no means rare where their Lordships have examined the whole evidence, formed for themselves an opinion on the entire case and reversed the unanimous decision of the two Courts in India on a question of fact. *Rungama* v. *Atchama* (38), *Huradhun* v. *Muthoranath* (39), *Mudhoo Soodan* v. *Suroop Chandra* (40), *Tayammaul* v. *Sashachalla* (23), *Guthrie* v. *Abool Mozuffar* (41), *Lekhraj Roy* v. *Mahatab Chand* (42), *Hay* v. *Gorden* (43), *Venkateswara* v. *Shekhari Varma* (44), *Mumtaz Ahmad* v. *Zubaida Jan* (45) and *Bishunchand* v. *Bijoy Singh* (46). It is not necessary for the present purpose to consider whether any general principle is deducible from the expressions used by their Lordships as to the circumstances under which they will depart from the rule ordinarily observed by them, such as 'that the very clearest proof is shown that the decision is erroneous,' that 'the Board is clearly satisfied that there has been miscarriage in the appreciation of

(27) 14 C. W. N. 842 : s. c 12 Bom. L R. 419 (1910).
(28) L. R. 25 I. A. 109 : s. c. I. L. R. 25 Cal. 824; 2 C. W. N. 321 (1898).
(29) I. L. R. 33 Cal. 537 : s c 3 C. L. J. 349 ; 10 C. W. N. 522 (1906).
(30) 9 C. W. N. 649 (1905).
(31) I. L. R. 22 Cal. 519 (1894).
(32) I. L. R. 36 Cal. 967 : s. c 14 C. W. N. 134 (1909).
(33) Unreported. Decided by P. C., dated 23rd January 1912.
(34) I. L. R. 21 Cal. 1 (1893).
(35) I. L. R. 23 Cal. 1 : s. c. L R. 22 I. A. 171 (1895).
(21) [1912] A. C. 323.
(36) L. R. 27 I. A. 10 : s. c. I. L. R. 27 Cal. 521 4 C. W. N. 501 (1899).
(37) 11 C. W. N. 130 (1906).
(38) 4 M. I. A. 1 (1846).
(39) 4 M. I. A. 414 (1849).
(40) 4 M. I. A. 431 (1849).
(23) 10 M. I. A. 429, 436 (1865).
(41) 14 M. I. A. 53 (1871).
(42) 14 M. I. A. 393 (1871).
(43) L. R. I. A. Sup. Vol. 106 : s. c. 10 B. L. R. 301 (1872).
(44) L. R. 8 I. A. 149 : s. c. I. L. R. 3 Mad. 334 (1881).
(45) L. R. 16 I. A. 205 : s. c. I. L. R. 11 All. 460 (1889).
(46) 15 C. W. N. [illegible].

evidence, that 'it is manifestly clear from the probabilities that the Court below was wrong,' that 'the case is very extraordinary,' that 'a strong case must be made out before the Board would recommend reversal, that 'it must very clearly appear that the conclusion is very plainly erroneous,' that 'there has been some miscarriage in respect of a presumption to which too much weight was given,' that 'very definite and exceptional grounds must be assigned for interference,' that 'there is so strong a preponderance of testimony that the Board can confidently pronounce the decision to be wrong,' and other expressions of like import. But it is obvious that if reversal of concurrent findings of fact is permissible, the Court of first appeal should not be deemed fettered to a larger extent.

In the present case, as I have already stated, the finding that the sale was effected through the instrumentality of the Plaintiff does not justify a decree in his favour. The purchaser does not make an explicit statement that the Plaintiff introduced him to the Defendant on or before the 28th June 1911; but even if this much be deemed to be implied in his statements, I cannot accept his testimony. The correspondence does not show any trace of the presence of Judah in the negotiations; one would have expected some mention of his name in the first or the second letter. It is also remarkable that no written communication appears to have passed between the Plaintiff and the Defendant, although the Plaintiff had taken the precaution to accept the agency by a written instrument. There is further the unexplained fact that the purchaser received Rs. 200 as brokerage, he cannot explain why the sum was described by this obviously inappropriate term; it is extremely improbable that the Defendant would have made a present of this sum to the purchaser, if he had really to pay Rs. 2,000 to the Plaintiff as broker. There is the further significant fact that the claim for brokerage was not put forward till the 26th January 1912, though, if the Plaintiff is to be believed, he had earned it before the 26th June 1911 and the sale had been actually completed on the 27th September 1911. Finally, the case for the Plaintiff is certainly not improved by the letter alleged to have been [illegible] on the 15th November 1911, which plainly bears the appearance of an attempt to create evidence for future use. After the most careful and anxious consideration of the entire evidence on the record and the circumstances of the case, I have arrived at the conclusion that the Plaintiff has failed to establish that he has earned the commission claimed in terms of the contract and that the decree in his favour cannot be supported. In my opinion, the appeal should be allowed and the suit dismissed with costs throughout.

Sanderson, C. J.—The result is that, in view of the opinion expressed by the majority of the Court, this appeal will be allowed, the judgment of the Court of first instance set aside, and the Plaintiff's suit dismissed with costs both of the Court of first instance and of this appeal.

Babu Suresh Ch. Mookerjee, Attorney, for the Appellant.

Babu Charu Chandra Bose, Attorney, for the Respondent.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 1965, 2216 TO 2219 OF 1913.

N. R. CHATTERJEA, J. NEWBOULD, J. 1915, Heard, 1, December. Judgment, 10, December.	KAILASH CHANDRA SAHA and anr., Plaintiffs, Appellants, *v.* DARBARIA SHEIKH and ors., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885,—Landlord and Tenant—Suit for rent—Non occupancy raiyat—Lease for a term—Suspension of portion of rent during the term—Stipulation for payment of rent at full rate after expiry of term—Agreement, if invalid Acceptance of rent at reduced rate after expiry of the term, if deprives landlord of his right to claim rent at the stipulated rate—Waiver—Intention of parties.

Where in a kabuliyat *for a term executed by a non-occupancy raiyat a certain rent was settled out of which a portion was kept in suspension and the balance was stated to be the rent payable for the term, and it was further stipulated that if after expiry of the term the raiyat continued in occupation without taking a fresh settlement he would be liable to pay rent at the full rate; and after the expiry of the term the raiyat remained in occupation without taking a fresh settlement and rent was then realised from the tenant at the reduced rate for a few years and thereupon the landlord sued for rent at the full rate,*

Held—*That the agreement did not contravene the provisions relating to non-occupancy raiyats and was not invalid.*

Held *also, that the landlord by accepting rent at the reduced rate was not deprived of his right to claim rent at the rate stipulated in the* kabuliyat *and was entitled to receive rent at the full rate.*

DURGA PRASAD SINGH *v.* RAJENDRA NARAYAN BAGCHI (2) *and* BAIJNATH PROSAD *v.* RAGHUNATH RAI (3) *followed.*

Held *further, that evidence that since the execution of the* kabuliyat *the tenant paid rent at a lower rate than that stated in the* kabuliyat *was admissible to shew the intention of the parties that the* kabuliyat *was not intended to be acted upon or that there had been a waiver of the terms of the lease.*

BENI MADHAB [illegible]ANI *v.* LALMOTI DASI (4) *followed.*

These were appeals preferred on the 27th June 1913 against the decree of M. Yusuf, Esq., District Judge of Zillah Rungpur, dated the 10th March 1913, modifying the decree of Babu Nalini Kanta Bose, Munsif of Kurigram, dated the 28th February 1912

These five appeals arose out of suits for rent based upon certain *kabuliyats*. The *kabuliyats* in three of the cases were for the term of one year, two for one year from Baisakh 1311 and the other for one year from Assar 1308, and the *kabuliyats* in the remaining two cases were for three years, each commencing from 1307 and 1308 respectively. Of these five *kabuliyats* two were registered.

The suits for rent were in respect of the years 1315 to 1317.

The Defendants were non-occupancy raiyats In all these *kabuliyats* executed by them certain rent was settled in each case but a portion of it was deducted as *hajat* (kept in suspension) and the balance was stated to be the rent payable for the term It was further stipulated in the *kabuliyats* that on expiry of the term the tenants would take a fresh settlement and if they continued in occupation without taking such settlement, the amount of

(2) I L. R. 41 Cal. 402: s. c. 18 C. W. N 66 (1913).
(3) 16 C. W. N. [illegible] (1911).
(4) 6 C. W. N. [illegible].

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hajat would not be allowed and they would be liable to pay rent at the full rate, *i.e.*, at the rate of Rs. 4-7-0, Rs. 6-8-10, Rs. 5-0-0, Rs. 10-8-0 and Rs. 16-0-0 per annum instead of Re. 1-6-0, Rs. 4-1-6, Rs. 2-11-0, Rs. 5-12-0 and Rs. 10-3-0 respectively.

After the expiry of the term of the *kabuliyats* the Defendants continued in occupation without taking a fresh settlement but rent was not realised by the Plaintiffs at the full rate. The Plaintiffs brought the present suits claiming rent at the full rate. The Defendants amongst other matters contended that the stipulation was always entered in *kabuliyats* executed in the Pargana in question but it was never intended to be given effect to and they further pleaded that as a matter of fact they had never paid at the higher rates although in all the five cases the terms of the *kabuliyats* had expired long before the institution of the suits, but had been paying at the lower rates.

The Munsif gave a decree for rent at the full rate.

On appeal the District Judge held that Plaintiff was entitled to recover rent only at the reduced rate. The District Judge held as follows :—" * * it was incumbent on the Plaintiffs to prove that they had realised at the higher rates during the period intervening between the expiry of the lease and 1315 (the year of the institution of the present suits). The view that I take is that if the Plaintiffs did not realise rents at the higher rates after the expiry of the terms of the *kabuliyats* they must be taken to have themselves put an end to the agreement under which the Defendants were to pay at the higher rates with effect from the year following the date of the expiry of their *kabuliyats*. The Plaintiffs had therefore to shew that they had realised at the higher rates on the expiry of the terms of the *kabuliyats* and if they failed to do so the Defendants would be liable only at the rates admitted by them, as they would not then be holding over under the same stipulations as were entered in the *kabuliyats* but under a new arrangement accepted by the Plaintiffs."

The Plaintiffs then preferred this appeal to the High Court.

Babu Surendra Chandra Sen for the Appellant.—The Plaintiff is entitled to Rates stipulated in the *kabuliyats*. There is nothing [illegible] to shew that Plaintiff realised rent at the reduced rate after the expiry of the term. Even assuming that rent was being realised at the reduced rate during the period ifitervening between the expiry of the term of the *kabuliyat* and the institution of the suit, I submit that that fact by itself is not sufficient to deprive landlord of his right, under the terms of the contract, to claim rent at the higher rate. The mere fact that rent has been received at a reduced rate does not bind lessor to accept rent at that rate. The authorities on the point support my contention. No question of waiver arises in the case. Plaintiff is quite at liberty to enforce his right at any time. There is no evidence that the parties put an end to the conditions contained in the *kabuliyat* and they entered into a new contract after the expiry of the lease and this is nobody's case. There is no substance in the plea of the Defendants that the stipulation in the *kabuliyat* that the amount of *hajat* would not be allowed after expiry of the term of the lease was inserted as a mere matter of form. The finding is that the Defendants having understood the contents of the *kabuliyats* executed them. In settling tenants on land, landlords in this country generally allow remission of rent for a temporary period for

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the benefit of the tenants as was done in the present case.

Babu Debendra Narain Bagchi for the Respondent.—Plaintiff having realised rent at the reduced rate after the expiry of the term of the lease has waived his right to claim rent at the full rate. Moreover the agreement itself is invalid under the provisions of sec. 29 of the Bengal Tenancy Act and is not enforceable at law. There is evidence to shew that rent was received by the Plaintiff at the reduced rate. Plaintiff by receiving rent at the reduced rate after the [illegible] term of the *kabuliyat* has entered into a new contract with the Defendants. After the expiry of the term the Defendants held the lands under a new contract. Plaintiff cannot therefore claim rent at the full rate as stipulated in the *kabuliyat*.

Babu Surendra Chandra Sen in reply: Sec. 29 of the Bengal Tenancy Act has no application in this case. Here the Defendants are non-occupancy raiyats and there is nothing in the terms of the *kabuliyats* which contravenes the provisions of the Bengal Tenancy Act relating to non-occupancy raiyats. The *kabuliyats* are valid and Plaintiff can enforce his rights thereunder at any time provided there has been no waiver, and I submit there has been none. Even in the case of an occupancy-raiyat, sec. 29 does not contravene this sort of agreement inasmuch as the rent sought to be recovered was settled at the beginning of the tenancy as the rent payable and that there was only a suspension of a portion of the rent for a temporary period. However this question does not arise.

The JUDGMENT OF THE COURT was as follows:—

These appeals arise out of suits for rent upon certain *kabuliyats*. The *kabuliyats* in three of the cases were for the term of one year and the *kabuliyats* in the remaining two cases were for 3 years each. Certain rent was settled in each case, but a portion was deducted as *hajat* (kept in suspense) and the balance was stated to be the rent payable for the term. It was stipulated however in the *kabuliyat* that on the expiry of the term the tenant would take a fresh settlement and if he continued in occupation without taking any fresh settlement, the amount of *hajat* would not be allowed. The Plaintiff in these suits has claimed rent at the full rate. The Court of first instance gave a decree for rent at the full rate, but on appeal the learned District Judge held that Plaintiff was entitled to recover rent only at the reduced rate. The Plaintiff has appealed to this Court.

Now the Defendant is not an occupancy raiyat. The case of *Mohamaya Kar* v. *Kishore Chang* (1) upon which reliance was placed on behalf of the Respondent related to an agreement made by an occupancy raiyat and the agreement contravened the provisions of sec. 29 of the Bengal Tenancy Act, and therefore cannot govern the present cases. The agreement contained in the *kabuliyat* in these cases as to payment at the full rate after the expiry of the term if the tenant chose to occupy the land does not contravene the provisions of the Act relating to non-occupancy raiyats, and is not invalid.

The learned District Judge however has held that even after the expiry of the term, the Plaintiff did not realise rent at the full rate, but realised rent at the reduced rate. Although there is evidence to show that rent was not realised at the full rate, there is no evidence that rent was realised at the reduced rate, and the finding of the Court below on the latter

(1) 18 C. L. J. [illegible]

point therefore is not based upon any evidence. It does not appear at what rate rent was actually realised since the expiry of the term. Assuming however that rent was realised at the reduced rate for a few years before suit, we do not think that that fact by itself is sufficient to deprive the landlord of his right to claim rent at the rate stipulated in the *kabuliyat*. The contract as to the rent payable after the expiry of the term is contained in the *kabuliyat*. The mere fact that rent for some years has been received at a reduced rate does not bind the lessor to accept rent at that rate, in future, because that is consistent with the reduction being a mere temporary abatement and as an indulgence on the part of the lessor. See *Durga Prosad Singh* v. *Rajendra Narayan Bagchi* (2) and *Baijnath Prosad* v. *Raghunath Rai* (3). The learned Judge has practically held that the landlord by accepting rent at the reduced rate after the expiry of the term of the leases has varied the rent by putting an end to the agreement to pay rent at the full rate. No such case however was made by the Defendant, and in four of the cases in which the leases were registered evidence of any subsequent agreement or evidence of conduct is inadmissible.

We are accordingly of opinion that the Plaintiff by accepting rent at the reduced rate is not precluded from claiming rent at the rate agreed upon in the *kabuliyat*.

The Defendant however pleaded in his written statement that the stipulation in the *kabuliyat* that the amount of *hajat* would not be allowed on the expiry of the term of the lease was inserted as a mere matter of form, in other words, that it was never intended to be acted upon. We think that this question should be gone into. In the case of *Beni Madhab Gorani* v. *Lalmoti Dasi* (4), this Court held that evidence that since the execution of the *kabuliyat* the tenant paid rent at a lower rate than that stated in the *kabuliyat* is admissible to show that the intention of the parties was that the *kabuliyat* from the very first was not intended to be acted upon, or that there had been a waiver of the strict term of the lease. We agree with the above view and we think the lower Appellate Court should come to a decision as to what was the intention of the parties from the beginning—whether the *kabuliyats* were not to be acted upon or in the alternative whether there was a waiver of the terms. The decrees of the Court below are accordingly set aside and the cases remanded to that Court for disposal after a decision of the question indicated above. It will be open to both parties to adduce further evidence on the point. Costs to abide the result.

Appeal allowed,

H. C. S. *Case remanded.*

(2) I. L. R. 41 Cal. 493 : s. c. 18 C. W. N. 66 (1913).

(3) 16 C. W. N. 496 (1911).

(4) 6 C. W. N. 242 (1898).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 438 OF 1912.

JENKINS, C. J. HOLMWOOD, J. 1915, Heard, 23, 27 and 28, July. Judgment, 4, August.	BALMUKUND RUYIA and ors., Plaintiffs, Appellants, v. MOTI LAL BARMAN and ors., Defendants, Respondents.

Simple mortgage—Mortgagor's power to create leases binding on mortgagee.

A simple mortgage in India, unlike a legal mortgage in England, does not arrest the mortgagor's power of leasing in the ordinary course of management and the

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mortgagor acts within his powers in creating a temporary lease which does not impair the value or impede the operation of the mortgage.

BANEE PERSHAD *v.* REET BHUNJUN SINGH (2) *referred to.*

KEECH *v.* HALL (1) *not applied.*

This was an appeal preferred on the 6th December 1912 against the decree of Babu Bidhu Bhusan Banerjee, Subordinate Judge of Zilla Hughly, dated 6th September 1912.

The facts of the case material [illegible] report will appear fr[illegible]gment.

Mr. B. C. Mitter, Dr. Sarat Chandra Basak and *Babu Bepin Chandra Bose* for the Appellants.

Sir Rash Behary Ghosh, Dr. Dwarka Nath Mitter and *Babu Baranashibasi Mookerjee* for the Defendant No. 1, Respondent.

Babus Braja Lal Chakravartty and *Mohini Mohun Chatterjee* for the Defendant No. 2, Respondent.

Babus Manmatha Nath Mukherjee and *Satindra Nath Mukherjee* for the Defendant No. 12, Respondent.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The contest on this appeal is as to the respective rights of a purchaser under a mortgage decree and a lease-holder in possession who was not a party to the mortgage suit. The Plaintiff in this suit is the purchaser and the contesting Defendant is the lease-holder. The Plaintiff prays for possession or in the alternative that the lease-holder be directed to redeem.

The other Defendants are the mortgagors and former claimants under mortgages or their representatives. The two mortgagors are Debendra Narayan, who is represented by Defendant No. 3, and his brother Upendra Narayan Defendant No. 4. These brothers were the sons of Joy Narayan Saha, a Hindu governed by the Bengal School of Law, who died before the mortgages to which I will next refer. On his death each of [illegible] became entitled to ¼th [illegible]re in the family property, their uncle, with whom we have no concern, [illegible]ng entitled to the other moiety.

On the 3rd of May 1894, Debendra mortgaged his ¼th of the property in suit to the Defendant Srimati Iswari Debi and Srimati Bhuban Mohini Debi, the mother of Defendants 7 and 8, to secure Rs. 400 with interest at 2 per cent. per mensem with monthly rests.

On the 10th of January 1896, Upendra mortgaged his ¼th share in the property to Panchanan Prosad Kundu who is now represented by Defendants Nos. 10 and 11 to secure Rs. 1,900 with interest.

On the 13th June 1898 Debendra and Upendra mortgaged the property in suit to Upendra Nath Mukherjee, father of Defendant No. 2, to secure Rs. 5,000 with interest.

On the 3rd of October 1898 the two brothers again mortgaged the property to Upendra Nath Mukherjee to secure Rs. 15,000 with interest.

These are the mortgages with which we are concerned in this suit and I now pass on to describe what was done with them.

On the 26th of May 1900 a suit No. 41 of that year, was brought on Debendra's 1st mortgage, and on the 8th of July 1901 a decree for sale was passed. The ¼th share of the property in suit was bought at the Court sale by Indra Narayan Pal, Defendant No. 9.

In 1904 suit No. 67 of that year was instituted by Upendra Nath Mukherjee on

(1) 1 Douglas 21 (1778).
(2) 10 W. R. 225 (1868).

his two mortgages and he joined as Defendants Debendra and Upendra and their mother, the two ladies who were mortgagees under Debendra's first mortgage, Indra Narayan Pal, the mortgagee under Upendra's first mortgage and P. N. Mallik to whom this last mortgage had been transferred on the 22nd October 1900.

In 1905 suit No. 55 of that year was instituted by P. N. Mallik on Upendra's first mortgage and the Defendants to that suit were Upendra, Debendra and their mother, the Kundus who had transferred to P. N. Mallik the mortgage then in suit, Upendra Nath Mukherjee, the predecessor of the present contesting Defendant and others who need not be particularised.

On the 30th June 1905 a decree was passed in suit No. 57 of 1904 brought by Upendra Nath Mukherjee and thereby a sale of the mortgaged properties was directed free from all incumbrances, and it was ordered that Indra Narayan Pal should get payment first out of ¼th of the sale-proceeds of the sum of Rs. 2,178-2-6 due on account of the mortgage bond, dated the 3rd May 1894, with interest at the rate of the bond up to the 12th August 1901 and certain other sums making a total of Rs. 2,305-7-0. Similarly Rs. 7,670 odd was directed to be paid in respect of the mortgage of January 10th, 1896. There then followed a power to redeem.

On the 23rd May 1906 a decree in the suit was passed directing a sale subject to the *mokurari maurasi* right and the *pattas* there described. And it was noted that Upendra Nath Mukherjee had obtained a decree in suit No. 57 of 1904.

On the 17th June 1907 the property in suit was put up to sale in suit No. 57 of 1904 and was bought by the Plaintiff Balmukunda Ruyia at Rs. 30,000. A deposit of Rs. 7,500 was paid, and after the balance had been paid the sale was confirmed.

Difficulties as to possession followed with the usual sequel of criminal proceedings and ultimately on February 23rd, 1911, this suit was instituted. The suit was heard by the Subordinate Judge, 2nd Court of Hughly.

By way of defence, the lessee the contesting Defendant relied on certain leases which according to them either vested in him a title paramount, or had become binding on the Plaintiffs by recognition or otherwise. The lessee also claimed that the suit was barred against him by limitation, and advanced other defences.

The result of the trial was that the Subordinate Judge decided in effect as to the bulk of the property that the lessee would only resist the Plaintiffs' claim for possession by redeeming the property on the terms stated in the Court's decree.

According to those terms the lessee had to pay Rs. 2,172-14-0 in redemption of the first mortgage and Rs. 6,780-11-2½ in redemption of the second mortgage but the Plaintiffs' claim for interest after the confirmation of the sale under the decree in suit No. 57 of 1904 was dismissed.

Neither party was satisfied with this decree and so the Plaintiffs have appealed and the Defendant has filed cross-objections. To appreciate the points at issue it is necessary to observe the dates of the leases on which the Defendant lessee relies. Some purport to have been transferred, and the rest have been granted direct to the lessee's predecessor. Those said to have been transferred may be eliminated from discussion for the contesting parties have come to the following arrangement regarding them. "It is agreed between Mr. B. C. Mitter on behalf of the Appellants and Sir Rash Behary Ghosh on behalf of the Respondent that

the tenancies to which the *kobalas* of 14th March 1888 and 9th November 1903 relate came into existence prior to the mortgage of 3rd May 1894 and that no notice to determine the same has been given, but this Court is not to affirm but to leave open whether those leases are *maurasi mokurari* or not so that, if necessary, that point may be determined in subsequent litigation. As a result of this the decision of the Subordinate Judge dismissing the suit in relation to the property comprised in these tenancies is to be confirmed on this ground but on this ground alone." The direct leases are dated the 27th of October 1894 and the 17th of January 1895 and two the 22nd of November 1897. Thus it will be seen that all are subsequent to the first mortgage and the last two are subsequent to the second mortgage. But no cross-objection has been preferred as to these last two so that the only contest is as to whether the first two prevail over the Plaintiffs' right to possession. These leases are each for 50 years with an option of renewal for 10 years and it has not been, nor could it be, maintained that the leases did not at least entitle the lessee to redeem. But the lessee maintains that he is entitled to retain possession without redeeming the Plaintiffs.

The relative positions of a mortgagee and of a tenant under a tenancy created by the mortgagor after a legal mortgage is well settled in England, but it would be a mistake to applly these English rules to the relations resulting from an Indian simple mortgage. The rule of *Keech* v. *Hall* (1), the leading English case, is one of conveyancing but under a simple mortgage the mortgagor does not part with possession, and the right of a mortgagee is merely to cause the mortgaged property to be sold for the payment of his debt.

And so we find that a simple mortgage does not as matter of conveyancing arrest the mortgagor's power of leasing in the ordinary course of management. Thus in *Banee Pershad* v. *Reet Bhunjun Singh* (2) it was decided—and the propriety of the decision has never been questioned—that as long as nothing took place which impaired the value or impeded the operation of the mortgage, the mortgagor in creating a temporary lease acted within his powers. This aspect of the case was not developed as fully as it might have been at the trial. It has not been shown that the first mortgage was impaired in value or impeded in operation by the first two leases. There is no evidence as to what class of lease is ordinarily granted in the case of properties such as that in suit, and the only restriction on leasing mentioned in the mortgage is against the granting of a *kayemi maurasi*. The impugned leases do not come within that description.

We learn from the Commissioner's report that "the disputed land is situated in the town of Salkia adjoining the Bandaghat and appertains to a very thickly populated and important commercial quarter of the town lying as it does exactly on the river Hughly over the disputed land and that on the north of it there exist the jute press and godowns of the Defendant." And so the lease involved building operations. At the same time the first mortgage was only for Rs. 400 and the view of the Subordinate Judge was that it could not be said that the mortgage security even of the first and second mortgages became insufficient by the execution of these leases. Nor can it be urged that the Plaintiffs have been taken by surprise, for the lower Court has held that the purchaser bought with notice of the leases, and no

(1) 1 Douglas 21 (17..).

(2) 10 W. R. [illegible]

attempt has been made to impugn the correctness of this finding.

Moreover no complaint was made by the first mortgagees or by Indra Narain who purchased under their decree.

On the contrary Indra Narain under whom the Plaintiffs claim so far as they rest on the first mortgage recognised and adopted the leases in the most unequivocal manner, for he brought a suit expressly on them and obtained a decree [redacted]

This suit was instituted in the Court of the Munsif at Howrah in 1907 and thereby rent was claimed and recovered on the registered *kabuliyats* of the 27th October 1894 and the 17th January 1895. And before, this rent was also paid to the Receiver appointed in suit No. 57 of 1904, the suit in which the Plaintiff's purchase was made. In view of these facts I do not think the two leases of the 27th October 1894 and the 17th January 1895 can be treated by the Plaintiffs as inoperative, and I hold that the lessee is under no obligation to redeem. Mr. B. C. Mitter at one time thought that the lessee had made an admission as to boundaries favourable to him, but in this he was manifestly mistaken.

The result then is that the decree of the Subordinate Judge will stand as to the plots comprised in the mortgage of the 16th January 1896, for as to these no appeal has been preferred, but it will be subject to a modification to which the Plaintiffs assent, as by an oversight the decree has been so expressed as to give rise to possible error. The decree as drawn directs that "the Plaintiffs will be entitled to get a decree for foreclosure against Defendant No. 1 with respect to the land covered by the third and fourth leases, dated the 22nd November 1897 and the 22nd November 1897 respectively. This must be altered by substituting the words "covered by the mortgage of the 16th of January 1896." In view of the statement made on behalf of the lessee that he does not propose to redeem the mortgage of the 16th January 1896 it becomes unnecessary to consider whether the Subordinate Judge erred in disallowing interest up to the date of the suit. There will be a statement to that effect embodied in the decree.

The result then is that the Plaintiffs' claim is dismissed as to the plots comprised in the tenancies to which the *kobalas* of 14th March 1888 and 9th November 1903 relate, that is to say the plots measuring 3 kattas and 7 kattas 6 chittaks and in this connection there will be embodied in the decree the terms to which the parties have agreed.

The Plaintiffs' claim will also be dismissed as to the plots comprised in the leases dated the 27th October 1894 and 17th January 1895 and measuring 7 kattas and 2 bighas and 8 kattas respectively.

The rest of the Subordinate Judge's decree will stand with the variation which I have indicated. The Appellants must pay the Defendant No. 1 half his costs of this appeal and two gold mohurs as hearing-fee to each of the Defendant Nos. 2 and 12.

Holmwood, J.—I agree.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 4176 OF 1913.

RICHARDSON, J. MULLICK, J. 1915, Heard, 10 and 11, February. Judgment, 11, February.	ALI MAHAMUD, Defendant No. 1, Appellant, *v.* AFTAHUDDIN BHUYA and another, Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 12—Amending Act I, B C of 1905—Portion of, tenure, sale of, by registered instrument—Non payment of landlord's fee—Title if passes—Purchaser allowing vendor to represent him to landlord—Effect on rent sale.

The transfer of a portion of a tenure was complete upon registration although the landlord's fee was not paid and no notice of the transfer was given to him.

KRISTO BULLUV GHOSE *v.* KRISTO LAL SINGH (1), CHINTAMONI DUTT *v.* RASH BEHARY MONDAL (2), HEMENDRA NATH MUKERJEE *v.* KUMAR NATH ROY (3) *and* GIRIS CHANDRA GUHA *v.* KHAGENDRA NATH CHATTERJEE (4) *relied on.*

But where the purchaser subsequent to his purchase allowed his vendor to represent him before the landlord, paying rent in the latter's name, the landlord was entitled to frame his suit for rent without impleading the purchaser, and the sale in execution of the decree obtained therein passed the entire tenure.

This was an appeal from a decision of Babu Jnanendra Nath Mukerjee, Subordinate Judge, Tipperah, dated the 18th June 1913, modifying a decision of Babu Phanindra Mohan Chatterjee, Munsif, Comilla, dated the 31st May 1912.

The facts of the case material to this report will appear from the judgment.

(1) I. L. R. 16 Cal. 642 (1889).
(2) I. L. R. 19 Cal. 17 (1891).
(3) 12 C. W. N. 478 (1908).
(4) 16 C. W. N. 81 (1911).

Babu Upendra K. Roy for the Appellant.

Moulvi Nuruddin Ahmed (for *Moulvi Mahomed Abdul Ashan*) for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for arrears of rent brought by the Plaintiffs as owners of a separate three annas share in a certain *dar-putni* tenure against the Defendants as their tenants. The learned Munsif dismissed the suit on the ground that the Plaintiffs had failed to establish their title to the share of the *dar-putni* which they claimed. In the lower Appellate Court the learned Subordinate Judge has found on the facts that the Plaintiffs have made out their title and has given the Plaintiffs a decree for arrears of rent at the rate admitted by the Defendants.

Before us there is no dispute, and under the circumstances there could be no dispute, that Plaintiff No. 1 at any rate is entitled to rent in respect of a two annas share of the *dar-putni*. The argument which has been addressed to us by the learned Vakil for the Defendant No. 1, the Appellant before us, has been confined to the defence raised below that Charu, the predecessor of the Defendants, purchased one anna out of the three annas in respect of which the Plaintiffs claim rent and that in respect of that one anna share no rent is due from the Defendants. It appears that the three annas share of the *dar-putni* was sold in execution of a decree for arrears of rent and was purchased by the Plaintiffs' vendor. The latter sold two annas to Plaintiff No. 1 and one anna to Plaintiff No. 2. *Primâ facie* therefore, on the facts found by the learned Subordinate Judge there appears to be no answer to the suit. The Defendants, however, alleged that the one anna share was sold to their predecessor before the institution of the rent

suit. The question, therefore arises whether the sale in execution passed that one anna share to the Plaintiffs' vendor. It is common ground that Charu was not a party to the decree in execution of which the rent sale was held. It has been further found that Charu, though he purchased by a registered instrument, did not pay the landlord's fee prescribed by sec. 12 of the Bengal Tenancy Act. In the view taken by the learned Subordinate Judge the fee not having been paid and no notice of the transfer having been given to the superior landlord, the *putnidar*, the latter was competent to bring a suit against the original tenants without joining Charu.

In this appeal it has been contended that regard being had to the Validating Act (Act I B. C. of 1903) the landlord was bound by the transfer although his fee was not paid and although no notice of the transfer was given to him. This contention is founded on the cases of *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (1), *Chintamoni Dutt* v. *Rash Behary Mondal* (2), *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (3) and *Giris Chandra Guha* v. *Khagendra Nath Chatterjee* (4). The authority of this series of case is undeniable and the result seems to be that a transfer may be complete upon registration although the landlord's fee is not paid and no notice of the transfer is given to him. Upon this part of the case the judgment of the learned Subordinate Judge may be open to just criticism. But the argument addressed to us overlooks a further finding of the Subordinate Judge upon a question of fact.

By his purchase Charu became one of a number of co-sharers in the *dar-putni* and the Subordinate Judge finds that Charu and his heirs "allowed Asok to represent them to the landlords." Asok was Charu's vendor and the finding is based partly on the fact that subsequent to Charu's purchase he and his heirs paid rent in Asok's name. All that the Validating Act says is that a transfer is not to be deemed invalid "merely on the ground that the landlord's fee prescribed by the said sec. 12 or 13 has not been paid." Here the subsequent conduct of Charu and his heirs introduces a new element into the case. We are concluded by the Subordinate Judge's findings on questions of fact, and on the facts as found the superior landlords were at liberty to frame their suit for arrears of rent in the manner in which they did frame it and the Appellant-Defendant cannot now take advantage of the fact that Charu was not impleaded.

The result is that the conclusion at which the Subordinate Judge arrived cannot be successfully assailed in second appeal and the appeal must be dismissed with costs.

Appeal dismissed.

(1) I. L. R. 16 Cal. 643 (1889).
(2) I. L. R. 19 Cal. 17 (1891).
(3) 12 C. W. N. 478 (1908).
(4) 16 C. W. N. 64 (1911).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 861 OF 1913.

MOOKERJEE, J. RICHARDSON, J. 1915, Heard, 23 and 24, February. Judgment, 24, February.	SURESH KANTA BANERJEE CHOUDHURY, Plaintiff, Appellant, *v.* NAWAB ALI SIKDAR and anr., Defendants, Respondents.

Principal, suit by, against agent for accounts—Limitation—Limitation Act (IX of 1908), Art. 89.

The Plaintiff as principal sued the Defendant as agent for accounts. The agency was created in 1896 by a registered document which provided that accounts were to be rendered at the end of each year, the agent also hypothecating immovable pro-

SURESH KANTA BANERJEE CHOUDHURY *v.* NAWAB ALI SIKDAR.

perty as security. In 1897 the Plaintiff transferred the property to his wife who in 1899 retransferred the property to her husband. The agency was terminated in 1910 and the suit was brought in 1911 for accounts from 1899.

Held—*That a new agency was created in 1899 irrespective of the agreement of 1896.*

That Art. 89 of the Limitation Act was applicable to the case and as in this case there was no demand and refusal during the continuance of the agency and as the suit was instituted within three years of the date when the agency terminated the Plaintiff was entitled to the accounts claimed.

This was an appeal from a decision of Babu Shyama Charan Banerjee, Subordinate Judge, Backergunj, dated 14th November 1912, modifying that of Babu Kumud Kanta Bose, Munsif, Barisal, dated 10th February 1912.

The facts of the case will appear from the judgment.

Babus Joges Chandra Roy and *Prokas Ch. Majumdar* for the Appellant.

Moulvi A. K. Fazlal Huq, and *Babu Sarat Ch. Dutt* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff in a suit by a principal against his agent for accounts. The agency was created on the 24th May 1896, for management of immoveable property. In 1897, the principal transferred the property to his wife and two years later the wife retransferred the property to her husband. The agent, however, continued to manage the properties as if no transfer had been effected. The agency was finally terminated in 1910, and the present suit was commenced on the 22nd March 1911, for accounts in respect of the years 1306 to 1317. The Court of first instance held that the terms of the agreement were enforceable and made a decree accordingly. By the agreement, which was embodied in a registered document, immovable property had been hypothecated and the Court of first instance held that the suit was in essence a suit to enforce a charge against immovable property within the meaning of Art. 132 of the Second Schedule to the Indian Limitation Act. On appeal, the Subordinate Judge has held that the effect of the transfer of the property, for management whereof the agent was appointed, was to terminate the agency, and that when the property was retransferred by the wife to the husband, a new agency was created independently of the term of the original contract. [*Behari Lal* v. *Harakumar* (1)]. In this view, he has held that Art. 132 was not applicable; he has thus treated the suit as one for accounts by a principal against his agent. At the same time, he has held, not quite consistently with his view as to the effect of the transfer, that as under the original agreement accounts were to be rendered at the end of each year the Plaintiff was entitled to accounts only in respect of the three years antecedent to the suit. On the present appeal it has been argued that the judgment is inconsistent and that if the transfer by the husband in favour of the wife was a real transaction which terminated the agency and if a new agency was created in 1899 on the retransfer by the wife to the husband, no reference can legitimately be made to the terms of the original agreement. The argument in substance is that Art. 89 is applicable to

(1) [illegible] of 1910; 16 C. W. N. 641 [illegible].

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the suit and that as it has been instituted within three years from the date of the termination of the agency, the Plaintiff is entitled to the accounts claimed. In our opinion this contention is well founded and must prevail.

Art. 89 provides that a suit by a principal against his agent for movable property received by the latter and not accounted for, must be instituted within three years from the date when the agency terminates or from the date when there has been a refusal to render accounts during the continuance of the agency. As in this case, there was no demand and refusal during the continuance of the agency, and as the suit has been instituted within three years of the date when the agency terminated, the Plaintiff is clearly entitled to the accounts claimed. On behalf of the Respondent it has been contended, however, that the accounts should be limited to the three years antecedent to the suit. For this proposition no authority has been cited, and the terms of Art. 89 do not support the contention; on the other hand the view we take is supported by the decisions of this Court in the cases of *Sib Chandra Roy Choudhury* v. *Chandra Narain Mukherjee* (2) and *Hafizuddin Mondal* v. *Jadunath Saha* (3). Reference has been made to the fact that a different view was taken in *Jogesh Chandra* v. *Benode Lal Roy* (4) where the decision in *Mati Lal Bose* v. *Amin Chand Chattopadhaya* (5) was accepted as good law. As pointed out, however, in the case of *Trailakhya Nath Mandal* v. *Abinas Chandra Roy* (6) the attention of the learned Judges who decided the case of *Jogesh Chandra* v. *Benode Lal Roy* (4) was not drawn to the earlier decision in *Hafizuddin Mondal* v. *Jadunath Saha* (3); and we are not prepared to accept it as good law.

The result is that this appeal is allowed and the decree of the Court below discharged. A preliminary decree is made in favour of the Plaintiff for the accounts claimed in the suit. This decree is made on the assumption that a new agency was created in 1899 irrespective of the agreement of 1896. The case will now be remitted to the Court of first instance in order that the accounts may be taken. The Appellant is entitled to his costs both in this Court and in the Court of the Subordinate Judge.

Appeal allowed.

(2) 1 C. L. J. 232 (1905).
(3) 12 C. W. N. 820: s. c. I. L. R. 35 Cal. 298 (1908).
(4) 14 C. W. N. 122 (1909).
(5) 1 C. L. J 211 (1902).
(6) 24 ind. Cas. 18 (1914).

[CIVIL REVISIONAL JURISDICTION]

RULE No. 694 OF 1915.

JENKINS, C. J.
HOLMWOOD, J.
1915,
Heard, 27 and 30, August.
Judgment, 30, August.

AMRITA LAL KUNDU, Judgment-debtor, Petitioner,
v.
ANUKUL CHANDRA DAS, Decree-holder, Opposite Party.

Company—Liquidation, attachment prior to—Property attached if vests in liquidator—Property attached sold and proceeds brought into Court—Proceeds how to be distributed.

Where after property belonging to a limited liability Company had been attached by a creditor, the Company went into voluntary liquidation:

Held—*That after the property had been sold and the proceeds brought into Court, the distribution thereof must be governed by the provisions of the Code of Civil Procedure.*

(3) 12 C. W. N. 820: s. c. I. L. R. 35 Cal. 298 (1908).
(4) 14 C. W. N 122 (1909)

AMRITA LAL KUNDU *v.* ANUKUL CHANDRA DAS.

That the attachment and sale could not be set aside at the instance of the liquidator.

The liquidator of a Company differs in this respect from the Official Assignee in that the property of the Company does not vest in him.

This was a Rule granted on the 16th July 1915 against the order of Babu A. Ghosh, Small Cause Court Judge, Howrah, dated 19th June 1915.

A creditor of a Company with limited liabilities and registered under the Companies Act got a decree against them in the Court of Small Causes at Howrah. He took out execution and attached and removed certain moveable property to Court and was about to put them up for sale. Subsequently the Company went into voluntary liquidation, appointing the Petitioner a liquidator of their assets. The liquidator sought to stay the sale and to release the attachment of the Court. The Small Cause Court in which the application was made, held that it would be unjust to stay the sale in a case circumstanced as above. Against this order, the liquidator moved the High Court and obtained this Rule but sale had in the meantime already taken place and only the sale-proceeds remained in the hands of the Court.

Babu Jnanendra Nath Sarkar (with him *Babu Bhupendra Nath Basu*) in showing cause said that these applications which were made in the Court of Small Causes, were presumably under secs. 215 and 171 of the Indian Companies Act; but "the Court" there, was "the Court having jurisdiction" under the Act. Secs. 2 (3) and 3 of Ind. Comp. Act.

[HOLMWOOD J.—Then the Court of Small Causes had no jurisdiction to entertain this application, but proceeded to make an order on the assumption that it had?]

Under sec. 3 (3) proceedings taken in the wrong Court were not invalid. This petition presented in a wrong Court was rightly rejected.

Sec. 171 did not contemplate a case of voluntary liquidation; no winding up order having been made by a Court of competent authority. Sec. 215 did not apply; "all or any of the matters" in sec. 215 related to matters similar to winding up of a Company. But avoidance of attachment is only contemplated in sec. 232 of the Act where it is after the commencement of the winding up. So also in Halsbury's Laws of England (Company) Vol. III, p. 535; *Parry's* case (1). "If an execution has been duly levied before the winding up commenced, so as to make the creditor a secured creditor a stay will be refused."

[JENKINS, C. J.—Is the attaching creditor a secured creditor here? I think Maclean, C. J., in a Full Bench case took the opposite view: *Frederick Peacock* v. *Madan Gopal* (2).]

Exactly so, but of the two conflicting Full Bench cases, *Anand Chandra* v. *Panchilal* (3) is in my favour. Maclean, C. J., in *Frederick Peacock* v. *Madan Gopal* (2) distinguished the earlier case and held that a property which had been attached by a creditor also vested in the Official Assignee. That is so in Insolvency, but here it is quite different. Any analogy based upon it is erroneous; *Re Withernsea Brickworks* (4). It is quite significant that while under sec. 35, Provincial Insolvency Act an attachment before insolvency can be avoided, we can find out no analogous provision in the

(1) 4 Deg. J., & Sm. 13 C. A. (1863).
(2) I. L. R. 28 Cal. 122: s. c. 5 C. W. N. 87 (1900).
(3) 5 B. L. R. [illegible] (1870).
(4) 14 Ch. [illegible]

Indian Companies Act. The intention of the legislature is clear; the Court has no power to release an attachment validly and duly made by a creditor.

Babu Ramani Mohan Chatterjee in reply said that "the Court" in sec. 215 meant the Court in which proceedings against the Company were pending. It could not mean the Court which had jurisdiction in winding up a company, as this was not a matter touching liquidation Sec. 171 was applicable when read with sec. 215. Sec. 207 enacted the consequences of a voluntary liquidation; it provided that all assets vested in the liquidator for rateable distribution among creditors, as they vested in the Official Assignee according to the Full Bench. The attaching creditor was not a secured creditor and as such the liquidator can take hold of all the property that the Company can claim.

[JENKINS, C. J.—Your argument is based upon the supposition that the assets of the Company vested in the liquidator just as the assets of an insolvent vest in the Official Assignee.]

Yes; the principle seems to be the same in both cases, *viz.*, distribution of assets *pari passu* among the creditors.

The JUDGMENT OF THE COURT was as follows:—

We must discharge the Rule. Though the matter is by no means clear we feel that apart from any defect of jurisdiction the distribution of the proceeds in Court must be governed by the provisions of the Code of Civil Procedure. The proceeds came into Court before the application was made to us to pass an order in favour of the liquidator. The liquidator's argument before us has been to a certain degree based upon the idea that the property of the Company vested in the liquidator. It is better that that idea should be at once removed. The liquidator of a company differs in this respect from the Official Assignee in that the property of the Company does not vest in him. I am of course leaving out of consideration the possible vesting of the property of an unregistered Company under a vesting order.

The Opposite Party will get his costs of this Rule. We assess the hearing-fee at one gold mohur.

Rule discharged.

[CIVIL REVISIONAL JURISDICTION.]

RULE. No. 627 OF 1915.

HOLMWOOD, J. MULLICK, J. 1915, 25, November.	NARESH CHANDRA BOSE, Plaintiff, Petitioner, *v.* HIRA LAL BOSE and ors., Defendants, Opposite Party.

Calcutta Improvement Act (V, B. C. of 1911), sec 71—Special Tribunal, if Court, and may call for records of other Courts—Land Acquisition Act (I of 1894), sec. 53.

The Special Tribunal constituted to hear references against orders passed by the Calcutta Improvement Trust has been constituted a Court under the Land Acquisition Act of 1894 and, under sec. 53 of that Act, is governed by the provisions of the Code of Civil Procedure and has the powers of a Judge under that Code.

The power to call for the records of other Courts is a power which is inherent in the Judge of a Land Acquisition Court and consequently in the Special Tribunal.

This was a Rule granted on the 28th of June 1915 against an order of Mr. A. H. Cuming, District Judge of 24-Parganas, dated 23rd June 1915.

The rule was granted upon an application which was briefly as follows:—

That the Petitioner was the owner by right of purchase at a mortgage sale of certain premises and land in Bhawanipur

THE

Calcutta Weekly Notes.

Vol. XX.] MONDAY, FEBRUARY 14, 1916. [No. 12.

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Criminal Sessions.

The Hon'ble the Chief Justice presides at the first Calcutta Criminal Sessions commencing its sittings from date.

Crown if bound to obey decree of Court.

The judgment of the Lord Chief Justice of England in the recent legal proceedings of *King* v. *Sir Edgar Speyer and Sir E. J. Cassel* which were taken at the instance of a private person to test whether an alien by birth although naturalized as a British subject is entitled to be a Privy Councillor, is of great constitutional importance. This question which required the interpretation of statutes has been answered in the affirmative. The case is of importance as furnishing a guide to the interpretation of statutes in the face of apparent conflicts between them. But what seems to be of even greater importance is the answer given by the Lord Chief Justice of England to the contention of the Attorney-General that the Court had no jurisdiction to make any order with regard to the question raised, for if the Court made an order that the persons appointed as Privy Councillors were not entitled to be so appointed, it would be a judgment against them only and the Court would be powerless to enforce the judgment of ouster against the Registrar of the Privy Council, who was the servant of the King and might not remove their names from the roll of Privy Councillors. Further that even if the Registrar did remove the names, the Court could not prevent the immediate reinstatement of the names, if the King thought fit to order it. The Lord Chief Justice answered that the decision would not involve making an order against the Registrar of the Privy Council but the Court would not be powerless to enforce the judgment if it were disobeyed by those against whom it was made. As regards the Crown, their Lordships observed that "In the Kings' Court they sat to administer justice, and to interpret the laws of the Realm in the King's name. It was respectful and proper to assume that once the law was declared by a competent judicial authority, it would be followed by the Crown."

This reminds us of very similar though much stronger observations made by Lord Macnaghten in the case of *Fischer* v. *The Secretary of State for India in Council* (3 C. W. N. 161). This was a case where the Appellant had applied to the Collector of Madura for the separate assessment and registration of a village of which he was the proprietor. The Collector under Madras Regulation XXV of 1802 and Madras Act I of 1876 after disallowing the objections of other interested parties ordered the registration. The Board of Revenue in due course confirmed the proceedings and the order of the Collector. The objector petitioned the Board against the order and the Board held that under sec. 5 of the Madras Act (I of 1876) the order could only be set aside by a Civil Court. The objectors then made a representation to Government that a suit would involve both time, trouble and expense to him and Government and the Government had every right under powers of general control to cancel the orders of the Collector. The Government falling in with the views of the objector directed the Collector through the Board of Revenue to cancel the order for separate registration and the Collector carried out this order of Government. Thereupon a suit was brought by the

Appellant for a declaration that the Government order was illegal and of no binding effect. The Subordinate Judge upheld the previous order of the Collector as having been made in accordance with the law. The Madras High Court avoided the question as to whether the order of Government was *ultra vires*. On appeal before the Judicial Committee Lord Macnaghten upheld the decision of the Subordinate Judge and held that the order of the Government was illegal. Then it was suggested at the Bar, as was done in the case of *King* v. *Speyers*, that a declaration from the Court as to the illegality of the executive order of the Government might prove infructuous. The order of Court in supersession of the order of Government might not *ipso facto* revive the order of the Collector. Lord Macnaghten held, it would. His Lordship observed "The vitality of the decision is not impaired or affected merely by destruction or mutilation of the entry in the Collector's book. Cancellation in obedience to illegal commands of Government can have no more effect than cancellation made at the dictation of a lawless mob which the officer in charge has no power to resist." (3 C. W. N. at p. 171).

It was further asked at the Bar, evidently on the assumption of the Collector being a subordinate of Government, "what would happen if the Collector ignored the order of Court?" Lord Macnaghten gave a more direct answer to the question than has been given by the Lord Chief Justice of England in *Speyer's* case. His Lordship said :—"It is highly improbable that an officer of Government would set the Court at defiance. It is impossible to suppose that the Government would countenance such conduct as that. But the remedy in such a case if it did occur would be simple enough. Every order such as that which the Appellant asks for carries with it liberty to apply. On a proper application, and a proper notice being given it would be found that the arm of the Court would be long enough to reach the offender whatever his position might be." The theory of the English constitution is, no doubt, that the King cannot do any wrong, but his officers are always amenable to law and legal procedure.

Suggestion for securing efficiency in Interpreters.

We publish below a letter in which it is shown that it is not really the pay and prospects of Interpreters in the Original Side that have interfered with the efficiency of that service so much as the lack of proper training. From the facts stated there it would appear that it would be an advantage if the Interpreters' service was made a special branch of public service and selections to its lower grades were made by examination both oral and written and men so selected were appointed to the Presidency Courts of Small Causes, Presidency Magistrates' Courts and to the translator's department in all the Courts and in the Government Secretariat. When occasion arises selection may be made in the High Court from amongst the members of this service. As some of the High Court appointments are worth Rs. 400 to Rs. 600 and the Chief Translator's salary in the Secretariat is much more, we are sure that candidates by such an arrangement will be induced to specialize in the art of interpretation and translation from the vernacular and other languages. This service will attract only such men as have an aptitude for mastering other languages.

CURRENT INDIAN CASES.

(Criminal.)

Criminal Procedure Code, sec. 195, cl. (6).

Ram Raja Dat *v.* Sheo Dayal, I. L. R. 37 All. 439.

The right conferred by cl. (*6*) of sec. 195 may not be exactly a right of appeal but it is strongly analogous to such right. The legislature intended that a Court of superior jurisdiction whose jurisdiction was invoked under sec. 195, cl. (*6*), should reconsider the entire matter on the merits and while allowing all reasonable weight to the opinion of the Court below should nevertheless reconsider the question of the propriety of the order of sanction on its merits upon a complete review of the entire facts.

Criminal Procedure Code, sec. 408—Appeal.

Emperor *v.* Har Dayal, I. L. R. 37 All. 471.

Where of several accused persons tried by an Assistant Sessions Judge one is sentenced to more than four years' rigorous imprisonment and the rest to lesser periods than that the appeals of all the accused lie to the High Court even if the person sentenced to imprisonment for wore than four years does not appeal.

(Civil.)

Wakf Validating Act, 1913.

Amirbibi *v.* Azizabibi, I. L. R. 39 Bom. 563.

The Act refers solely to wakfs created after

the passing of the Act. There is nothing in the Act about *wakfs* already in existence when the Act was passed.

Civil Procedure Code, sec. 93.

SALEMAN *v.* SHAIKH ISMAIL, I. L. R. 39 Bom. 580.

The Collector under sec. 93 stands in the position with regard to his Collectorate as the Advocate-General in the Presidency town and the suit which requires his consent is a suit which he, if he thought fit, would be competent to file in his own name as a public officer whose duty it is to protect public charities as the representative of the Crown in that capacity and he has no right to consent to the institution of a suit by two persons claiming to have an interest in the trust unless it is such a suit as he would consider himself to be justified in filing at the relation of such two persons in his own name.

Hindu Law.

PARVATI BAI *v.* BHAGWANT, I. L. R. 39 Bom. 393.

According to the Mitakshara although property in the paternal or ancestral estate is by birth the father has independent power in the disposal of effects other than immoveables for indispensable acts of duty and for purposes prescribed by text of law as gifts through affection, support of the family, relief from distress, etc. This power of the father does not enable him to dispose of ancestral property even though not immoveable by Will.

Correspondence.

TO THE EDITOR, "CALCUTTA WEEKLY NOTES."

Dear Sir,—It appears from the paragraph headed "Pay and prospects of Interpreters" in the Weekly Notes, in its issue of the 17th January, that an attempt has been made to show that the deterioration in the staff of Interpreters is attributable to inadequacy of pay. Any such attempt, however, must be futile inasmuch as most of the Interpreters who have heretofore succeeded as such, foremost among whom may be mentioned Babu Benimadhab Mukerjee and the late Babu Abinash Chandra Ghose (Senior), were recruited from the lower Courts where they had to begin on much lower pay than what is at present fixed for even the lowest appointment in the Interpreters' Department in the High Court, and had to work on such pay for a pretty long time before they were appointed Interpreters in the High Court on a salary of Rs. 400. Here, it will be seen, the higher appointments had been filled by promotion from lower appointments on appreciation of merit. The secret of their success lay in the training they had received in the lower Courts and not in the pay being Rs. 400 in the High Court.

Regard being had to the fact that the Chief Interpretership carries a salary of Rs. 600 per mensem which is equal to the salary of a Subordinate Judge and a Deputy Magistrate of the third grade, and the two Senior Interpreterships carry a pay of Rs. 400 each which is equal to the pay of a Munsif of the first grade or a Deputy Magistrate of the fifth grade, and that it takes a member of the Judicial service starting with an initial pay of Rs. 200 eighteen to twenty-two years to rise to Rs. 600 and fourteen to sixteen years to rise to Rs. 400 and a member of the Executive service beginning with a pay of Rs. 200 ten to twelve years to rise to Rs. 400, it would hardly be fair to suggest that the scale of pay in this Department is not sufficiently attractive. It is true that barring the above three appointments the remaining six posts in the Department carry salaries ranging from Rs. 300 to Rs. 150, and the scale of pay for these posts was fixed from time to time since about the year 1890 when another appointment worth Rs. 400 which had existed before was split up; but regard being had to the fact that it takes even a member of the Subordinate Executive Service beginning with a pay of Rs. 100 six to eight years to rise to Rs. 250, it is unreasonable to pronounce the pay to be unreasonable and inadequate.

A grievance seems to have been made of the fact that it has taken Babu Trailakhya Nath Goswami's successor twenty-three years to rise from a salary of Rs. 150 to Rs. 400, and this has evidently been put down to the injudicious gradation of appointments in the Department which causes a block in promotion. The real reason has however been ignored, the truth being that for reasons best known to the authorities he was passed over more than once and outsiders including trained Interpreters from the lower Courts and others were promoted over his head. It would not be out of place to mention in this connection that even Babu Benimadhab Mukerjee and the late Babu Abinash Chandra Ghose (Senior) were not fortunate enough to rise to the [illegible] Interpretership until they had put in [illegible] years of service.

It has [illegible] practice of the

Court to select Interpreters from amongst candidates for vacancies by testing their abilities by trial in open Court but in spite of such trials it has so happened latterly that even candidates passing such test have not fulfilled the expectations of the Bench and the Bar.

Yours truly,
VERI AMATOR.

Review.

THE LAWYER'S OFFICIAL DIARY, 1916. *Published by the Law Printing House, Mount Road, Madras.*

This diary which has since its first publication become popular with the members of the legal profession has in this its fourth year of issue been much enlarged in size by the addition of matters particularly useful to lawyers. Another peculiar feature this year is that the diary contains pages for the first three months of 1917 also. The get-up is excellent.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—(Before THE LORD CHIEF JUSTICE and AVORY and LUSH, JJ.). *The King* v. *Sir Edgar Speyer* and *Sir E. J. Cassel.* 17th December 1915.

Are naturalized British subjects born of alien parents entitled to be Privy Councillors.

This was a rule *nisi* obtained against the Respondents to show cause by what authority they were or claimed to be members of His Majesty's Privy Council. The Attorney-General took preliminary objections on behalf of the Crown that the proceedings at the instance of a private person were misconceived, and that the Court had no jurisdiction to entertain them. The Court overruled all the objections. In support of the rule it was urged that the Respondents were not born of British parents, nor in the United Kingdom, and that by the provisions of Statutes 12 and 13, Will. III, c. 2, sec. 3, (Act of Settlement), and Statutes 4 and 5, Geo. V, c. 17, sec. 3, sub-sec. (*2*), (British Nationality and Status of Aliens Act, 1914), they were not competent to be members of the Privy Council. The Naturalization Act of 1844 (7 and 8 Vic, c. 66) conferred on naturalized aliens the rights and capacity of ordinary British subjects but refrained from giving them rights of Government. The Naturalization Act of 1870 (33 Vic., c. 14), expressly repealed the Act of 1844, but did not expressly repeal the Act of Settlement. Under the Act of 1870, therefore, a naturalized alien could not be appointed a member of the Privy Council. The Act of 1870 removed such disqualifications on naturalized aliens, as were removed by the Act of 1844 and no more. The Act of 1914 did not introduce any change in the rights of persons of alien birth. The intention of the Act of Settlement was to exclude all persons not born of British parents, even if those persons had been naturalized, and that law still applied.

The Respondents showed cause. They submitted that their appointments were neither wrongful nor illegal. They were naturalized British subjects, and any person holding a certificate of naturalization under the Act of 1914 had the status of a natural born British subject. By sec. VII of the Naturalization Act, 1870, it was enacted that an alien to whom a Certificate of Naturalization had been granted, was entitled to all political rights to which a natural born British subject was entitled. The holding of the office of a Privy Councillor was nothing more than a political right. The Court discharged the rule. In the course of his judgment the Lord Chief Justice said as follows :—

The complaint is that both Sir Edgar Speyer and Sir Ernest Cassel have wrongfully and illegally been sworn as members of the Privy Council by reason of the provisions of the Act of Settlement (statutes 12 and 13, Will. III, c. 2, sec. 3) and the British Nationality and Status of Aliens Act, 1914 (statutes 4 and 5, Geo. V, c. 17, sec. 3, sub-sec. 2). The question at issue depends upon the construction to be placed on these and other statutes relating to naturalized British subjects. The Attorney-General took the preliminary objection on behalf of the Crown that these proceedings were entirely misconceived and that this Court had no jurisdiction to entertain them. He based his objection upon five grounds :—

(1) That the wrong (if any) was a usurpation of rights by the Crown, whereas the remedy was only available for usurpation against the Crown of the rights of Prerogative of the Crown.

(2) That no judgment in favour of the relator could be enforced, because it would be an order upon the Crown.

(3) That membership of the Privy Council did not constitute the holding of an office.

(4) That if it did, it was an office held at pleasure.

(5) That the complaint was not a matter for

a Crown Office information, but only for information by the Attorney-General.

As to the first ground. The argument of the Attorney-General was that originally a writ of *quo warranto* was only available for use by the King to protect the King against encroachment on the Royal prerogative or of the rights, franchises, or liberties of the Crown, and that an information in the nature of a *quo warranto*, which proceeding had taken the place of the old writ of *quo warranto*, was equally limited in its availability as a remedy. I think that this point fails.

In *Darley* v. *The Queen* (12 Cl. and F., 537), the Judges were summoned to the House of Lords to give their opinion. The House of Lords adopted the opinion delivered by Chief Justice Tindal, and since then this decision has been the starting-point when considering the law relating to *quo warranto* and the effect of the earlier cases has been much qualified—The *Queen* v. *Hampden* [(1865) 6 B. and S., at p. 931]. Many of the authorities cited to us in the course of the argument were dealt with in that case and reviewed by Chief Justice Tindal. He expressed his conclusion in the oft-quoted words at p. 541 :—

> After the consideration of all the cases and *dicta* on this subject the result appears to be that this proceeding by information in the nature of *quo warranto* will lie for usurping any office, whether created by charter alone or by the Crown, with the consent of Parliament, provided the office be of a public nature and a substantive office, not merely the function or employment of a deputy or servant held at the will or pleasure of others.

The test to be applied is whether there has been usurpation of an office of a public nature and an office substantive in character; that is, an office independent in title. This decision is an authority against the proposition argued by the Attorney-General. It establishes that whereas formerly a *quo warranto* was held to lie only where there was a usurpation of a prerogative of the Crown or of a right of franchise, a proceeding by information in the nature of *quo warranto* has long since been extended beyond that limit and is a remedy available to private persons within the limits stated by Chief Justice Tindal and subject always to the discretion of the Court to refuse or grant it. The case of the *Queen* v. *The Guardians of St. Martin's* [(1851) 17 Q. B., 159] takes the same view of the decision of *Darley* v. *The Queen* (*supra*).

Referring to the second ground, it proceeded upon the assumption that if the Court were to pronounce a judgment of ouster it would be making an order upon the Sovereign. But a judgment against the Respondents would have effect against them only; it would be an order upon the subject, not upon the Crown. It was then argued that that Court would be powerless to enforce a judgment of ouster in this case, that it could not order the Registrar of the Privy Council, who was the servant of the King, to remove the names from the Roll of Privy Councillors, neither could the Court prevent the immediate reinstatement of the names if the King thought fit to order it. It was sufficient to say that a judgment pronounced in favour of the relator would not involve the making of an order upon the Registrar, neither would the Court be powerless to enforce the judgment if it were disobeyed by those against whom it was made. That was the King's Court, they sat there to administer justice, and to interpret the laws of the Realm in the King's name. It was respectful and proper to assume that once the law was declared by a competent judicial authority it would be followed by the Crown.

The third ground depended on whether membership of the Privy Council constituted the holding of an office, for, if an office, it was clearly of a nature within the meaning of Darley's case (*supra*). The term "office" was not here used in a strict sense (*The Queen* v. *Fox*, 8 E. and B., 945), and to be a Privy Councillor was to hold an office within the meaning of the term as used. Indeed, membership involved the taking of an oath of office.

The fourth ground was that the office was not of a permanent nature, but was held at pleasure. It was difficult to understand why in principle an office held at pleasure should not equally, with an office of a permanent character, be the subject of this remedy, provided that the office was of a public and substantive character, particularly as an office held at pleasure was often in effect of a permanent character. After considering the authorities since *Darley* v. *The Queen*, it appeared that they rested upon the principle formulated in that case, and were only applications of it to the particular facts. *The Queen* v. *Fox* (*supra*) was much relied upon by the Attorney-General. On examination it appeared that the Court discharged the rule because the guardians could appoint at once, and therefore it was useless to grant the information. In the present case there could be no reinstatement as *ex hypothesi* it would be illegal. *Darley* v. *Sylvester* (25 L. T. 459) was a decision on the exercise of the dis-

cretion of the Court. No case had been cited of a refusal by the Court of an information where the reappointment to an office held at pleasure would be illegal. It would seem strange that the Court, by refusing the remedy, should perpetuate illegality.

The last ground was that the remedy could only be sought at the instance of the Attorney-General by an information *ex officio*, and that the order should be discharged because it was made at the instance of a private person. In support of the contention *Sir William Lowther's* case [(1725) 2 Lord Raym. 1,403] and *Ibbotson's* case [(1736) Cases temp. Lord Hardwick, p. 261] were cited. It could not be doubted that the present application concerned public government, and there was no ground for impugning the motives of the relator. A stranger to the suit could obtain prohibition (see *Broad* v. *Perkins*, 21 Q. B. D., 533), and there was no reason why he should not, in a proper case, obtain an information of *quo warranto*. Sir George Makgill appeared to have brought the matter before the Court on purely public grounds without any private interest to serve, and it was to the public advantage that the law should be declared by judicial authority. In his Lordship's opinion the preliminary objection failed on all grounds.

It now becomes necessary to decide the main question—whether the appointment of the Respondents to the Privy Council was contrary to law. By the third section of the Act of Settlement is was enacted that—

> No person born out of the Kingdom of England, Scotland, or Ireland or the Dominions thereunto belonging (although he be naturalized or made a denizen except such as are born of English parents) shall be capable to be of the Privy Council or a member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements, or hereditaments from the Crown, to himself or to any other or others in trust for him.

I disregard the brackets for the purpose of construing the language (*Duke of Devonshire* v. *O'Connor*, 24 Q. B. D., 478, *per* Lord Esher). The words of the section mean that a naturalized subject of the Crown is not capable to be a Privy Councillor unless he is born of English parents. . . . There is no statutory obligation on the Crown to appoint any person to the Privy Council, but this section imposes a limitation upon the powers of the Crown with regard to the appointment of naturalised subjects. If that limitation is still in force—that is, if these provisions of the Act of Settlement affecting naturalized persons have not been repealed expressly or impliedly by later statutes—the appointment of both the Respondents is contrary to law, as neither of them was born of English parents. . . .

At the time of the Act of Settlement naturalization was obtained by means of a Bill in Parliament for that purpose, and so jealous was Parliament of this provision limiting the capacity of naturalized subjects that it passed the statute George I, c. 4, which enacted that no Bills of naturalization should be received in either House of Parliament unless words in effect preserving the limitations prescribed by the Act of Settlement were inserted. In 1844 an Act was passed to amend the laws relating to aliens (7 and 8 Victoria, c. 66) and to enable the rights and capacities of British subjects to be granted to aliens subject to the conditions and restrictions imposed by that Act. It extended the rights of aliens with regard to the holding of real and personal estate (secs. 2, 3 and 4), andby sec. 6 enabled aliens to become naturalized upon obtaining a certificate from the Secretary of State and taking the prescribed oath. An alien who complied with the conditions imposed by the Act "shall enjoy all the rights and capacities which a natural-born subject of United Kingdom can enjoy or transmit, except that such alien shall not be capable of becoming of her Majesty's Privy Council, nor a member of either House of Parliament." Naturalization under the Act of 1844 therefore gave to the naturalized subject all the rights of a natural-born subject save that the first and second limitations or disqualifications under the Act of Settlement were still preserved (secs. 6 and 8). . . .

By the Naturalization Act, 1870 (33 Victoria, c. 14), the statute of 1844 was repealed and further facilities were given to an alien to obtain a certificate of naturalization (sec. 7). It enacted that an alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the United Kingdom. The only qualification stated is that he shall not, when within the limits of the foreign State of which he was a subject before he obtained naturalization, be deemed to be a British subject unless he has ceased to be a subject of that State. No reference is made in this Act to the Act of Settlement or to the limitations preserved under the Act of

1844 as to membership of the Privy Council or of Parliament. The words "shall be entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled" in their natural meaning must be held to exclude any qualification except that expressly mentioned which is above quoted. The two limitations preserved by the repealed Act of 1844 disappeared in the Act of 1870, and the language of this Act is inconsistent with their continued existence. In my judgment this statute of 1870 cannot be read otherwise than as extending the rights and capacities of naturalized subjects. . . . If this statute is to be construed, as I think it must, as extending the rights of naturalized subjects it cannot be read as impliedly re-imposing the limitations repealed by the Act of 1844 or which had been expressly preserved by that Act. If Parliament intended to preserve these limitations it is inconceivable that no reference should have been made to them in the Act which expressly repealed the statute preserving two of the four original limitations and in terms gave the same political and other rights to a naturalized subject as were enjoyed by a British subject.

The conclusion is irresistible that the statute of 1870 by implication repealed such of the limitations originally imposed by the Act of Settlement as were preserved by the Act of 1844. Therefore the Respondents, having been naturalized, under the Act of 1870, were capable of being Privy Councillors when they were respectively appointed.

But Mr. Powell contends that since the Act of 1914 they ceased to be capable of being Privy Councillors as sec. 3, sub-sec. (2), of this Act (4 and 5 George V, c. 17) re-enacts the third section of the Act of Settlement. The Act of 1914 is entitled "An Act to consolidate and amend the enactments relating to British nationality and the Status of Aliens." By the first sub-section of sec. 8 a naturalized subject shall be entitled to the same political and other rights, powers, and privileges, and shall "as from the date of his naturalization have to all intents and purposes the status of a natural-born British subject." These words are definite and precise, but it is contended that the second sub-section must be read as qualifying this language. The agument is that the sub-section means that sec. 3 of the Act of Settlement is either still in force or re-enacted, and is extended. I cannot so read this section of the Act of 1914. As I have already held, the section of the Act of Settlement was not in force as regards paturalized subjects at the time of the passing of the Act of 1914. If the argument for the relator is right and the section of the Act of Settlement is re-enacted, it follows that the status of a naturalized subject would be worse under this statute than it was either before or under the Act of 1844, for he could not under the suggested construction hold an office or place of trust or a grant of lands from the Crown. . . The Act of 1914 was intended to extend and not to curtail the rights of naturalized subjects and aliens. . . .

Messrs. A. Powell, K. C., and *Mullins* for the Relator.

Sir R. Finlay, K. C., and *Messrs. Roskill, K. C., L. Scott, K. C., McCardie* and *Parr* for the Opposite Parties.

The Attorney-General, the Solicitor-General and *Mr. Branson* for the Crown.

B. D.

KING'S BENCH DIVISION.—Before MR. JUSTICE SCRUTTON. *Hart and anr.* v. *Rogers.* 3rd December 1915.

Landlord letting furnished rooms or flats, but retaining control of the roof or staircase, is responsible to the tenant for defects.

This was a landlord's action to recover rent of a suite of furnished rooms. The defence was that the Plaintiff retained control of the roof, and that owing to his neglect to repair it, water came into the flat to such an extent, that it became unfit for human habitation and compelled the Defendants to find other lodgings.

The learned Judge discussed the legal obligations of the landlord as follows :—

It is clear that ordinarily the lessor of an unfurnished house does not impliedly warrant that it is fit for occupation, and that the lessor of a furnished house or apartments does impliedly warrant that it is fit for human occupation at the beginning of the tenancy. What is the position where the landlord retains in his own possession and control something essential to the enjoyment of the premises demised, such as a staircase or a roof? In the case of a roof, the Divisional Court in *Hargroves* v. *Hartopp* (1905) 1 K. B., 472, held that such a landlord was at least under a duty to use reasonable care to keep the roof in repair, following the language of Baron [illegible] in *Cameron's Coalbrook Steam Coal Co.* v. *Taylor* (L. R. 6 Exch. [illegible] Lord Alverstone suggests that in *[illegible]* (1902) 2 K. B.,

177, the Court went further, and treated the liability of a landlord who reserved the control of a staircase as an absolute duty to keep the premises in a safe condition at all events. He doubts this, but finds it unnecessary to decide the point.

In *Miller* v. *Hancock* (*supra*) the real question was the liability of the landlord to a visitor of the tenant, but I think, as I pointed out in *Huggett* v. *Miers* (1908) 2 K. B., 278, and in *Hargroves* v. *Hartopp* (*supra*), the Court approached the matter through the legal relation of landlord and tenant. The defect complained of was a worn condition of steps in a staircase, which must be a condition arising gradually and may or may not be obvious. Lord Esher says, "The landlord was bound to keep the staircase so as to afford a reasonably safe entrance and exit to the tenants." Lord Justice Kay speaks of "a duty on the part of the landlord to keep the stairs in a safe condition."

Lord Alverstone in *Hargroves* v. *Hartopp* (*supra*) takes the same view. Mr. Justice Atkin in *Lucy* v. *Bawden* (1914) 2 K. B., 318, has come to the conclusion that the decision in *Miller* v. *Hancock* must be limited to the liability for traps as explained in *Indermaur* v. *Dames* (L. R. 2 C. P., 311), and he says the evidence was clearly consistent with the defects being in the nature of a trap. I suppose a worn step may or may not be "a trap" within the meaning of the decisions. The defect, which the jury found in *Lucy* v. *Bawden* (*supra*) was the absence of a fence or rail, which was a defect that any one could see. There was an allegation that the second step in the outside staircase was defective. The jury negatived this, and Mr. Justice Atkin says:—"The case might have had a different result had not the jury negatived the existence of a defect in the repair of the steps"—I suppose if such a defect had been found to be a trap.

I have carefully considered the language of *Miller* v. *Hancock* (*supra*) and have come to the conclusion that, as reported, all the Judges imposed an absolute duty to repair on the landlord. I think if the Court, and particularly Lord Justice Bowen, had meant merely to impose a liability for traps on the line of *Indermaur* v. *Dames* (*supra*), they were quite capable of expressing it in clear words and would have done so. If it is to be held that they really meant to limit themselves to imposing either a duty to use reasonable care to repair or a duty to give notice of traps or concealed defects of which the landlord knew and the tenant did not know, it must, in my view, be so held by the Court of Appeal and not by a Judge of first instance.

I notice, though it is not authority, that Mr. Foa is of opinion (Foa's Landlord and Tenant, 5th Ed., page 143) that the decision is perfectly correct, and is an authority for holding that in the letting of flats, where the staircase forms no part of the demise but remains in the control of the landlord, he is responsible to his own tenants for defects of repair.

Messrs. Disturnal, K. C., and *Morle* for the Plaintiffs.

Messrs. Rose-Innes, K. C., and *F. Dodd* for the Defendants.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before D. CHATTERJEE and BEACHCROFT, JJ. APPEAL FROM ORIGINAL DECREE NO. 355 OF 1914. MATILAL SAHA PODDAR, Defendant-Appellant *v.* BIDYA SUNDARI DASYA and GOVERNMENT, Plaintiffs-Respondents. 1st February 1916.

Costs—Court-fee—Suit for maintenance—Civil Procedure Code (Act V of 1908), sec. 35, Or. 33, rr. 10, 11.

The appeal arose out of a suit for maintenance brought by the mother against her son. The suit was decreed by consent of both parties—the Defendant agreeing to pay Rs 25 per mensem for the maintenance of his mother. It was admitted that the Defendant was in possession of much property left by his father and in consideration of these circumstances the learned Judge in passing the decree ordered the Defendant to pay the costs in respect of Court-fees and commission.

It was contended in appeal that this order of the Judge in respect of costs was not supported by the Civil Procedure Code and reference was made to rr. 10 and 11 of Or. 33.

Held, that the direction was just and proper under sec. 35 of the Code of Civil Procedure.

Babu Gopal Chunder Das for the Appellant.

Babus Atul Chunder Dutt (for *Babu Ram Charan Mitra*) and *Dhirendra Nath Dutt* for the Respondents.

A. T. M. *Appeal dismissed.*

which were acquired by the Calcutta Improvement Trust, and a sum of Rs. 11,250 awarded as value thereof. That the Opposite Party No. 2 as Receiver of the estate of Hira Lal Bose filed a petition claiming a portion of the said amount on the allegation that the land was not comprised in the mortgage and did not therefore pass to the Petitioner. That the Petitioner thereupon put in an objection stating that the land had been clearly included in the mortgage. The dispute was referred to the Calcutta Improvement Trust Tribunal under sec. 30 of the Land Acquisition Act read with those of the Calcutta Improvement Act No. V of 1911 (B. C.). That when the case came on before the Tribunal, the Petitioner prayed that the records of the mortgage suit which were then and were still in the District Judge's record room should be called for as the same and other papers were necessary to be produced as evidence on Petitioner's behalf in the apportionment case. That thereupon the President of the Tribunal by a requisition called for the records from the office of the District Judge of Alipur. But the District Judge refused to send the records on the ground that the Tribunal was not a Court within the meaning of Or. 13, r. 10, C. P. C.

That subsequently the Petitioner made the present application to the District Judge praying that records be sent to the Special Tribunal.

The Judge on the 23rd June refused the application holding that the Tribunal was not a Court.

Against this order the Petitioner moved the Court and obtained the present Rule.

Babus Mohendra Nath Ray, Gunada Churn Sen, Monmotha Nath Ray and *Surendra Nath Das-Gupta* for the Petitioner.

Babu Ram Churn Mitter for the Government.

The JUDGMENT OF THE COURT was as follows :—

The question that is raised in this Rule is one of considerable importance to the public having dealings with the Special Tribunal constituted to hear cases from the orders of the Calcutta Improvement Trust. It is perfectly clear that some *modus operandi* must be devised by which the Tribunal may have access to Land Acquisition and other records that are necessary for the purpose of their business. But there appeared to be technical difficulties under the law. We therefore asked the learned Government Pleader, Babu Ram Churn Mitter, to give us his assistance in the matter, and we have also heard the learned Vakil Babu Mohendra Nath Ray for the Petitioner, and it appears to us fairly clear that in the exercise of our powers of supervision under the Charter, we ought to give directions to the lower Court in the same way in which a Bench of this Court appears to have done in the case of *Golap Coomary Dassi* v. *Soondur Narain Deo* (1). There the Court also dealt with administrative orders of this Court. Now as the shortest way to get over the difficulty we may point out that the Special Tribunal has been constituted a Court under the Land Acquisition Act, 1894, and under sec. 53 of that Act the Land Acquisition Court is governed by the provisions of the Code of Civil Procedure and has the powers of a Judge under that Code. It is not necessary to follow the learned Judge in the Court below to the extent of holding that the Special Tribunal would be able to compel the production of records from another Court. It is this power of com-

(1) 4 C. L. R. [illegible].

pulsion which seems to have been a stumbling-block in the learned Judge's mind. Nobody ever heard of an attempt to compel a Court to send its records to another Court, and we are not apprehensive that any such question will ever arise. The power to call for records is a power which is undoubtedly inherent in the Judge of a Land Acquisition Court and consequently in the Special Tribunal.

For these reasons we think that the Rule should be made absolute and the District Judge should be directed to send the record asked for by the President of the Tribunal.

We make no order as to costs.

Rule made absolute.

[PRIVY COUNCIL.]

[APPEAL FROM EASTERN AFRICA.]

EARL LOREBURN. VISCOUNT HALDANE. LORD WRENBURY. 1915, 3, December.	ABDURAHIM HAJI ISMAIL MITHU, Appellant, *v.* HALIMABAI, Respondent.

Emigration—Memons of Cutch—Settlement in East Africa amongst Mohamedans—Hindu law rules of succession, if continues to apply to emigrants—Presumption—Domicile.

Where a Hindu family migrate from one part of India to another, primâ facie, *they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country and being themselves Mohamedans settle among Mohamedans, the presumption that they have accepted the law of the people whom they have joined is the one that should be much more readily made.*

Where certain members of the Memon community at Cutch (who, being originally a sect of Hindus, upon conversion to Mohamedanism, did not adopt the Mohamedan law as to succession but retained the Hindu law of succession as a customary law binding upon the entire community) about half a century ago emigrated to Mombasa in East Africa where they settled down among people who professed the Mohamedan religion:

Held—*That in order to raise the presumption that the emigrants accepted the Mohamedan law of succession, all that had to be shown was that they had so acted as to raise the inference that they had cut themselves off from their old environments.*

That the analogy here was that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India.

Held—*That the Mohamedan law of inheritance governed the devolution of property left by a deceased Memon settler in Mombasa when it did not appear from the evidence that the Memons in Mombasa had at any time established any distinctive political or social organisation for themselves or ever as a body claimed to be outside the system of law which prevailed among the Mohamedans of Mombasa.*

This was an appeal from a judgment of the Court of Appeal for Eastern Africa reversing a judgment of the High Court of East Africa at Mombasa.

The facts of the case sufficiently appear from the judgment.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—This is an appeal from a judgment of the Court of Appeal for Eastern Africa reversing a judgment of the High Court of East Africa at Mombasa. The question to be decided is whether the succession to the estate of one Haji Ismail

ABDURAHIM HAJI ISMAIL MITHU *v.* HALIMABAI.

Mithu, deceased, is governed, as the Appellant, who is a son, claims, by Hindu law, or whether such succession is governed by Mohamedan law as the Respondent, who is the widow, asserts. This question arose in an action brought by the Respondent against the Appellant claiming administration and a declaration that she was entitled, on the footing that Mohamedan law applied, to an eighth of her husband's estate. On the Appellant's contention the Respondent, as widow of the deceased, became entitled to no more than maintenance.

The deceased was a merchant who had settled at Mombasa, and was a member of the Indian sect known as Memons. According to the case as stated by the Appellant's Counsel, some 400 or 500 years ago the "Luwanas," a sect of Hindus located in Scinde, became converted to the Mohamedan faith and took the name of Memons. A century or so later they migrated to Cutch, where they settled. There were two migrations. Those who first migrated, and their descendants became known as Cutchee Memons, while those who migrated on the second occasion, and their descendants were called Nassapooria Memons. Both sets of migrants held to religious tenets and customs which are common to the Memon community, and, for the purposes of the present appeal, the distinction between the two sets is immaterial.

Upon their conversion to Mohamedanism the Memons did not adopt the Mohamedan law as to succession, but retained the Hindu law of succession as a customary law which remained binding upon the entire Memon community at Cutch. Over half a century ago Memons began to migrate from Cutch to East Africa, and there are now, so it is stated, at least a hundred Memon families at Mombasa.

The deceased's father was a Nassapooria Memon who about half a century ago, with his wife and children, including the deceased, migrated to Mombasa, where they settled. At Mombasa the succession to Mohamedans is in general governed by Mohamedan law, although it would probably be open to immigrants to prove that they have brought with them and preserved a custom establishing special law of succession.

The action was tried before Hamilton, C. J. The Appellant and Respondent both called evidence. It was shown that in some cases, of which eleven appear to have been fully proved, succession among the members of the Memon community at Mombasa had taken place according to Mohamedan law. The only documentary evidence was also in accordance with this view. On the other hand oral evidenec was given for the Appellant and accepted by the learned Judge who tried the case which showed that in a few cases distribution in accordance with Hindu law had taken place. It was also established that there had been a custom, or at least a practice, that ornaments given to a wife in her husband's life-time were allowed to remain with the widow only during her life or until remarriage, a custom or practice more nearly resembling the rule which obtains among Hindus than any which regulates such cases among Mohamedans. Upon consideration of the evidence Hamilton, C. J., decided in favour of the Appellant. He took the view that the burden of proof lay on the Respondent to show that there was a Mohamedan custom which applied to the Memons in Mombasa, that this custom was ancient and invariable, and that it had superseded the custom which governed the Cutch Memons in such cases before migration.

The Court of [illegible] of a different

opinion. They held that Hamilton, C. J., had, having regard to the facts as established, wrongly stated the character of the burden of proof. They took the view that if the present Respondent simply produced sufficient evidence to show that the custom of Hindu succession had ceased to be generally observed by the Memons in Mombasa, that was sufficient to entitle her to succeed, if the other side failed to bring forward sufficient evidence in answer. They commented on the indications, adverse to the present Appellant, furnished by the documentary records, and on what they considered to be on the whole the preponderance in trustworthiness of the oral evidence against him. That on certain occasions females should have been proved to have preferred maintenance to a share of a very small estate they regarded as in the circumstances inconclusive; nor was the special custom or practice as to ornaments enough to displace the presumption that the general rule was that of Mohamedan law.

Their Lordships are in agreement with the conclusions reached by the Court of Appeal for Eastern Africa. It seems to them that the learned Judge who tried the case misconceived what, having regard to the circumstances of the Memon migration to Mombasa, was the real question for the Judge who had to try the case.

Where a Hindu family migrate from one part of India to another, *primâ facie*, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Mohamedans, settle among Mohamedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from the circumstances. In the present case it is to be observed that it does not appear that the Memons in Mombasa have at any time established any distinctive political or social organisation for themselves. Such organisation as has been formed appears to have been formed mainly, if not entirely, for purposes of worship. There seems to be no sufficient reason in what has been brought before the Courts in this case for regarding the Memons who have emigrated from Cutch to Mombasa as other than a number of individual Mohamedans who have settled down among a people who are of their own religion. It does not appear that these Memons have ever as a body claimed to be outside the system of law which naturally follows from that religion, and so prevails among the Mohamedans at Mombasa. Their Lordships have examined the oral evidence brought forward on behalf of the Appellant. It relates to very small estates and is of an inconclusive character. There is lacking in it indication of intention to assert a principle. A good deal of the evidence for the Respondent is open to the same observation. But several of the documentary records distinctly support the contention that some at least of the Memon families had treated themselves as governed in point of succession by Mohamedan law, and the balance of the oral testimony, appears to be on this side. Under these circumstances their Lordships think that the pre-

sumption which arises from the facts proved, and the weight of evidence are both in favour of the conclusion reached by the Court of Appeal.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed without costs.

Appeal dismissed.

[ORDINARY ORIGINAL CIVIL JURISDICTION]

CHAUDHURI, J.
1916,
Heard,
7, January.
Judgment,
10, January.

In the matter of the Indian Arbitration Act (IX of 1899),
and
IN THE MATTER OF
JOY LALL & Co.,
v.
MONMOTHA NATH MULLIK and anr.

Broker liable as principal—Custom and usage of Calcutta Gunny Market—Sec. 92, Prov. (5), Indian Evidence Act (I of 1872)—Evidence of custom or usage incidental to contract—Indian Contract Act (IX of 1872), secs. 230 and 236—Arbitration and Award by Bengal Chamber of Commerce, jurisdiction.

An award made by the Bengal Chamber of Commerce was sought to be set aside by Defendants in Court on the ground that the Chamber acted in excess of jurisdiction in having made the award in favour of the Plaintiffs disregarding the fact that the contract in question was made by Plaintiffs as brokers although in fact the Plaintiffs had no principals and the contract was not therefore enforceable. The Plaintiffs alleged that there was a custom in the market in respect of gunny, hessian and manufactured jute goods by which brokers are held liable upon such contracts and such custom being well-known to the Chamber, the award was properly made and valid.

The Court allowed evidence of custom and usage to be given and held that there was such a custom and that the Defendants knew of it.

PATIRAM BANERJEE *v.* KANKINARA CO., LD. (1) *distinguished.*

Held—*That secs. 230 and 236 of the Indian Contract Act, the former of which deals with undisclosed principal and the latter with falsely contracting as agent, were not applicable to this case.*

Held *also, that evidence of usage of trade applicable to the contract which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent.*

FLEET *v.* MURTON (7) *followed.*

That the usage being known to the Chamber the matter was within their jurisdiction and the award was properly made.

The facts of the case as also the argument at the Bar are fully set out in the judgment.

Mr. S. R. Dass, Counsel, for the Defendants, Petitioners.

Messrs. N. Sarkar and *P. N. Chatterjee*, Counsel, for the Plaintiffs, Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

CHAUDHURI, J.—This is an application to set aside an award made by the Bengal Chamber of Commerce. Joy Lall & Co. entered into a contract "for principals" for the sale of certain goods to the Mulliks hereinafter referred to as Plaintiffs and Defendants respectively. The Defendants did not take delivery of the goods and the Plaintiffs referred the matter of their dispute to the Bengal Chamber of Commerce under a clause in the contract. The Defendants thereupon took a plea before the

(1) 19 C. W. N. [illegible] (1915).
(7) L. R. [illegible] (1911).

Chamber that it had no jurisdiction (1) inasmuch as the Plaintiffs were merely brokers in the transaction and the contract was "for principals" (2) there were fraud and misrepresentation when the contract was entered into, that is to say, in fact Joy Lall & Co. had no principals at all, although the contract purported to be by them as brokers on behalf of principals. The Chamber has made an award in favour of the Plaintiffs. In answer to the application now made the Plaintiffs alleged that there was a custom in the market by which brokers are held liable upon such contracts and that such custom being well-known to the Chamber it is submitted that they have properly made their award and it is accordingly valid. Upon that an issue was framed for trial before me as to whether there was such a custom. Learned Counsel appearing for the Defendants submitted that no evidence of that kind could be taken inasmuch as it would contradict the terms of the contract. I have however allowed evidence to be taken subject to such objection. The evidence is that brokers in such contracts in Calcutta, in gunny, hessian and other manufactured jute goods, are held by custom responsible by both buyers and sellers for the performance of the contract. Such evidence has been given on behalf of the Plaintiffs and has not been contradicted by any one on the side of the Defendants. Inasmuch as learned Counsel for the Defendants also contended that his clients, if there was such a custom, were unaware of it, he was allowed to call one of the Defendants. It appears that he had previous dealings with the Plaintiffs and I may say at once that I am not at all satisfied with his evidence. The custom pleaded by the Plaintiffs has been proved and I am not satisfied that the Defendants did not know it. I think they knew. The question, therefore, is, can evidence of such custom be taken, or its existence considered by the Chamber.

It is urged that it has been decided in *Patiram Banerjee* v. *Kankinara Co., Ld.* (1) that a broker on such a contract is not liable. It is to be noticed that Woodroffe, J., guarded his decision in that case, by stating that it was said that there was a custom in Calcutta that such contracts were regarded as principal contracts, but that there was no such evidence before them.

Mollett v. *Robinson* (2) has been relied upon as having held "It is also an elementary proposition that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character. No usage unknown to the principal can justify a broker in converting himself into a principal seller." It is argued that the contract itself cannot be contradicted.

In *Hutchinson* v. *Tatham* (3) Brett, J., laid down "that though you cannot contradict a written document by evidence of custom you may add a term not inconsistent with any term of the contract."

In *Hutchison* v. *Eaton* (4) it was held that the arbitrator had no jurisdiction to decide on custom inconsistent with the terms. In that particular transaction the Plaintiffs alleged that the goods were of inferior quality. This case was discussed and followed in *North-Western Rubber Co.* v. *Huttenbach* (5). The cases dealing with this point are to be found in Smith's Leading Cases under head "*Wigglesworth* v. *Dallison*" and were referred to. There is no doubt that with respect to commercial contracts it has been long established

(1) 19 C. W. N. 623 (1915).
(2) L. R. 5 C. P. 646 (1870).
(3) L. R. 8 C. P. 482 (1873).
(4) L. R. 18 Q. B. D. 861 (1884).
(5) [1908] 2 K. B. 907.

that evidence of a usage of trade applicable to the contract which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent: That with regard to particular commercial usages evidence is admissible either to engraft terms with the contract or to explain its terms. In *Humfray* v. *Dale* (6) it was held that not merely a term but a party on oral evidence of custom may be added to a contract in writing.

On behalf of the Plaintiffs *Fleet* v. *Murton* (7) has been relied upon. It is very similar to *Humfrey* v. *Dale* (6). In *Fleet* v. *Murton* (7) evidence was adduced on behalf of the Plaintiff that in the London Fruit Trade if the brokers did not name their principals in the contract note itself, the brokers are held personally responsible on the contract. Cockburn, C. J., held that evidence of the custom was admissible on the ground that "although when a party professes to contract as broker, it might *primâ facie* be taken that he contracts without the intention of incurring liability on his own part, yet, if by the custom of the particular trade there is that qualification of the contract (which if written into the contract in extenso, would undoubtedly bind him), that qualification might, he thought, be imported into the contract by evidence of the custom." Blackburn, J., was of the same opinion. The custom sought to be proved in that case was that if the broker did not disclose his principal's name on the contract, he was personally liable.

Fleet v. *Murton* (7) was followed in this Court in *Gubboy* v. *Avetoom* (8). It is difficult to distinguish the point arising in *Fleet* v. *Murton* (7) from that in the matter before me. It appears from the correspondence relating to the matter which was placed before the Chamber that the Plaintiffs were not being addressed as agents or brokers: the Plaintiffs were demanding fulfilment of the contract and the Defendants were asking for extension of time. It also appears from some of the letters that they held the Plaintiffs responsible to them upon the contract and, upon the evidence before me, I am of opinion that the Defendants knew of the alleged custom. There is a clear distinction between secs. 230 and 236 of the Contract Act. The latter section deals with the case of a person falsely contracting as agent. He is not entitled to performance: The former, with the case of undisclosed principals. The agent in such cases is not personally bound unless he does not disclose the name of the principal. It does not appear that the Plaintiffs were ever asked to disclose the name of their principals. I think that in a contract of the character in suit evidence can be taken about the custom alleged. It does not cease to make the principal liable, but makes the agent also liable. It does not therefore appear to me to contradict the terms of the contract or to change the intrinsic character of it. It is a matter essentially fit for the Chamber being within their knowledge. The gunny business in Calcutta is very extensive and of daily occurrence and contracts of the nature in suit are usual. I think the Chamber had jurisdiction in this matter and properly made the award. The rule is, therefore discharged with costs.

Messrs. Mukherjee and Dutt, Attorneys, for the Defendants, Petitioners.

Messrs. Mitter and Boral, Attorneys, for the Plaintiffs Opposite Party.

Rule discharged.

(6) 7 E. & B. 266; E. B. and E. 1004 (1857).
(7) L. R. 7 Q. B. 126 (1871).
(8) I. L. R. 17 Cal. 449 (1890).

(7) L. R. 7 Q. B. 126 (1871).

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

Suit No. 419 of 1911.

Imam, J, 1916, Heard, 25, 26 and 27, January. Judgment, 27, January.	J. I. J. Hyam and anr., *v.* The Bengal Stone Co., Ld.

Account, suit for, costs of suit pending reference for account.

In a suit for accounts where the Defendant resisted Plaintiffs' claim for an account, costs were awarded to the Plaintiffs up to and including the hearing by the decree directing reference for an account.

This was a suit for an account from the Defendant Company, carrying on business as builders and contractors, for monies received from the Plaintiffs on account of the construction of two buildings constructed by the Defendant Company for the Plaintiffs.

In January 1909, the Defendant Company contracted with the Plaintiffs to construct for them two buildings in Calcutta, *viz.*, premises No. 27 Park Street and premises Nos. 294/295 Bow Bazar Street on the basis of actual cost plus 10 per cent. profit on the actual cost, and received from the Plaintiffs Rs. 50,000 on account, and a mortgage for Rs. 2,50,000 on the Bow Bazar premises, and afterwards on the 22nd August 1911, upon the completion of the buildings, a further sum of Rs. 2,80,000. When the Defendant Company received this last payment of Rs. 2,80,000, they had not yet submitted their bill to the Plaintiffs for the cost of the work, and they on the same day, *i.e.*, on the 22nd August 1911, took the following letter from the Plaintiffs on an 8 as. stamp paper, the letter being drawn at the office of the Defendant Company's solicitors and signed by the Plaintiffs when they were not represented by their own solicitors.

12, Hastings Street,
Calcutta, 22nd Aug. 1911.

To

The Bengal Stone Company, Ld.

Dear Sirs,

In consideration of the Bengal Stone Company, Limited, this day reconveying and releasing the premises Nos. 294/295, Bow Bazar Street mortgaged by us to the Bengal Stone Company, Limited, we hereby admit and acknowledge that the said reconveyance and release only relates to the said premises Nos. 294 and 295, Bow Bazar Street, and we hereby undertake to pay to the said Bengal Stone Co., Ld., not later than the 31st December 1911 any sum which may hereafter be found to be due from us to the said Bengal Stone Co., Ld., under or in connection with the agreement, dated the 21st January 1909, and made between the said Bengal Stone Co., Ld., of the one part and ourselves of the other part.

We hereby also agree to forego any and all claims that we may have had or have against you in respect of delays in completion of the buildings at Park Street and Bow Bazar and will only make such corrections in your bills and accounts as we may find to be erroneously or excessively charged. All other items of the contract agreement, dated 21st January 1909, to be considered as in force.

Yours faithfully,
(Sd.) J. I. J. Hyam,
(Sd.) Harry Jones by his attorney, J. I. J. Hyam.

On the 25th August 1911, the Defendant Company submitted their bill of costs amounting to Rs. 3,57,301-6-11, but did not furnish a detailed account of the measurements of the quantities of work done, inspite of repeated demands, but offered their books of account for Plaintiffs' inspection and the vouchers for payments made for materials used in the construction of the

buildings. The Plaintiffs contended that the sum of Rs. 2,80,000 and the letter of the 22nd August were taken from them under circumstances which amounted to coercion, and they engaged an engineer to measure up the buildings and were advised that the Defendant Company were overpaid, and the Plaintiffs brought their suit for an account from the Defendant Company as to the actual cost of the buildings and of the monies received on account thereof. The Defendant Company in their written statement resisted the Plaintiffs' claim for an account on the ground, amongst others, that by reason of the letter of the 22nd August there was an account stated between the parties.

Mr. Justice Imam, before whom the suit was tried, decreed the Plaintiffs' suit and ordered a reference for account before the Official Referee, holding however that the facts of the case did not amount to coercion in law.

Mr. Zorab (with him *Mr. S. Hyam*) appeared for the Plaintiffs.

Mr. Pearson (with him *Mr. Surita*) appeared for the Defendant Company.

Mr. Hyam for the Plaintiffs: Your Lordship will allow me my costs.

[IMAM, J.—Should not costs be reserved until the accounts are taken? Generally costs are reserved in such cases.]

Mr. Hyam.—I submit I am entitled to my costs irrespective of the result of the reference. The substantial question in the case was account or no account. I asked for an account, the Defendant Company resisted my claim and lost, and costs should follow the event. Where a reference for an account is an incidental relief, costs are reserved pending the Referee's report. Here the Plaintiffs' very claim was for an account, and they have succeeded in their claim. In *Sellar* v. *Griffin* (1),

(1) 11 W. R. 593 (1868).

Defendant denied Plaintiff's right to an account, and, an account being directed, costs up to and including the hearing were given to the Plaintiff by the decree ordering the reference. In *Hurrinath Rai* v. *Krishna Kumar Bakshi* (2) Lord Hobhouse in the Privy Council stated the principle as to costs in such cases as follows:—"And inasmuch as the Defendant has taken the course of denying . . . his accountability *in toto*, he should have been ordered to pay the whole costs of the suit. If he had been truthful, he should have submitted at once to an account and thus saved great expense," and the same principle is illustrated in *Boynton* v. *Richardson* (3), *Collyer* v. *Dudley* (4) and *Jefferys* v. *Marshall* (5).

Mr. Pearson for the Defendant Company.—In *Jellicoe* v. *Price* (6) costs were reserved pending the reference for an account. This is the general rule. *Sellar* v. *Griffin* (1), *Collyer* v. *Dudley* (4) and *Jefferys* v. *Marshall* (5) were exceptional cases. But Plaintiffs should be deprived of their costs although successful on the issue as to account, because they charged coercion and failed on that issue. In their charge of coercion they made unfounded aspersions on the character of the Defendants. That is misconduct and sufficient cause to deprive them of their costs. In *Huxley* v. *West London Extension Ry. Co.* (7) Lord Halsbury laid down the principle in such cases as follows:—"Everything which increases the litigation and the costs, and which places upon the Defendant a burden which he ought not to bear in the course

(1) 11 W R 593 (1868).
(2) I L R 14 Cal. 417 at p. 429 (1887).
(3) 21 Beav. 340 (1855).
(4) 1 T & R. 451 (1813).
(5) 19 W. R. 94 (1870).
(6) 1 Y. & C. Ch. [illegible].
(7) 14 A. C. [illegible].

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of that litigation, is perfectly good cause for depriving the Plaintiff of his costs." Plaintiffs in charging coercion have increased the costs of this litigation and should be deprived of their costs. Similarly Lord Watson says in the same case at p. 33 "good cause in my opinion embraces everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense." In any event the Defendant Company should get the costs on the issue of coercion on which they have succeeded. *Parker* v. *McKenna* (8).

Mr. Hyam in reply:—*Jellicoe* v. *Price* (6) was itself an exceptional case. The Vice-Chancellor in reserving costs did not approve of the decision in *Colleyer* v. *Dudley* (4). A successful party can only be deprived of his costs for misconduct or for other sufficient cause. There is no misconduct found against the Plaintiffs here, neither is there any sufficient cause to deprive them of costs. In *Huxley* v. *West London Extension Ry. Co.* (7) Plaintiff made an extravagant and extortionate claim and tried to support it by fraudulent statements and dishones acts and by evidence which the jury disbelieved. In *Parker* v. *McKenna* (8) charges of grave and deliberate fraud were made which turned out to be entirely without foundation. None of these strictures are applicable to the present case. *Per contra* the Defendant Company, in obtaining the letter of the 22nd August in the absence of the Plaintiffs' solicitors, were themselves guilty of such misconduct as to deprive them of their costs on the issue of coercion on which they succeeded. Daniel Ch. Pr. 8 "Ed.", p. 1039 (*b*).

(4) 1 T. & R 421 (1828).
(6) 1 Y & C. Ch. Ca. 71 (1841).
(7) 14 A. C. 26 at p. 32 (1899).
(8) 10 Ch. App. 93 at p. 120 (1874).

IMAM, J.—The Plaintiffs will get their costs up to and including the hearing on scale No. 2.

Messrs. Jones & Co. for the Plaintiffs.

Messrs. Orr, Dignam & Co. for the Defendant Company.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES NOS. 1243, 1979—1981 OF 1912.

MOOKERJEE, J. N. R. CHATTERJEA, J. 1915, Heard, 20, and 24, August and 2, September. Judgment, 24, November.	MATHURAMOHAN SAHA & ors., Defendants, Appellants, *v.* RAM KUMAR SAHA and CHITTAGONG DISTRICT BOARD, Plaintiffs, Respondents.

Bengal Local Self-Government Act (III B. C., of 1885), sec. 138 (d), rules under—Rr. 93, 98, in ultra vires and directory—Power to make rules to regulate exercise of statutory authority, scope of—Interpretation of statutes—Interpretation by authorities charged with execution of rules, value of—Rule whether mandatory or directory or in part one and in part the other—Test—Release, if may operate as conveyance—Plaintiff if and when should be allowed to complete his title pending suit—Contract of Corporation without seal if enforceable when not demanded by statute—Part-performance as a ground for specific enforcement of unsealed contract—Successive contracts dealing with same matter—Former if rescinded when later contract invalid—Rescission by renunciation, when effective—Rescission after part-performance—Money taken by Corporation under illegal contract—Liability to refund—Civil Procedure Code (Act V of 1908), Or 41, rr. 22 (3), 33—Cross-objection where may be urged against co-Respondent—Court's power to permit when justice requires—Change of law.

The effect of rr. 98 and 93 of the Rules made by the Lieutenant-Governor on the 15th December 1885 under sec. 138 (d) of Act III of 1885 B. C. (Bengal Local Self-Government Act) is that no immoveable property vested in a District Board can be

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sold, except with the previous approval of the Local Government (sec. 93) and except by an instrument under the Common Seal signed by the Chairman and by two members of the Board.

These rules are not ultra vires *being rules made for the purpose of "regulating the powers" of District Boards to transfer property, within the meaning of sec. 138* (d) *of the Act.*

The requirement as to signature by two members of the Board in r. 98 is mandatory and not merely directory; for read (as it must be) with r. 93, it implies a prohibition on the Board to effect transfers otherwise than in the manner laid down by it.

The authority to "regulate" does not include a power to prevent or prohibit, but, subject to this qualification, a rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power.

MUNICIPAL CORPORATION OF TORONTO *v.* VIRGO (6) *and* ATTORNEY-GENERAL *v.* ADVOCATE-GENERAL (7) *referred to.*

Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation may be disregarded by it for cogent and persuasive reasons.

BALESWAR *v.* BHAGIRATHI (8) *referred to.*

No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience; it is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

HOWARD *v.* BODINGTON (13) *and other cases.*

A statutory rule may upon such interpretation be very well held to be in part mandatory and in part directory.

Where a District Board having sold some land by auction to the highest bidder for Rs. 1,280 granted to the latter a certificate, and then as the certificate did not specifically describe the property sold executed a deed of release in favour of the purchaser:

Held—*That the sale was ineffective as there was no compliance with the provisions of either sec. 54 of the Transfer of Property Act or rr. 93 and 98 aforesaid.*

The release did not operate as a conveyance, as title to land cannot pass by a mere admission when the statute requires a deed.

HEMENDRANATH *v.* KUMAR NATH (5) *and* HEMENDRANATH *v.* KUMAR NATH (4) *distinguished.*

That the release and the certificate not being in compliance with r. 103 did not constitute even a valid contract for sale.

Held, *in a suit by the purchasers to recover possession from a person other than the District Board, that coming into Court as Plaintiffs they could succeed only on proof of a valid title.*

That not having had any title on the date of the institution of the suit, the trial could not have been postponed to enable them to complete their title by securing a duly executed instrument from the Dis-

(6) [1896] App. Cas. 88
(7) [1896] App. Cas. 348.
(8) I. L. R. 35 Cal. 701 (713) : s. c. 12 C. W. N. 857 : 7 C. L. J. 563 (1908).
(4) 12 C. W. N. 478 (1908).
(5) I. L. R. 32 Cal. 1061 : s. c. 2 C. W. N. 96 (1904).
(13) L. R. 2 P. D. 203 (1877).

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trict Board, the principle of GUNPAT *v.* ADHARJI (42) *(discussed with reference to cases in* SARAT CHANDRA *v.* APURBA KRISHNA (43)] *being inapplicable to such a case.*

Where the original contract by which a District Board agreed to transfer land for a consideration of Rs. 25 was not forthcoming,

Held—*That if the seal of the Board was necessary to give validity to it, it should be presumed against the Board that everything had been done that was necessary to make it a binding contract upon both parties.*

DOE D PENNINGTON *v.* TANNIERE (44) *referred to.*

Semble: *The strict rule of ancient Common Law that a Corporation could only act under its seal and was not bound by written contracts not under seal should be relaxed where there is no statutory requirement of a contract being under seal and the benefit of the contract has been enjoyed by the Corporation.*

That in any case part-performance such as will prevent an ordinary Defendant from setting up the defence of the Statute of Frauds will prevent a Corporation from setting up that defence or a defence grounded on the absence of the Corporation seal; [*Fry on Specific Performance* (1911) *sec. 648 and cases referred to*] *though where the statute positively requires the contract to be under seal, the exception based upon the doctrine of part-performance cannot be applied.*

Where therefore the District Board having acquired property belonging to A under the Land Acquisition Act agreed to restore the property to A, on the latter paying Rs. 25 being the costs of the acquisition and A deposited the money, and was allowed to remain in occupation of the land and to incur expenditure thereon for many years on the basis of the contract:

Held—*That the contract itself not being* ultra vires *of the District Board, in the sense that it was beyond the scope of the authority of the District Board as a Corporate Body under any circumstances, was specifically enforceable even though not sealed.*

One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former, but if though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless and until it is performed.

Where parties enter into a contract which if valid would have the effect by implication of rescinding a former contract and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect of the former transaction.

Held, *that a later agreement of A with the District Board to purchase for Rs. 957 odd a larger area including the subject-matter of the previous agreement, which did not fulfil the requirements of r. 103 and was thus inoperative, did not make the pervious contract inoperative.*

A who duly deposited the latter sum also, failed to obtain a conveyance and subsequently applied for refund of Rs. 998 odd being the amount of both deposits. The refund was not made and both parties continued to conduct themselves as if there was no rescission, and when the District Board

(42) I. L. R. 3 Bom. 312 (1877).
(43) 14 C. L. J. 53 (1911).
(44) 12 Q. B. 998, 1013 (1848).

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proceeded to dispose of the land, A protested.

Held—*That there was no abandonment of the whole agreement clearly made out, such as is necessary to establish a renunciation of the contract by A.*

That there could not be such rescission after the contract had, as in this case, been half performed.

A Corporation like a natural person is not entitled to retain money or property which it has received under an agreement which turns out to be ultra vires *or illegal. The law, independently of express contract, will compel restitution or compensation.*

As an ordinary rule, a Respondent in an appeal is not entitled to urge cross-objections except as against the Appellant but under r. 22 (3) *and r. 33 of Or. 41 of the Civil Procedure Code, the Appellate Court can in a proper case allow cross-objections to be urged against a co-Respondent.*

In the peculiar circumstances of the present case in which the co-Respondent supported the Appellant and there was no question of surprise, the Court permitted this to be done.

These were appeals from a decision of J. Phillimore, Esq., District Judge, Chittagong, dated 9th February 1912, modifying that of Babu Asutosh Banerjee, Subordinate Judge, Chittagong, dated 28th November 1910.

The facts of the case fully appear from the judgment.

Sir Rash Behari Ghose and *Babu Dhirendralal Khastgir* for the Appellants.

Babus Mahendra Nath Roy and *Gunadacharan Sen* for the Respondents.

Babu Kshitish Ch. Sen for the District Board Respondent.

THE JUDGMENT OF THE COURT was as follows:—

The history of the litigations, which have culminated in these appeals, consists principally of matter of record, and has not formed the subject of controversy in the elaborate arguments addressed to this Court. In 1895, one Ram Kamal Saha made over a sum of money to the District Board of Chittagong for the acquisition of a tract of land, in order that a tank might be excavated thereon for the benefit of the inhabitants of the locality. On the 15th June 1897, the usual declaration was published under the Land Acquisition Act; the land was in due course delivered to and became vested in the District Board on the 11th and 21st February 1898. It subsequently transpired that Ram Kamal Saha, the donor, was not moved by motives of public philanthropy, but that his real object as also the object of Ram Sundar Saha, now represented by the Appellants, his three sons, was to spite his relation Ramkumar Saha (the Respondent in these appeals) who was owner of a substantial portion of the property acquired. As Mr. Skrine, the then Commissioner of the Chittagong Division observed, the country was honeycombed with tanks, and it was simply monstrous to wish to pull down godowns and buildings to excavate another tank. The result was that, on the 7th March 1898, the District Board decided to abandon the project; but as possession of the land acquired had already been taken, the Government was not at liberty to withdraw from the acquisition under sec. 48 (*1*) of Act I of 1894. The Bengal Government accordingly informed the Commissioner, on the 21st May 1898, that the Government could not withdraw from the acquisition of the land at that stage, and forwarded the opinion of the Superintendent and Remembrancer of Legal Affairs, that if the Board did not want the land, they would arrange with the original owners [illegible]

off their hands at the price paid for its acquisition. On the 29th August 1898, the Board intimated to Ramkumar Saha that as they had abandoned the project, it had become necessary to return the land to its original owner, and they enquired of him, whether he was willing to take back the land on payment of Rs. 25 as the expenses of acquisition. The owner, who was obviously anxious to get back the land, which he had lost by reason of what was essentially an unwarrantable misuse of the machinery provided in the Land Acquisition Act, deposited the amount in the Treasury on the 6th September 1898. The Land Acquisition Collector, apparently in ignorance of these proceedings, called upon Ramkumar Saha on the 16th December 1898, to receive Rs. 538-5-6 as compensation for that portion of his land which had been acquired for the benefit of the District Board. On the 10th January 1899, Ramkumar Saha wrote to the Land Acquisition Collector and refused to take the compensation money on the ground that he had already accepted and acted upon the offer of the Board to retransfer the land to him on payment of Rs. 25. The sum held in deposit by the Land Acquisition Collector as compensation was subsequently made over by him to the District Board. The District Board, however, did not execute a conveyance in favour of Ramkumar Saha, and, so far as we can gather, the latter also did not press for a regular deed. The reason, no doubt, was that notwithstanding the proceedings for acquisition he continued in actual occupation of the land. More than two years later, on the 27th November 1900, the Land Acquisition Collector intimated to Ramkumar Saha that Rs. 957-11-1 had been spent for acquisition of the land, that Rs. 538-5-6 which at one time stood to his credit as owner of the land acquired, had been made over to the District Board, and that the land would be given to him on payment of the balance, Rs. 491-5-7. This offer, so far as can be made out from the record, covered not only the land of Ramkumar Saha which had been acquired for the District Board, but also other lands in the neighbourhood which had been acquired for the purposes of the same project of excavation of a tank. On the 4th December 1900, Ramkumar Saha deposited in the Treasury the entire sum of Rs. 957-11-1; and on or about the same date, a draft conveyance in his favour was drawn up on a stamped paper purchased at his cost for Rs. 10. The conveyance, however, for some unexplained reason, was neither executed nor registered. About a year later, on the 2nd August 1901, the Bengal Government intimated to the Commissioner of the Chittagong Division that the land should be offered to the original owners at cost price, and that if they declined, it should be sold by public auction. The letter added that in either case, the net sale-proceeds should be given to the donor or his personal representatives who had paid the cost of acquisition. On the 24th February 1902, the District Board issued a letter to Ramkumar Saha and informed him that if he did not, within thirty days, deposit Rs. 538-5-6 as price of the land and Rs. 13-9-6 as cost of acquisition (total Rs. 551-15-0) to take back his land, the land would be sold by public auction. Obviously the District Board authorities overlooked that a much larger sum than what was demanded had already been deposited by Ramkumar Saha. The record does not show what reply was submitted by the latter. We know, however, that on the 20th October 1902 the Land Acquisition Collector intimated to Ramkumar Saha and several other persons (some of them apparently his superior landlords,

and others his tenants) that they should on payment of Rs. 872-2-3 within 6th November 1902, take back the land, and, that, otherwise, it would be sold by public auction. The notice explained, on the face of it, that the sum demanded was obtained by deduction of Rs. 118-9-9, that is, 15 per cent. from Rs. 990-12-0 (which was the cost of acquisition of the land in four parcels under four declarations; the respective amounts were Rs. 50-8-3, 36-11-0, 62-8-10 and 841-10-0). The record does not show what followed upon this notice, but, it is plain that the Land Acquisition Collector overlooked that a much larger sum than what he demanded had been deposited nearly two years before. The position now was that Ramkumar Saha did not get a title deed for the whole land, although he had fully complied with the requisitions of the District Board and of the Land Acquisition authorities. Meanwhile, on the 17th May 1903, the Commissioner of Chittagong had asked permission of the Board of Revenue to restore the acquired land to the original owners. Why this was done is not explained, because we know that on two previous occasions, namely, on the 21st May 1898 and on the 2nd August 1901, the Local Government had, expressly or impliedly approved the proposal for retransfer of the land to the original owners; it is useless to speculate whether the letter of the 17th May 1903, was written, because the previous correspondence and the orders contained therein were overlooked. The record shows that on the 29th May 1903, the Board of Revenue held that their sanction was not necessary, and that as the land had vested in the District Board, the latter were competent to effect the proposed retransfer to the original owner. What action was taken by the District Board on receipt of this reply does not transpire from the evidence on the record; but we find that on the 21st March 1904, Ramkumar Saha petitioned to the District Board for return of Rs. 992-11-1, which had been in deposit then for several years (the sum was made up of Rs. 25 paid on the 6th September 1898, Rs. 10 paid on account of stamp on the 3rd December 1900, and Rs. 957-11-1 deposited on the 4th December 1900). No notice was taken of this application by the District Board authorities. Ramkumar Saha waited for three years and renewed his application on the 9th June 1907, but with no better result. He again renewed his application on the 12th August 1907. Upon this application, the Chairman of the District Board, on the 26th December 1907, directed that the sum might be refunded, because, in his opinion, the land should be retained and the tank constructed; he added in his note that the acceptance of the refund by Ramkumar Saha would estop the latter in any claim on the unexecuted conveyance ,and he specifically directed that the Applicant might be asked to take the money. This instruction however, was not carried out; the order of the Chairman was not notified to Ramkumar Saha, nor was the money ever paid or tendered to him, though an attempt is made in the oral evidence to show that a clerk of the District Board office verbally communicated the substance of the order of the Chairman to an officer of Ramkumar Saha. The fact remains, that the money is even now in the hands of the District Board authorities. On the 22nd February 1909, the District Board put up the land to auction. Ramkumar Saha, who was in occupation all this time, as soon as apprised of the intentions of the Board, appeared and objected to the sale on the ground that the Board had already contracted to sell the property to him. The objection was

summarily overruled, and the property was sold to Ram Sundar Saha as the highest bidder for Rs. 1,280. On the 14th May 1909, what is called a sale certificate was issued to the purchaser; as the property was not specifically described in this document, the Chairman of the District Board executed in favour of the purchaser a deed of release on the 12th July 1909. Symbolical possession of the property is said to have been delivered to the purchaser on the 17th August 1909; but he was not able to obtain actual possession. The result was that on the 28th September 1909 the purchaser instituted four suits in the Court of the Munsif of Chittagong for declaration of title by purchase and for recovery of possession from Ramkumar Saha; the District Board of Chittagong was not joined as a party Defendant to these suits. The purchaser instituted four different suits, apparently on the ground that the land had been acquired in four distinct parcels on the basis of four declarations under the Land Acquisition Act. On the 16th December 1909, Ramkumar Saha instituted a cross suit in the Court of the Subordinate Judge of Chittagong, against Ram Sundar Saha, the purchaser, and the Chairman of the District Board. This suit relates only to that portion of the land which had originally belonged to Ramkumar Saha. The plaint formulates the relief claimed as follows:—*first*, that the title of the Plaintiff in *kaemi dartapa* right and right by adverse possession be declared; *secondly*, that the purchaser Defendant be restrained in his attempt to take possession; *thirdly*, that the District Board be made to execute a conveyance in his favour and that his possession be confirmed; *fourthly*, that he be awarded a decree for damages for Rs. 1,957-11-1 with interest and costs; *fifthly*, that he be granted such relief as the Court might think fit. Subsequently to the institution of this suit, the suits in the Court of the Munsif were transferred to the Court of the Subordinate Judge and the five suits were tried together. The Subordinate Judge, in the suit of Ramkumar Saha, allowed him a decree for Rs. 992-11-1 against the District Board, with interest thereon from date of judgment until payment. In the suits by Ram Sundar Saha, the Subordinate Judge gave him a decree for possession with *mesne profits* and costs against Ramkumar Saha. Four appeals were then preferred to the District Judge by Ramkumar Saha, namely, one appeal by him in his suit, and three appeals by him in three of the four other suits; the lands comprised in these suits were identical with what was comprised in his suit. Consequently the subject-matter of the controversy before the District Judge was restricted to that portion of the land, which originally belonged to Ramkumar Saha. The District Judge in the suit of Ramkumar Saha modified, to his detriment, the decree of the primary Court. He confirmed the decree in his favour for Rs. 992-11-1, but he made the recovery of this sum from the District Board conditional on his making over possession of the land to the Board within six months. In the other three suits, brought by Ram Sundar Saha, he allowed the appeals of Ramkumar Saha and dismissed the claim for possession on the ground that the sale of the 22nd February 1909 was inoperative in law. The representatives of Ram Sundar Saha, who had died in the interval, have preferred four appeals to this Court and have contended that the sale mentioned was valid and operative. Ramkumar Saha has preferred a memorandum of cross-objections in the appeal which arises out of his suit and has argued that he had a good title to the land and was at any rate entitled to a decree

for specific performance against the District Board. Notice of the memorandum of cross-objections was, however, served at first only on the Appellants, and when this was brought to the notice of the Court, the hearing of the appeals was adjourned, at the request of the Counsel for the District Board, to enable him to consider the position and to receive adequate instructions; it was ultimately intimated to the Court that the District Board supported the contention of the Appellants and opposed the cross-objections of their co-Respondent, Ramkumar Saha. The appeals have been elaborately argued on both sides, and the points which emerge for consideration as also the facts whereon they are based may be briefly summarised.

The land now in dispute admittedly belonged originally to Ramkumar Saha. At the instance of Ramkamal Saha and Ram Sundar Saha, the land was acquired under the Land Acquisition Act and was vested in the Chittagong District Board for the excavation of a tank. The project was subsequently abandoned, and the District Board, with the concurrence of the Local Government, decided to return the land to the original owner on payment of the actual expenses of the acquisition, as no compensation had been previously paid to him. The District Board, through their Vice-Chairman, then made an offer to Ramkumar Saha to return the land to him, if he paid Rs. 25, as the expenses of acquisition. This offer was forthwith accepted, and the money was deposited in the Treasury. Though no formal conveyance was executed, Ramkumar Saha continued in occupation presumably on the strength of this agreement. Two years later, a second offer was made to Ramkumar Saha by the Land Acquisition Collector, on behalf of the District Board, to transfer to him the whole of the land acquired (inclusive of the land covered by the previous agreement) if he would pay Rs. 957-11-1 which had been assessed as compensation. This offer was also accepted, and the amount demanded was forthwith deposited. A draft conveyance was prepared, but was not executed for some unexplained reason. More than a year later, the District Board, through their Chairman, offered to Ramkumar Saha to retransfer to him his portion of the land on payment of Rs. 538-5-6, the amount assessed as compensation therefor, and Rs. 13-9-6, the proportionate amount of expenses of acquisition. A few months later, the Land Acquisition Collector, on behalf of the District Board, offered to retransfer the land to Ramkumar Saha, his landlords and his tenants, if Rs. 990-12-0 was paid. What took place on these offers, does not transpire from the record; but two years later, Ramkumar Saha petitioned for refund of his deposit; this was of no avail, and a renewed application three years later was equally fruitless. On a third application by him, some months later, the Chairman of the District Board directed a refund, but his order was neither communicated nor carried out. More than a year afterwards, notwithstanding protest by Ramkumar Saha, the District Board put up the land to auction, when it was purchased by Ram Sundar Saha, who had, 11 years earlier set the machinery of the Land Acquisition Act in motion to deprive his rival of the land in suit. The purchaser, however, was not able to obtain actual possession, and was obliged to sue for recovery of possession, with the result that a cross suit was instituted by Ramkumar Saha with a view to perfect his own title or to recover damages from the District Board. The outstanding features of the case, then, are, that Ramkumar Saha has never been paid any compensation for his land, and, has, on the

other hand, paid to the District Board authorities, with a view to obtain a re-transfer thereof, a sum of Rs. 992-11-1 of which the Board had enjoyed the benefit for 9 years at the date of the institution of the suit. The only question is, what are the legal rights of the parties; for, there is not much room for doubt as to where the justice of the case lies. It is convenient to examine, at the outset, the position of Ram Sundar Saha who was the first to come into Court and to launch these litigations.

There is no controversy that under sec. 16 of Act I of 1894, the title vested absolutely in the District Board when possession of the land acquired was taken by the Collector on the 11th and 21st February 1898. The question arises, whether that title has been subsequently transferred to Ram Sundar Saha. The District Judge has held that the answer must be in the negative. The purchaser relied upon the sale certificate granted to him on the 14th May 1909, and the release executed in his favour on the 12th July 1909, the Court of Appeal below has held that neither is of any avail. Sec. 54 of the Transfer of Property Act provides that a sale of tangible immovable property of the value of Rs. 100 and upwards can be made, only by a registered instrument. The sale certificate was not registered and cannot consequently operate as a valid conveyance. The release was registered but it does not purport to be a conveyance, and was stamped, not as a conveyance but as a release: as stated on the face of it, it was granted, because the property covered by the sale-certificate was not described with sufficient precision in that document. A release of this character cannot operate to transfer title, because, as has been repeatedly ruled in this Court, title to land cannot pass by a mere admission when the statute requires a deed: *Jadunath* v. *Rup Lal* (1), *Dharam Chand* v. *Manji Sahu* (2) and *Narak Lal* v. *Magoo Lal* (3). The decision in *Hemendranath* v. *Kumar Nath* (4) (which at an earlier stage is reported in *Hemendranath* v. *Kumar Nath* (5)] is distinguishable; there this Court held upon a construction of all the terms of the particular instrument that though called a deed of disclaimer it operated as a deed of transfer; the Court did not formulate any general proposition of universal application that a deed of release has always the same operation as a conveyance. But, even if the release in this case could, by any stretch of language, be construed as a conveyance, there would be a fatal objection to its validity. Neither the release nor the sale certificate fulfils the requirements of r. 98 of the Statutory Rules made by the Lieutenant-Governor on the 15th December 1885 under sec. 138 (*d*) of Act III of 1885 (B. C.). (Bengal Local Self-Government Act) R. 98 is in these terms: "every transfer of immoveable property, vested in a Board, shall be made by an instrument under the Common Seal, signed by the Chairman and by two members of the Board, and, where these rules require the previous approval of the Commissioner of the Division, the fact that the transfer is signed with such approval shall be distinctly expressed." This rule must be read along with r. 93, which, so far as relevant to the present matter, provides that "no immoveable property vested in a District Board, shall, except with the previous approval of the Local Government and in such manner and on such terms and

(1) I. L. R. 33 Cal. 967: s. c. 10 C. W. N. 650; 4 C. L. J. 22 (1906).
(2) 16 C. L. J. 436 (1912).
(3) 22 C. L. J. 380 (1911).
(4) 12 C. W. N. 478 (1908).
(5) I. L. R. 32 Cal. 169: s. c. 9 C. W. N. 96 (1904).

conditions as that Government may approve, be transferred by the Board by way of sale." The effect of these two rules, consequently is that no immoveable property vested in a District Board can be sold, except with the previous approval of the Local Government and except by an instrument under the Common Seal signed by the Chairman and by two members of the Board. Neither the sale certificate nor the release fulfils this condition, as both the documents, though sealed and signed by the Chairman, were not signed by two members of the Board. The Appellants have sought to escape from this difficulty by a two-fold argument, namely, *first*, that rr. 93 and 98 are *utra vires*, and *secondly*, that r. 98, if *intra vires*, is directory and not mandatory.

In support of the first contention, reference has been made to secs. 20 and 138 (*d*) of Act III of 1885 (B. C.). The former section defines a District Board as a Body Corporate with power to acquire and hold property both moveable and immoveable and, subject to any rules made by the Lieutenant-Governor under the Act, to transfer any such property held by it and to contract and do all other things necessary for the purposes of the Act. A District Board has, consequently, power to transfer property held by it, subject to any rules made by the Lieutenant-Governor under the Act. Sec. 138 (*d*) authorises the Lieutenant-Governor to make rules consistent with the Act for the purpose of regulating the powers of District Boards to transfer property. The Appellants have argued that this authorises the Lieutenant-Governor to frame rules which impose restrictions on alienations, but not to frame rules which prescribe the formalities to be observed when alienations are made. After careful consideration of the argument addressed to us, we are unable to accept this contention. The expression "regulate the powers," when applied to a rule, appears to us to be comprehensive enough to include, not only rules which restrict the power of alienation to property of specified value and kind, but also rules which regulate the mode in which the alienation is to be effected. It is conceivable, for instance, that the rules may prescribe that a District Board may sell land for one purpose and not for another, or that the sale can be made only with the assent of the Local Government when the value of the land exceeds a prescribed limit, or that the conveyance is, in certain cases, to be executed by the Chairman alone, while, in other cases, it is to be signed by the Chairman and a member of the Board. Rules framed in this behalf may, without undue stretch of language, be deemed to be rules regulating the powers of the District Board. The term "regulate" is defined as follows in the Oxford Dictionary, Vol. VIII, p. 379; "to control, govern or direct by rule or regulations, to subject to guidance or restrictions, to adapt to circumstances or surroundings." Consequently, a rule to regulate a power may be a rule to restrict the exercise of the power as also a rule to guide the exercise of the power; though, as Lord Davey said in *Municipal Corporation of Toronto* v. *Virgo* (6), authority to regulate does not include a power to prevent or prohibit, because, in the language of Lord Watson in *Attorney-General* v. *Advocate-General* (7), a power to regulate assumes the conservation of the thing which is to be made the subject of regulation. Subject to this qualification, a rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power. In our opinion,

(6 [illegible]
7) [illegible]

rr. 93 and 98 are not *ultra vires*. In the interpretation of the scope of sec. 138 (*d*), some stress may also be laid upon the circumstance that immediately after the enactment of the section by the Legislature, the construction now accepted by us was placed thereon by the authority charged with the duty of framing the rules. As was explained in *Baleswar* v. *Bhagirathi* (8), it is a well-settled principle of interpretation that Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation has not by any means a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons. We may add that if the contention of the Appellants were to prevail, the object of the Legislature would obviously be defeated; instead of a simple and definite rule as to the mode in which trasfers are to be effected, we would have here all the uncertainty which prevails in other systems of law as to the manner in which transfers may be validly effected by a Corporate Body.

In support of the second contention, namely, that r. 98, if not *ultra vires*, is merely directory and not mandatory, it has been argued that the rule does not by the use of negative words, expressly provide that a valid transfer can be effected in no other way, and reference has in this connection been made to the decisions in *Liverpool Borough Bank* v. *Turner* (9) and *Cole* v. *Greene* (10). In the first of these cases, it was ruled that although the Merchant Shipping Act, 1854, contains no provision negativing the validity of a mortgage made otherwise than according to the terms of the Act, the whole scope of the Act is to that effect, and an equitable mortgage is consequently invalid. In the second case, it was ruled that a contract within the scope of sec. 151 of Stat. 3 and 4 Will IV, Ch. 68 is not void, though not signed "by the Commissioner or by any three of them, or by their clerk" as prescribed by that section. In our opinion, the contention of the Appellants is not well founded. Rule 98 must be read along with r. 93, and the latter rule does use appropriate words to indicate that no immoveable property vested in a District Board can be transferred by way of sale, except in such manner as the Local Government may approve. The intention is clearly manifest that a transfer shall not be made except in the manner prescribed by Rule 98. The whole aim and object of the law would plainly be defeated, if here, the command to do the thing in a particular manner did not imply a prohibition to do it in any other; indeed the language used in Rule 93 leaves no room for doubt as to the intention [*Jolly* v. *Hancock* (11); *Re Dickinson* (12)]. The decisions relied upon by the Appellants are clearly of no avail. The observations of Lord Campbell, L. C., in *Liverpool Borough Bank* v. *Turner* (9), show that a transfer in a mode other than that prescribed may be null and void, even though there are no negative words in the statute declaring that all transfers in any other form shall be null and void. No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification

(8) I. L. R. 35 Cal. 701 (713): s. c. 12 C. W. N. 657; 7 C. L. J. 563 (1908).

(9) 1 John and Hem 158; affirmed in 2 DeG. F. and J. 502 (507) (1860).

(10) 6 M. and G. 872 (890) (1843).

(9) 1 John and Hem. 158; affirmed in 2 DeG. F. and J. 502 (507) (1860).

(11) 7 Exch. 820 (1852).

(12) 20 Ch. D. 315 (1882).

for disobedience; it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed. [*Howard* v. *Bodington* (13)]. The decision in *Cole* v. *Greene* (10) seems, at first sight, to assist the contention of the Appellants, but on closer examination turns out to be clearly distinguishable, as there the clause in question, according to strict grammatical construction, was held not to form part of the proviso; the judgment of Tindal, C. J., shows that if the latter part of the section could be treated as part of the proviso, it would have been deemed imperative and not directory only. Here, however, r. 98, when read with r. 93, shows that the requirement as to signature by two members of the Board is mandatory and not directory. This is shown also by an application of a useful test, namely, do the statutory prescriptions affect the performance of a duty or do they relate to a privilege or power. It is well settled that where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it is neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred [*Caldow* v. *Pixell* (14)]. On the other hand, where a public duty is imposed and the statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. The distinction between the two classes of cases is illustrated by the decisions in *Ward* v. *Beck* (15), *Stapleton* v. *Haymen* (16), *The Andalusian* (17), *Le Feuvre* v. *Miller* (18), *Cope* v. *Thames Haven Ry. Co.* (19), *Diggle* v. *London and Blackwall Ry. Co.* (20), *Frend* v. *Dennett* (21), *Cornwall Mining Co.* v. *Bennett* (22), *Irish Peat Co.* v. *Phillips* (23), *Bottomley's case* (24) and *Re Gifford* and *Bury* (25). These cases show that when a public body or a company is established by statute or incorporated for special purposes only, and is altogether the creature of Statute Law, the prescriptions for its acts and contracts are imperative and essential to their validity. The case of *Frend* v. *Dennett* (21), is specially instructive. The Public Health Act 1848, enacted that contracts exceeding £10 in value should be sealed with the seal of the Board; that they should contain certain particulars; and that every contract so entered into shall be binding; provided always that before contracting for the execution of any work, the Board shall obtain from the Surveyor a written estimate of the probable expense of executing it and keeping it in repair. The first of these requisites was decided to be imperative, and a contract unsealed was consequently held inoperative against the Board and the rates. But the provision which required an estimate, was held to be merely a direction or instruction for the guidance of the Board and not

(10) 6 M. and G. 872 (890, (1843).
(13) L. R. 2 P. D. 211 (1877).
(14) 2 C. P. D. 566 (1877)

(15) 13 C B N. S 668; 134 R. R 691 (1863).
(16) 2 H. and C 918; 133 R. R. 858 (1864).
(17) L R. 3 P. D 182 (1878).
(18) 8 E. and B. 821; 112 R. R. 582 (1857).
(19) 3 Exch. 841; 77 R. R. 859 (1849).
(20) 5 Exch. 442 (1850).
(21) 4 C. B. N. S. 576; 5 L. T 73; 114 R. R. 859 (1858).
(22) 5 H. and N. 423; 120 R. R. 670 (1860).
(23) 1 B. and S. 598; 124 R. R. 650 (1861).
(24) 16 Ch. D. 681 (1880).
(25) 20 Q. B. D. 869 (1888).

a condition precedent essential to the validity of the contract [*Hunt* v. *Wimblodon Local Board* (26), *Eaton* v. *Basker* (27), *Brooks* v. *Torquay* (28), *British Insulated Wire Co.* v. *Prescot* (29), *Nowell* v. *Worcester* (30) and *Bonar* v. *Mitchell* (31)]. This meets completely the argument of the Appellants that if any of the provisions of r. 98 be deemed mandatory, the same character must be imputed to all its provisions. The view we take is supported by the principles deducible from the decisions in *Ashbury Ry. Co.* v. *Riche* (32), *Chasteauneuf* v. *Capeyron* (33) and *Young* v. *Mayor of Royal Leamington* (34). In the case last mentioned, the House of Lords ruled that sec. 174 of the Public Health Act, 1875, which enacts that every contract made by an Urban authority, whereof the value or amount exceeds £50, shall be in writing and sealed with the Common Seal of such authority, is obligatory and not merely directory. Lord Bramwell observed: "the Legislature has made provisions for the protection of rate-payers, share-holders and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities, which involve deliberation and reflection. That is the importance of the seal. It is idle to say, there is no magic in a wafer. It continually happens that carelessness and indifference on the one side and the greed of gain on the other cause a disregard of these safeguards, and improvident engagements are entered into. The decision may be hard in this case on the Plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement." A similar view has been taken in a long line of cases in the Courts of the United States, where the principle has been repeatedly affirmed that if the charter or constituent act of a Corporation prescribes a particular mode in which the property of the Corporation shall be disposed of, that mode must be pursued [*Platter* v. *Elkhart County* (35), *Crow* v. *Warren County* (36) and *Shimen* v. *Phillipsburg* (37)]. The point was discussed with characteristic clearness and striking logical force in able and interesting opinions by Field, C. J., in what are known as the City Slip Cases in California where it was ruled that sales of real estate belonging to the city by its officers, under the authority of an ordinance not adopted in accordance with statutory requirements, were void and did not pass title to the purchasers [*Mc. Craken* v. *San Francisco* (38), *Grogan* v. *San Francisco* (39) and *Pimental* v. *San Francisco* (40)]. There is thus no escape from the position that neither the sale certificate nor the release has operated to transfer title to the Appellants.

It is further clear that they do not constitute even a valid contract for sale, because r. 103 requires that every contract or agreement entered into by any District Board in respect of a sum or involving a value above Rs. 500 shall be sanctioned at a meeting, be in writing, be signed by the Chairman and two other Members of the District Board and shall be sealed with the Common Seal of such

(26) 4 C. P. D. 48 (1878).
(27) 7 Q. B. D. 529 (1881).
(28) [1902, 1 K. B. 601.
(29) [1895] 2 Q. B. 468.
(30) 9 Exch. 457; 96 R. R. 793 (1853).
(31) 5 Exch. 415 (1850).
(32) L. R. 7 H. L. 653 (1875).
(33) 7 App. Cas. 127 (1882).
(34) 8 App. Cas. 5.7 (1883).
(35) 103 Ind. 360; 2 N. E. 544.
(36) 128 Ind. 51; 20 N. E. 642.
(37) 58 N. J. L. 506; 33 Atl. 852.
(38) 16 Calf. 591.
(39) 18 Calf. 590,
(40) 21 Calf. 351.

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District Board. The rule adds that unless so sanctioned and executed, such contract shall not be binding on the District Board. It has been finally argued that the objection to the title of the Appellants should not have been allowed to prevail, as the sale was admitted [*Satyesh* v. *Dhanpat* (41)] and that, at any rate, the trial should have been postponed to enable the Appellants to complete their title by securing a duly executed instrument from the District Board [*Gunpat* v. *Adharji* (42)]. There is no force in either of these contentions. The Appellants come into Court as Plaintiffs and must succeed on proof of a valid title. Their title was challenged by the Defendants and though the factum of the sale by auction was admitted, it was asserted that the title had not been transferred thereby. The Appellants had ample opportunity to produce a properly executed conveyance from the District Board, if they could, but they have not done so. The case before us clearly does not fall within the class of decisions where it has been ruled that a suit need not be dismissed merely because the authority for its institution such as a certificate under the Pensions Act, 1861, or sec. 78 of the Land Registration Act, or, sec. 60 of the Bengal Tenancy Act, or, sec. 4 of the Succession Certificate Act is not produced with the Plaint. The cases on this subject will be found reviewed in the judgment of this Court in *Sarat Chandra* v. *Apurba Krishna* (43) and need not be re-examined here. They are distinguishable, as the Plaintiffs here had no title at all at the date of the institution of the suit. We hold accordingly that the District Judge has correctly found that Ramsundar Saha had no enforceable title at the date of the commencement of his suits, which must be deemed to have been rightly dismissed. The inference follows that the title to the land in dispute is still vested in the District Board, and, we must, consequently, examine the rights of Ramkumar Saha against that body, which form the subject of enquiry in his suit.

There is no controversy upon one fundamental point, namely, that after the land in dispute had become vested in the District Board, they abandoned the project to excavate a tank and obtained the sanction of the Local Government to re-transfer the land to the original owner. The question is, whether there is a valid contract for such transfer enforceable at the instance of Ramkumar Shaha against the District Board. It cannot be disputed that there was an offer by the District Board to Ramkumar Saha on the 31st August 1898, to reconvey the land to him upon payment of Rs. 25 as actual expenses of acquisition and that the offer was accepted by him when he made the requisite deposit on the 6th September 1898. This plainly constituted an enforceable contract. R. 102 of the Statutory Rules provides that every contract made by or on behalf of a Board in respect of a sum or involving a value exceeding Rs. 50 shall be in writing and shall be signed by the Chairman or Vice-Chairman of the Board. As the contract in this case was for re-transfer of the land for Rs. 25, neither r. 102 nor r. 103, which apply respectively to contracts in excess of sums of Rs. 50 and Rs. 500, has consequently any application, but we know that the offer of the 31st August 1898 was, as a matter of fact, signed by the Vice-Chairman. It has not been proved that the Vice-Chairman had no authority to make this particular offer; no copy of the rules, if any, framed by the District Board under sec. 32 (*e*) of the Bengal Local

(41) I. L. R. 24 Cal. 20 (1896).
(42) I. L. R. 3 Bom. 312 (1877).
(43) 14 C. L. J. 53 (1911).

Self-Government Act as to the powers to be exercised by the Chairman or Vice-Chairman, has been produced. We must assume that the Vice-Chairman was competent to make the offer, specially, as his act has never been specially repudiated in these proceedings. The document whereby the original offer was made, is apparently not in existence, and the draft copy kept in the office has been produced; it is consequently impossible to say, whether the original bore the seal of the District Board; but if a seal is necessary it is to be presumed, as Lord Denman says in *Doe d Pennington* v. *Tanniere* (44) against the Corporation that everything has been done that was necessary to make it a binding contract upon both parties. The Statutory Rules, however, do not expressly require that a contract of this description should be sealed. The omission to affix the seal would not, therefore, affect the validity of the contract. The strict rule of the ancient Common Law, no doubt, was that a Corporation could only act under its seal and was not bound by writtten contracts not under seal. This rule, however, was relaxed in many cases at an early date, and where a Corporation is acting within the scope of the legitimate purposes of its institution, even parol contracts made by its authorised agents raise implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the Corporation. [6 Vin. Abr. 267; 1 Wms. Saund 615, 616: 1 Blackstone Com. 475; *Lawford* v. *Billericay Rural Council* (45), *Douglass* v. *Rhyl Urban District Council* (46), *Melbourne Banking Corporation* v. *Brougham* (47) and *Bank of Columbia* v. *Patteson* (48)]. This is borne out by the statement of Fry in his Classical Treatise on Specific Performance of Contracts, 1911, sec. 618: "It appears to be clear that such part performance as will prevent an ordinary Defendant from setting up the defence of the Statute of Frauds, will prevent the Defendant company from setting up either that defence or a defence grounded on the absence of the corporate seal or of the statutory formalities in accordance with which the company may be enabled to contract. This was clearly laid down in the case of *Wilson* v. *West H. H. and Ry. Co.* (49), and there are other authorities leading to the same conclusion." Reference is then made to *Marshall* v. *Corporation of Queen Borough* (50), *Maxwell* v. *Dulwich College* (51), mentioned in *Carter* v. *Dean of Ely* (52), *London and Birmingham Ry. Co.* v. *Winter* (53), *Earl of Lindsey* v. *Great Northern Ry. Co.* (54), *Crook* v. *Corporation of Seaford* (55) and *Mayor of Drogheda* v. *Holmes* (56). Amongst more recent decisions, reference may usefully be made to the judgment of Neville, J., in *Hoare* v. *Kingsbury Urban Council* (57), which shows that the exception based upon the doctrine of part performance cannot be applied where, as in *Frend* v. *Dennett* (21) and in *Young* v. *Royal Leamington Spa Corporation* (34), the contract is, by sta-

(44) 12 Q. B. 998, 1013 (1848).
(45) [1903] 1 K. B. 772.
(46) [1913] 2 Ch. 407.
(47) 4 App. Cas. 156 (1878).
(21) 4 C. B. N. S. 576; 5 L. T. 73; 114 R. R. 859 (1858).
(34) 8 App Cas. 517 (522).
(48) 7 Cranch. 299.
(49) 34 Beav. 187; 2 DeG. J. and S. 475 (1864).
(50) 1 Sim. and St. 520 (1823).
(51) 4 L. J. Ch. 138 (1828).
(52) 7 Sim. 211 (222); 40 R. R. 113 (121) (1835).
(53) Cr. and Ph. 57 (63).
(54) 10 Hare 664 (1853).
(55) L. R. 10 Eq. 678; L. R. 6 Ch. App. 551 (1870).
(56) 5 H. L. C. 460; 101 R. R. 251 (1855).
(57) [1912] 2 Ch. 452.

tute positively required to be under seal; to hold otherwise would in effect be, as Lindley, L. J., said [*Young* v. *Corporation of Leamington* (58)] to repeal the act of Parliament and to deprive the rate-payers of that protection which Parliament intended to secure for them. In the case before us, however, the Statutory Rules do not render a seal necessary for the validity of this class of contracts, and the doctrine of part-performance may well be applied; the District Board have had the benefit of the money paid by Ramkumar Saha and have allowed him to remain in occupation of the land and to incur expenditure thereon for many years on the basis of the contract. It is worthy of note that the contract in this case is not *ultra vires* in the sense that it is beyond the scope of the authority of the District Board as a Corporate Body under any circumstances; such contract is not affected by the class of decisions, whereof *Ashbury Ry. Co.* v. *Riche* (32) may be taken as the type. We hold accordingly that there was an enforceable contract on the 6th September 1898.

Two questions next require consideration, namely, *first*, has there been an implied rescission of this contract by a substituted agreement, and, *secondly*, has there been an implied rescission of the contract by abandonment. As regards the first point, we have to bear in mind that, subsequent to the agreement of the 6th September 1898, an offer was made to Ramkumar Saha by the Collector on behalf of the District Board on the 27th November 1900 to re-transfer the entire land to him (inclusive of the land acquired from him as also from others) if he would make the required deposit. He may be deemed to have accepted this offer on the 4th December 1900, when he paid into the Treasury the amount demanded. What, then, was the legal effect of this transaction; did it amount to an implied rescission of the original agreement by a substituted agreement? The answer must be in the negative, *first*, because the second agreement was only more comprehensive than, but in no way inconsistent with, the first agreement and, *secondly*, because, the second agreement was inoperative in law.

As regards the first point, it is well-settled that a contract need not be rescinded by an express agreement to that effect; if the parties make a new and independent agreement concerning the same matter, the latter may be construed to discharge the former, when the terms of the latter are so inconsistent with those of the former, that they cannot stand together [*Gilbert* v. *Hall* (59)]. The true principle is that one contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former; but, if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless and until it is performed. [*Hunt* v. *South Eastern Ry. Co.* (60), *Dodd* v. *Churton* (61), *Patmore* v. *Colburn* (62) and *Thornhill* v. *Neats* (63)]. The same view has been adopted in the Courts of the United States [*Drown* v. *Forrest* (64), *Rhoades* v. *Chesapeake Ry. Co.* (65) and *McDaniels* v.

(32) L. R. 7 H. L. 653 (1875).
(58) 8 Q. B. D. 579 (585) (1882).
(59) 1 L. J. Ch. 15 (1831).
(60) 45 L. J. C. P. 87 H. L. (1875).
(61) [1897] 1 Q. B. 562.
(62) 1 Cr. M. and R. 65 (1837).
(63) 1 C. B. N. S. 531; 125 R. R. 251 (1860).
(64) 68 Vermont 557; 14 L. R. A. 80.
(65) 49 W. Va. 594; 87 Am. St. Rep. 826; 55 L. R. A. 170.

Robinson (66)]. It is further well-settled that where parties enter into a contract, which, if valid, would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction. As observed in Willes, J., in *Noble* v. *Ward* (67), this is an accordance with a series of cases which will be found referred to in the second of the Egreemont Cases, *Doe d Biddulph* v. *Poole* (68). A similar view was taken in *Britt* v. *Aylett* (69). In the case before us, the second agreement was inoperative in law, as it contravened the provisions of r. 103 of the Statutory Rules previously mentioned. We cannot, consequently, hold that the original agreement of the 31st August 1898 was, by implication, rescinded by the subsequent agreement of the 4th December 1900.

As regards the second point, we have to consider whether the agreement of the 6th September 1898 was impliedly rescinded by abandonment, when Ramkumar Saha applied to the District Board, on the 24th April 1904, 9th June 1907 and 12th August 1907 for return of the sum previously paid by him; for, there is no dispute that where one party, by acts and conduct, evinces an intention no longer to be bound by the contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract. The rule on this subject was formulated by Lord Coleridge, C. J., in *Freeth* v. *Burr* (70), "where the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which, I think, the decision in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, namely, that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." This exposition has been twice affirmed by the House of Lords. In *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.* (71) Selborne, L. C., said: "you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." In the same case, Lord Blackburn added: "where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, if you go on and perform your side of the contract, I will not perform mine, that in effect amounts to saying "I will not perform the contract." To the same effect is the observation of Lord Collins in *General Bill Posting Co.* v. *Atkinson* (72), "the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." As renunciation is thus based on an absolute aban-

(66) 26 Vermont 316; 52 Am Dec. 574.
(67) 4 H and C. 149; L. R. 1 Exch 177; L. R. 2 Exch. 135; 143 R. R. 534 (1867).
(68) 11 Q B 713; 75 R. R 607 (1848).
(69) 11 Arkansas 475; 52 Am. Dec. 282.
(70) L. R. 9 P. C. 208 (1874).
(71) 9 App Cas 434 (438, 443 (1884).
(72) [1909] App. Cas. 118 (122).

donment of the contract, it follows, as Bowen; L. J., said in *Boston Deep Sea Fishing Co.* v. *Ansell* (73), that a rescission of the contract implies that you relegate the parties to the original position they were in before the contract was made; that cannot be where half the contract has been performed. It is also well-settled that the Court insists upon clear and precise evidence of a mutual intention to determine and abandon the contract [*Robinson* v. *Page* (74) and *Buckhouse* v. *Crosby* (75)]. Sugden, L. C., said in *Carolan* v. *Brabazon* (76), "the Court requires as clear evidence of the waiver as of the existence of the contract itself, and will not act upon less." To the same effect is his observation in *Moore* v. *Crofton* (77). Smith, M. R., in *Clifford* v. *Kelly* (78) and in *Cartan* v. *Bury* (79), quotes with approval the statement of Lord St. Leonards in his celebrated work on Vendors and Purchasers (1862) Ch. 4, sec. 9, para. 3, p. 168: "An abandonment of the whole agreement, clearly made out, (for the Court will look at the evidence with great jealousy), is a good defence in equity." [*Brophy* v. *Connolly* (80), *Chambers* v. *Betty* (81), *Homan* v. *Skelton* (82), *Chubb* v. *Fuller* (83), *Lloyd* v. *Collett* (84), *Reynolds* v. *Nelson* (85), *Garrett* v. *Besborouh* (86), *Cubitt* v. *Blake* (87) and *Earl of Rosse* v. *Sterling* (88)]. Now let us examine the relative situation of the parties in the light of these principles. The applications by the Plaintiff for return of his money do not state explicitly that he wished to rescind the contract. His conduct, indeed, was inconsistent with any such possible implication; he did not offer to quit possession of the land on receipt of the money. In fact, if he rescinded the contract and gave up the land, he would be entitled not only to a return of his money, but also to compensation assessed under the Land Acquisition Act. The Chairman, when he recorded the order for return of the money, no doubt, noted that if the Plaintiff took back the money, he might find himself estopped in his attempt to enforce the contract, not, indeed, the earlier contract, but the later agreement which formed the basis of the unexecuted draft conveyance, in any event, his remarks show that he, at any rate, thought that there was a subsisting contract between Ramkumar Saha and the District Board. But whatever the result might have been, if the Plaintiff had actually received back his money, the incontestable fact remains, that the amount has not yet been paid to him. The order of the Chairman was never communicated to him; the money has never been tendered, much less actually paid to him. The District Board have never sought to obtain possession of the land from him, as they would unquestionably be entitled to do on a rescission of the contract. The plain truth is that whatever may have been recorded on paper, both parties have conducted themselves as if there had been no rescission; they have not been relegated to the original position

(73) 39 Ch D. 339 (365) (1888).
(74) 3 Russell 114; 27 R. R. 26 (1826).
(75) 2 Eq. Cas. Abr. 32 (1737).
(76) 3 J. and L. 200 (209); 9 Ir. Eq. Rep. 224 (1846).
(77) 3 J. and L. 438 (445); 7 Ir. Eq. Rep. 344 (1846).
(78) 7 Ir. Ch. Rep. 333 (1858).
(79) 10 Ir. Ch. Rep. 387 (400) (1860).
(80) 7 Ir. Ch. Rep. 173 (1857).
(81) Beatty 488 (1815).
(82) 11 Ir. Ch Rep 75 (97) (1860).
(83) 4 Jur. N. S. 153 (1858).
(84) 4 Brown C. C. 469 (1793).
(85) 6 Madd. 18; 22 R. R. 225 (1821).
(86) 2 Dr. and Wal. 441; 2 Ir. Eq. Rep. 150 (1839).
(87) 19 Beav 454; 105 R. R. 209 (1854).
(88) 4 Dow. 419 (1816).

they occupied before the contract was made. Their conduct has been inconsistent with the theory of rescission, and when for the first time, more than a year after the order for refund had been recorded by the Chairman, the District Board attempted to sell the land as if they were emancipated from continued liability under the contract, the Plaintiff forthwith protested and relied upon the contract, and there is no room for doubt that whatever might have been said, nothing had been done, up to that stage, on either side, on the hypothesis that the contract had been abandoned. The demand of a return of the deposit is not by itself conclusive evidence of an intention to abandon the contract; but where, as in *Whalen* v. *Stuart* (89), such demand is accompanied by other conduct consistent only with an intention to rescind, the vendee who has so acted cannot later seek specific performance, for, as has been said, a non-existent contract cannot be specifically enforced. We hold accordingly that the conduct of the parties does not show that the contract was rescinded, and it has not been urged that, apart from this the conduct of the Plaintiff has been such that though it does not amount to rescission, it still disentitles him from insistence on specific performance, as was held in *Price* v. *Assheton* (90) and *Price* v. *Dyer* (91). The conclusion follows that, at the date of the institution of this suit, there was a valid contract specifically enforceable by the Plaintiff against the District Board.

No question of limitation obviously arises under Art. 113 of the Schedule to the Indian Limitation Act, as the Plaintiff had notice, for the first time, on the 22nd February 1909, that the performance was refused, and the suit was instituted within three years from that date.

The question next arises, whether the Plaintiff is entitled to the assistance of the Court in any other manner. The District Judge has made in his favour a conditional decree for recovery of Rs. 992-11-1 from the District Board. In the view we take of the right of the Plaintiff to enforce specific performance of the contract of the 6th September 1898, it is plain that this decree must be modified. The Plaintiff is not entitled to a return of the sum of Rs. 25 paid on the 6th September 1898, but he is entitled to a return of the sum of Rs. 957-11-1 paid on the 4th December 1900 when he accepted the second offer. The second agreement, as we have already seen, is not enforceable and never superseded the original contract. Consequently, the District Board are not entitled to retain the money paid by the Plaintiff thereunder. It cannot be disputed that where a Corporation receives money or property under an agreement, which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation [*Rankin* v. *Emigh* (92)]. This is good sense and based on sound principle. The relief is granted, not upon the illegal contract, nor according to its terms, but on an implied contract of the Corporation to return, or failing to do that, to make compensation for property or money which it has no right to retain; to maintain such an action is not to affirm but to disaffirm the illegal contract [*Central Transport Co.* v. *Pullman Palace Car Co.* (93)]. As

(89) 194 N. Y. 195; 87 N. E. 819.
(90) 1 Y. and C. Exch. 82; 41 R. R. 222 (1834).
(91) 17 Ves. 356; 11 R. R. 102 (1810).

(92) 218 U. S. 27.
(93) 139 U. S. 24

Baggallay, L. J., said in *Chapleo* v. *Brunswick Building Society* (94), if the company has received the benefit of the payment, if, for instance, that amount has found its way to the credit of its banking account, the Plaintiffs might have been enabled to establish a claim against the company to the extent of the benefit derived by it from the transaction. [*Lawford* v. *Billericay Rural Council* (45) and *Douglass* v. *Rhyl Urban District Council* (46)]. In the case before us, the Plaintiff is clearly entitled to a return of Rs. 957,11-1 together with interest thereon from the date of deposit to the date of realisation.

One other question requires consideration, namely, whether the Plaintiff is entitled to relief against the District Board by way of cross-objections to the decree, in an appeal preferred by the other Defendants. It need not be disputed that, as an ordinary rule, a Respondent in an appeal is not entitled to urge cross-objections except as against the Appellant [*Bishnucharan* v. *Jogendra Nath* (95), *Sabiuddin* v. *Deomurat* (96), *Kallu* v. *Manni* (97), *Jadunandan* v. *Koer Kallyan* (98), *Nursey* v. *Harrison* (99) and *Abdul Ghani* v. *Mahammad* (100)]. But r. 22 (3) of Or. 41 of the Code of 1908 has materially altered the pre-existing law by substitution of the words "party who may be affected by such objection" for the word "Appellant" contained in sec. 561 (3) of the Code of 1882. It may further be observed that r. 33 of Or. 41 has conferred wide discretionary powers on the Court of Appeal to alter the decree of the Court below as the case may require. In the case before us, the Saha Defendants, who are Appellants in this Court, have attacked even the conditional decree made by the District Judge in favour of the Plaintiff; the appeal, in fact, reopens the whole matter in contorversy and calls upon the Court to re-examine the questions in dispute from all possible points of view. That appeal has been supported by the District Board Respondent. The Plaintiff-Respondent has been constrained, with a view to ensure his safety, to take cross-objections, which if successful, would make his title unassailable. These objections, no doubt, primarily touch the co-Respondent, but that co-Respondent has throughout supported the Defendants-Appellants against the Plaintiff-Respondent. No question of surprise arises, as every party has been given full notice and opportunity to place his own case before the Court in its true bearing. The circumstances are thus obviously of a very special character; the District Board has decided to part with the land acquired for a purpose which has fallen through. The substantial question is whether relief should be granted in respect of that land to the original owner or to the subsequent purchaser. If we allow the cross appeal, though relief is granted in form against the District Board, the ultimate result is that the title of the original owner is secured as against the subsequent purchaser. In these peculiar circumstances, it is in no sense unjust that effect should be given to the cross-objections. There is no answer to the cross-objections on the merits, while the appeal itself is, as we have seen, groundless. The cross-objections must, consequently, succeed, while the appeal cannot be sustained.

We may add that even if we had declined

(45) [1903] 1 K. B. 772 (780, 786).
(46) [1913] 2 Ch. 467.
(94) 6 Q. B. D. 696 (711).
(95) I. L. R. 26 Cal. 114 (1898).
(96) I. L. R. 30 Cal. 355 (1903).
(97) I. L. R. 23 All. 93 (1900).
(98) 16 C. W. N. 612: s. c. 15 C. L. J. 61 (1911).
(99) I. L. R. 37 Bom. 511: s. c. 15 Bom. L. R. 781 (1913).
(100) I. L. R. 28 All. 95 (1905).

to entertain the cross-objections, and had merely dismissed the appeal, the practical result would have been identical with what will be the consequence of our decree. The Plaintiff Ramkumar Saha has been in undisturbed possession of the land all along, notwithstanding the acquisition. His possession became adverse to the Board on the 21st February 1898; consequently, he acquired an indefeasible title on the 21st February 1910. If the conditional decree made by the District Judge be maintained, the Plaintiff need never take back the deposit, but he will be entitled to receive from the Collector the compensation awarded under the Land Acquisition Act. The Plaintiff thus achieves the end he has in view, namely, retention of possession of the land; that possession can no longer be disturbed by the District Board. The Counsel for the District Board fully appreciated the difficulties of the situation; he complained that the decree of the District Judge is ineffectual for his purposes, as it does not entitle the District Board to recover possession of the land by execution and on payment of the decretal amount to the Plaintiff. The obvious answer is that the decree cannot be modified, in the way suggested, in favour of the District Board; the Board are not the Plaintiffs in the suit, and, have never chosen to appeal against the decree made by either Court.

We have finally to consider the question of costs. In the three appeals in which the decree of the District Judge is affirmed, the Appellants will pay the costs of the Respondents in this Court. In the other appeal, in which the appeal is dismissed and the cross-objections allowed, the Appellants will also pay the costs of the Plaintiff-Respondent. But the costs of the Plaintiff, both in the primary Court and in the Court of the District Judge, should, in our opinion, be paid by the District Board [*Thornhill* v. *Weeks* (101)]. The history of this protracted litigation proves conclusively that the whole difficulty has been created by the utterly unbusinesslike manner in which the transactions reviewed by us have been carried on ever since 1898 by the District Board of Chittagong. There is no exaggeration whatever in the quaint observation, embodied in one of the office notes in the record, that this matter "remained to be decided from a long time owing to different opinions of different officers." One can only hope that the long delay and uncertainty, which have characterised the proceedings of the Board in this particular matter, furnish but a solitary instance of the way in which business is transacted by a Corporation created for purposes of public utility. The net result to the Plaintiff has been that though his land was acquired under very doubtful circumstances in 1898, he has had to wait for more than 18 years to get back his property, notwithstanding that he has, in the interval, responded promptly to every demand of the District Board.

The result of our decision may now be summarised. Appeals Nos. 1979, 1980 and 1981 of 1912 are dismissed with costs. Appeal No. 1243 is dismissed, but the cross-objections therein are allowed and the decree of the District Judge discharged. In lieu thereof, we direct that the suit (435 of 1909) out of which that appeal arises, do stand decreed in the manner following. The Plaintiff Ramkumar Saha is awarded a decree for specific performance of the contract of sale of the land mentioned in the schedule to the plaint, as against the District Board of Chittagong; the Board is directed to execute a conveyance in his favour in accordance with law. On failure of the Board to execute the conveyance,

(101) [1915] 1 Ch. 106.

MATHURAMOHAN SAHA *v.* RAM KUMAR SAHA.

the Plaintiff will be at liberty to proceed in accordance with Or. 21, rr. 32 and 34 of the Code. The possession of the Plaintiff will be confirmed, and should it transpire that he has been dispossessed, he will be restored to possession in execution of the decree of this Court, as explained in *Madanmohan* v. *Gajaprasad* (102) and *Fatehchand* v. *Narsingdas* (103). The Plaintiff in addition, have a decree, against the District Board, for Rs. 957-11-1 together with interest thereon at 6 per cent. per annum from 4th December 1900 to the date of realisation. The Plaintiff will have his costs in the Courts of the Subordinate Judge and the District Judge from the District Board, and his costs in this Court from the other Defendants. A self-contained decree, which will set out the various sums in detail, will be drawn up in this Court.

It has been brought to our notice that the District Board have not been correctly described in these proceedings in accordance with sec. 20 of Act III of 1885 (B. C.). The cause title of the plaint will accordingly be amended and the expression "District Board of Chittagong" will be substituted for "the Chairman of the District Board, Chittagong."

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDER

NOS. 345, 346, 348 AND 349 OF 1915.

N. R. CHATTERJEA, J.	TAMIJUDDI SHEIKH & ors., Opposite Party, Appellants,
NEWBOULD, J.	*v.*
1915,	SATYA SANKAR GHOSHAL & ors., Petitioners, Respondents
Heard, 3 and 6, December.	
Judgment, 14, December.	

Civil Procedure Code (Act V of 1908), Or. 47, r. 2—Judge who did not decide case but signed the decree if may entertain review application under r. 2—"Judge who passed decree" meaning of—Review granted without notice by Judge who decided case if authorises Judge who signed decree to entertain review application.

An application under Or. 47, r. 2, of the Civil Procedure Code for a review of a decree upon some grounds other than the discovery of new and important matter or evidence or the existence of a clerical or arithmetical mistake cannot be made to a Judge who signed the decree but did not write or deliver the judgment in accordance with which the decree was drawn up. The expression "the Judge who passed the decree in r. 2, Or. 47, C. P. C., means the Judge who decided the case and not the Judge who merely signed a decree after satisfying himself that it has been drawn up in accordance with the judgment delivered by his predecessor, and the fact that the former had granted an application for review which was set aside on the ground of the order having been passed without notice to the other side did not authorise the latter to entertain the application.

These were appeals preferred on the 22nd July 1915 against an order of Mr. F. W. Ward, Special District Judge of Zillah Tipperah, dated 12th June 1915.

The facts of the case fully appear from the judgment.

Babus Bepin Behary Ghosh and *Mohini Mohan Chatterjee* for the Appellants.

Mr. B. C. Mitter and *Babu Ram Charan Mitter* for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

In these four appeals the question we have to decide is whether an application under Or. XLVII, r. 2, for a review of a decree upon some ground other than the discovery of new and important matter

(102) 14 C. L. J. 159 (1911).
(103) 22 C. L. J. 383 (1912).

or evidence, or the existence of a clerical or arithmetical mistake, can be made to a Judge who signed the decree but did not write or deliver the judgment in accordance with which the decree was drawn up. In other words, the point for determination is the meaning of the expression "the Judge who passed the decree" in that Rule. In our opinion these words undoubtedly mean the Judge who has decided a case and not the Judge who has merely signed a decree after satisfying himself that it has been drawn up in accordance with the judgment delivered by his predecessor.

It has been contended by the learned Counsel who appears on behalf of the Respondents that the decree is non-existent until it is signed and that therefore the Judge who signed the decree must be held to have passed it. But once the decree is signed it takes effect from the date of the judgment. The Judge who delivers the judgment expresses what the decree is and is responsible for its substance while the signing Judge is responsible for its verbal accuracy. There is no straining of language in saying that the former passed the decree which subsequently came into operation with retrospective effect on the performance of an official act by the latter. The word "pass" has many meanings but when used as a part of a legal expression it signifies "utter or pronounce judicially, *e.g.*, pass sentence." (See the Oxford Dictionary, para. 52 (*b*), under this word).

The view we take is supported by a comparison of the former and the present Codes of Civil Procedure. In sec. 624 of the Code of 1882 it was provided that no application for a review of judgment on, what may be called for the sake of brevity, special grounds should be made to any Judge other than the Judge who delivered it. A careful comparison of secs. 623 and 624 of that Code with the corresponding rr. 1 and 2 of Or. 47 and sec. 114 of the Code of 1908 now in force shows that though there has been an alteration of the language there has been no change of the law. Sec. 623 of the former Code and sec. 114 and Or. 47, r. 1 of the present Code provide generally that an application for review may be made to the Court which passed the decree. R. 2 of Or. 47, however requires that an application for review on special grounds must be made to the Judge who passed the decree. If such an application could be made to a Judge who had only signed the decree there would be no necessity to substitute the word "Judge" for the word "Court." Any successor of the Judge who delivered judgment could deal with such an application for review as well as one who had signed the decree. The act of his signing the decree is simply an accident due to his having happened to be appointed during the interval between the delivery of judgment and the preparation of the decree. It seems clear therefore that the word "Judge" has been deliberately used in place of the word "Court" in order to retain the provision of the former Code that applications of this kind must be made to the Judge who delivered judgment.

We therefore hold that the learned Special Judge was wrong in holding that he was the Judge who passed the decrees of which he granted a review. As he acted without jurisdiction the fact that his predecessor had previously granted a review, which was set aside by the High Court on the ground that the order was passed without notice to the other side, cannot give validity to his order.

We accordingly decree these appeals and set aside the order of the Special Judge granting review of the four appel-

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Obituaries.

It is with a deep sense of regret that we have to record the sudden death of Babu Umakali Mukerji which took pake on the 12th instant. One of the senior vakils of the High Court he was in large practice on the Appellate Side, chiefly in the Patna group. He was always at his best in dealing with complicated questions of fact. He was a fine gentleman and although advanced in years he bore his age well. The Judges assembled in Full Court last Monday and made appreciative references to his ability and character. For some time Babu Umakali officiated as the Senior Government pleader in the High Court during the absence on leave of Babu Rancharan Mitter. On the same occasion their Lordships also made sympathetic references to the premature death of Babu Kritanta Kumar Bose, vakil, which took place on the same day as that of Babu Umakali Mukerji. Babu Kritanta Kumar Bose was in the prime of his life and was the brother of Babu Basanta Kumar Bose also a senior vakil of the High Court. We convey our sincerest condolence to the members of the bereaved families.

Sentences at the Calcutta Criminal Sessions.

Some years ago we had occasion to protest against disproportionate sentences passed at the Calcutta Court of Criminal Sessions even in cases of petty theft on the ground of the accused having been previously convicted of similar offences. We recollect that in cases of theft of a tin vessel worth a few annas or stealing a handkerchief in an attempt to pick one's pocket, prisoners were awarded five to seven years' rigorous imprisonment on the ground of there being previous convictions against them. But we are glad to notice that His Lordship the Chief Justice, with his large experience of criminal cases as a Recorder, a Justice of the Peace and counsel, has been awarding sentences in such cases as would be given by the Judges in England. It is a fundamental principle recognised in every system of jurisprudence that the punishment inflicted must be commensurate with the gravity of the offence. It is as much a failure of justice to convict an innocent person as to punish one proved to have committed an offence with undue severity. The Statute lays down the maximum punishment to which an offender may be liable but it is left to the discretion of the Court to determine how much punishment will meet the ends of justice regard being had to all the facts and circumstances of the particular case in question.

The sentences passed by his Lordship the Chief Justice presiding over the present Criminal Sessions of the High Court proceed upon such principle and have met with much appreciation. On a conviction of theft with a previous conviction for a similar offence his Lordship sentenced the accused to undergo three months' rigorous imprisonment. We are sure that the judges and magistrates in the mofussil will realise that the Indian Penal Code in providing for enhanced punishment for certain specified offences after previous conviction does not make it imperative on them to inflict in such cases either the maximum sentence or anything approaching it. The policy of the

legislature that the sentence should never be too severe is apparent from the fact that even in cases in which an appeal has been allowed to the High Court only on a question of law an express provision has been made that the alleged severity of a sentence shall be deemed to be a question of law and a good ground of appeal. (Sec. 418, Cr. P. C.).

Like the present Lord Chief Justice of England, His Lordship Sir Lancelot Sanderson does not favour the idea of a harsh administration of the criminal law. Shortly after his elevation on the bench Lord Reading presiding in the Court of Criminal Appeal adopted the principle that there should be within reasonable limits a certain proportion between length of sentence and value of goods stolen in cases of larceny irrespective of the prisoner's record. In a certain case the prisoner was sentenced to eighteen months' hard labour for stealing a pair of boots. It appeared that he had been convicted as many as twenty times previously, seven of these convictions being for larceny. The Court of Criminal Appeal applying the test of value reduced the sentence to nine months' hard labour. We had occasion to refer to this subject at the time (18 C. W. N., pp. ix, xvni).

Sir Lancelot Sanderson has had considerable experience in the administration of justice in criminal cases and the care and the keen concern for justice with which he has been trying the cases at the Calcutta Criminal Sessions are being generally much appreciated. It is also a general desire that when suitable opportunities present themselves, His Lordship should also at times preside over the Criminal Appellate and Revisional Bench. This will give his Lordship an idea of the ins and outs of the administration of criminal justice in the mofussil and very likely with his Lordship's up-to-date experience of the administration of Criminal Law in England, Sir Lancelot Sanderson will be able to give suggestions to the Subordinate Judiciary which would be welcomed alike by them and the public. This will be no departure from previous practice. Both Sir Comer Petheram and Sir Francis Maclean used to take criminal work frequently.

Bills in Council—Mr. Malaviya's Bills.

Two recent decisions of the Privy Council have furnished occasion to the Hon'ble Pandit Madan Mohan Malaviya to introduce two Bills in the Legislative Council of the Governor-General. In *Shamu Pattar* v. *Abdul Kadir* (I. L. R. 35 Mad. 607 : s. c. 16 C. W. N. 1009) the Privy Council held that a mortgage is not proved to have been properly attested unless it is proved that the document was signed by witnesses who actually saw the execution of the deed and that attestation of a mortgage-deed on a mere acknowledgment of his signature by the executant is not sufficient. This was no doubt in accordance with the trend of judicial opinion in Calcutta, Madras and latterly of Bombay also, but in Allahabad it had been consistently held that attestation upon acknowledgment of his signature by the executant is valid under sec. 59 of the Transfer of Property Act. It must also be added that the decisions of the other High Courts were not always formulated in the uncompromising language used by the Privy Council, and in practice did not stand in the way of Courts finding mortgage-deeds executed by *purdanashin* ladies which appeared to be otherwise in order to have been properly attested, although from the very nature of things it is impossible to have proof of attestation by independent witnesses of actual execution by a *purdanashin* lady. The practical difficulties which would arise from a strict application of the Privy Council decision was felt immediately the decision was announced, and we gave expression to the apprehension generally felt at the time in our columns. It is impossible to say that there are any reasons of policy which should require attestation of mortgage-deeds to be of the actual execution of the documents whilst Wills may be attested upon acknowledgment only; on the other hand regard being had to the social conditions of this country, there are cogent reasons against insisting on attestation being of actual execution. There ought, we think, to be no opposition to the acceptance of the Bill as law.

The other Bill introduced by Pandit Madan Mohan Malaviya seeks to nullify the Privy Council decision in *Jambu Prasad* v. *Aftab Alikhan* (I. L. R. 37 All. 49 : s. c. 19 C. W. N. 282). The decision in that case was that the registration of a document which had been presented for registration by an agent not specially authorised in the mode laid down in sec. 33 of the Act is invalid even though he did so with the assent of the executant who in that case actually accompanied the agent to the Registration Office. As we urged at the

time we reported this decision, upon the facts found, their Lordships might very well have held that the presentation in that case was in fact by the executant. If they had done so no necessity for the proposed amendment would have arisen. The amendment proposed is that "notwithstanding anything contained in this Act, the registration of a document registered before or after the commencement of this Act, shall not be deemed to be invalid by reason only of the fact that the document was presented for registration by an agent not duly authorised by a power-of-attorney executed and attested or authenticated under the provisions of any enactment in force."

The proposed amendment will not, we conceive, repeal sec. 33 of the Registration Act (as may at first sight be imagined) for it will still be open to the Registering officer to refuse to register unless the conditions in sec. 33 are fulfilled. Should the document, however, be registered the proposed sec. 87A will cure any defect in presentation referable to sec. 33, provided of course it is established that the person who presented the document for registration was authorised to present it by the executant though not in the mode laid down in sec. 33. In every case of a document presented for registration by a person other than the executant and not being an agent specially authorised as required by sec. 33, it will be open to raise an issue as to whether the person who presented the document was in fact authorised by the executant to present it. If this should be the correct view of the proposed amendment the safeguards contemplated by sec. 33 when documents are presented for registration by persons other than the executants in person will in no way be endangered. This amendment also should, in our view, be accepted.

Mr. Setalvad's Bill.

Mr. Setalvad's bill seeks to remove an old grievance from which both the Hindu and Mahomedan Communities have suffered. Reputed scholars have expressed the opinion that there is no warrant in Hindu law for pronouncing gifts to unborn persons under all conditions and in all circumstances invalid. But we recognise that it is too late in the day to question the soundness of established judicial opinion on merely doctrinal grounds. The object of the mover is simply to remove the bar imposed by this supposed rule of Hindu and Mohomedan law to the application of secs. 13 to 16 of the Transfer of Property Act and secs. 100 to 103 of the Succession Act to gifts whether testamentary or inter vivos by Hindus and Mahomedans. The difficulty which it has created is well illustrated by cases of which *Rai Bishen Chand* v. *Asmaida Koer*, L. R. 11 I. A. 161, is an instance. When a testator desires by his Will to benefit a class some of whom may happen to be born after his death, the Courts here being faced by the difficulty raised by this rule have been driven to hold, contrary to the obvious intentions of the testator, that the gift should operate in favour of some of the class but not of others. In order that they might not have to pronounce the whole gift invalid (which also would be contrary to the intentions of the testators) the Courts have had really in this class of cases to make a new Will for the testator, by whatever reasoning they might persuade themselves that in so doing they had been only interpreting the Will as expressed. This anomaly will be removed by the proposed amendment which if accepted, will as the proposer says, enable Hindus and Mahomedans to make dispositions of their property to the same extent and subject to the same limitations as other communities in British India.

Correspondences.

To the Editor, "Calcutta Weekly Notes."

Sir,—A few days ago the papers gave currency to a rumour that the Government of Bengal with the concurrence of the High Court intends taking away the survey-commissions from the hands of the survey-passed pleaders and entrusting them to a body of Sub-Deputy Collectors. It would appear that this is not a mere rumour, for the Bengal Government has addressed letters to the District Judges inviting their views as to the desirability or feasibility of the proposed scheme. Lest judgment should go by default, I take leave to offer a few observations.

It is close upon two decades since the Pleaders' Survey Examination was introduced and the avowed object was to replace the existing Civil Court Ameens by a body of specially trained lawyers who would be willing to execute survey-commissions. The Civil Court Ameen had become a by-word for corruption and it was felt that the scandal was far too great to be allowed to continue. For the first three years the test was comparatively easy, but then it became so hard, embracing, as it did, levelling

and Theodolite-survey, that only a very low percentage of candidates passed. Moreover the examination-fee was raised and the High Court clogged it with so many onerous conditions that practically speaking there has been no fresh accession to the rank of survey-passed pleaders for the last 5 or 6 years. As was to be expected, members of the Bar who had undergone highly technical training and satisfied a singularly hard test did their work with remarkable efficiency and this has been testified to by the Judges. Where any very great scientific accuracy is required Civil Court Ameens are no good, they not having any knowledge of Theodolite-survey or of levelling. Moreover proper execution of commissions often requires not merely a knowledge of surveying but also a clear appreciation of the issues in the case and a power of sifting evidence, for witnesses are not infrequently examined in the course of the enquiry. This gives the trained lawyer with a knowledge of surveying a decided advantage over an Ameen or an Engineer and a pleader-commissioner's report has about it a lucidity and completeness all its own and is of very great help to the Court. The Courts have often acknowledged the merits of these reports and it is seldom they are set aside and if statistics wer taken, I dare say my observations will be borne out. Their honesty has been beyond reproach and I have not as yet heard any insinuations against them, though a losing party is seldom very charitable towards his judge. There have been some complaints on the score of dilatoriness but here again the pleader-commissioner may very well challenge comparison with the Ameens, for in my experience I have found that these latter have a way of holding back their reports either because they find their hands full or for some other reason best known to themselves.

Has any case been made out for a change or what practically is a reversion to the old order of things? The Sub-Deputy Collectors do not, practically speaking, have any training in surveying. Unfortunately knowledge of surveying does not come by intuition and a theoretical knowledge of an elementary text-book on surveying no more fits a man to undertake practical surveying than a course of lectures on swimming gives a man facility in swimming when in water. The consequence would be that they would be completely dependent upon our familiar friends, the Ameens. So it will be the same old stuff with a new label on. Then again the Sub-Deputy Collectors are not trained lawyers either and they have not yet been credited with any very great familiarity with the rules of evidence or the power of sifting evidence or appreciating the scope or the real issues in a civil case. It is not also certain that when necessary, as is often the case, they will be available to the Courts for examination or for elucidation of certain points in their reports. The costs also will be very heavy, if not prohibitive; for the present Sub-Deputy Collectors cannot possibly be spared from their usual work. A new set will have to be appointed, assisted by a body of Ameens. The proposed scheme will be a godsend to the Ameens but the very reverse to the litigants.

Lastly, may I ask, would it be at all fair to the members of the Bar who have satisfied a singularly hard test after a laborious period of apprenticeship and at considerable cost and sacrifice to throw these gentlemen overboard? Their honesty and efficiency have been recognised and some of them have, not unreasonably come to reckon upon the survey-commission as a legitimate source of their income. These often keep a struggling young member going. Let us hope the Government will abstain from unwarranted interference which is calculated to work mischief and that the High Court will set its face against this uncalled for change.

Yours truly,

CHINSURA. TARAK NATH BOSE.
Pleader

To the Editor, "Calcutta Weekly Notes."

Sir,—A question has of late been raised among the pleaders of Alipur as to whether a petition of objection against the grant of Probate or Letters of Administration (as the case may be) is to be treated as a caveat within the meaning of Art. 12 of Sch. II of the Court Fees Act, and as such chargeable with a fee of Rs. 5. Hitherto, the common practice in this district had been not to treat such a petition as a caveat, and consequently no fee had to be paid. But the present learned District Judge is of opinion that a petition of objection to the grant of Probate or Letters of Administration is in fact a "caveat" and he therefore refuses to accept any such petition unless the prescribed Court-fee of Rs. 5 is paid on it. But from the form of caveat given in sec. 71 of the Probate and Administration Act it appears that a caveat is altogether quite a different thing from a petition of objection.

According to that section, a caveat is a mere

request at large that nothing might be done in the matter of the estate of a deceased person without notice to the caveator. It is practically a precaution taken by the caveator to ensure the grant of probate being made in his presence or within his knowledge, so that he may have an opportunity for objecting to the grant if he so desires. The lodging of a caveat does not necessarily imply that the caveator means actually to object to, or oppose, the grant of Probate. In England too, a caveat is looked upon as a mere *caution* entered in a Probate Court, (*Vide* William's Executors, 9th Ed., p. 496).

In an old case of the Calcutta High Court (10 C. L. R. 550) a petition of objection against the grant of Probate was held chargeable with the Court-fee prescribed for a caveat, perhaps on the reasoning that right of opposition does not exist unless there is caveat. It is this solitary ruling that has perhaps created the whole trouble in this matter. It is really very difficult to set at naught the authority of this case especially in view of the fact that it was decided on 9th January 1882, that is, after the 1st day of April 1881, the day on which the Probate Act (passed on 21st January of 1881) came into force. But it is to be noted that the report of this case does not make the slightest reference to the Probate Act; and consequently the Form of Caveat prescribed in sec. 71 of the Act seems not to have been at all considered therein.

So the question is, does or does not, the right of objection exist without a caveat? We have already seen that a caveat is a mere claim to notice, and has no reference to the opposition that the caveator may ultimately set up against a grant. So when the notice of the petition for grant has already been served on a party who then comes forward in compliance with such notice to object to the grant, it will be curious logic to maintain that such an objector has still to ask for what he has already got. This radical difference between a caveat and an objection will also become apparent from the case in I. L. R. 22 Bom. 261 (at p. 265) where it has been held that the entry of caveat does not make a probate proceeding a "contentious" one, while an objection does.

Besides, it is worth our while to note that a caveat is an initiatory petition, and as such is naturally chargeable with a Court-fee, just as a plaint is. But the petition of objection is on the same footing as the written statement of a party impleaded in a suit, and therefore ought to be exempted from any Court-fee. It is a matter of regret that the reports do not furnish very many cases on this controversial point. In *Moothoo* v. *Janki*, 1 L. B. R. 212, the right of objection has been allowed without any caveat, and consequently without the fee of Rs. 5. The case in 6 Ind. Cas. 650 also is an authority for the proposition that a person can oppose the application for grant of Probate and Letters of Administration without first lodging the caveat. In the latest edition of Majumdar's Hindu Wills, Mr. D. N. Chakravarti has cited a Punjab case in support of this view and has expressed his disapproval of the ruling in 10 C. L. R. But it may be asked, how we are to avoid the authority of this Calcutta case, reported in 10 C. L. R.? As considerable uncertainty prevails with respect to this matter our most earnest request to you, Mr. Editor, is that you should discuss the law on the said point in your most esteemed journal and set at rest all controversy regarding it.

Thanking you in anticipation,

I remain,
Truly Yours,
A. C. GHOSE,
9/1, Gobinda Ghosal's Lane,
Bhowanipur.

Reviews.

THE DURRUL MUKHTAR OF MUHAMMAD ALA-UD-DIN HASKAFI with an English translation. *By Brij Mohan Dayal, B.A., Pleader, Lucknow. 1913. Printed by C. M. Dayal, at the Anglo Arabic Press, Naubasta, Lucknow.*

The *Durrul Mukhtar* (*lit.* Selected Pearls) was a commentary written in the year 1070 Hijri on the *Tanvirul Absar* of Sheikh Abdulla Tumurtashi the texts of the latter being incorporated in the commentary in much the same way as Vijnaneshwara incorporates in his commentaries (the Mitakshara) the texts of Yajnavalkya. The present work of 400 odd pages is a reprint with an English translation of such portions of the *Durrul Mukhtar* as are applicable to Indian Musulmans of the Hanafi sect. The text of Tanwir is distinguished in the translation by being printed in thicker type and in the original by being placed in brackets. To this, the translator adds his own notes by way of footnotes. The *Durrul Mukhtar* is a work of established reputation and is frequently cited in modern text-books and judicial decisions. There is no doubt therefore that its appearance in English

garb will be welcomed by scholars as well as by legal practitioners. This we understand is one of a series of similar publications which the translator has in contemplation. We sincerely hope that the scheme will meet with the encouragement which, judging from the manner in which this first instalment of it has been executed, it fully deserves.

The Law of Land Acquisition in British India. *By A. K. Nanniah, B.A., B.L., at the Lawyer's Companion Office, Trichinopoly. Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row, Proprietors of the Law Printing House and the Lawyer's Companion Office, Trichinopoly and Madras. 1915*

Like all commentaries on statutes issued from the Lawyer's Companion Office this, on the statutes realting to Land Acquisition, is cyclopedeic. The Land Acquisition Act of 1894, The Land Acquisition (Mines) Act of 1885 and the relevant sections of the Railways Act are annotated after the manner of other similar publications from this office. Appended to this are the acquisition provisions in the several Municipal Acts and similar enactments in connection with the improvement of the cities of Calcutta and Bombay. The get-up is perfect.

Sanjiva Row's Indian Contract Act, 1872. *By P. Ramanatha Iyer, B.A., B.L. Second Edition. Published by T. A. Venkasawmy Row and T. S. Krishnasawmy Row. Proprietors of the Law Printing House and the Lawyer's Companion Office, Trichinopoly and Madras. 1915.*

This is a portly volume of over a thousand pages, and legal practitioners who may have occasion to consult it may look forward to finding in it whatever references (whether to text-books or cases) they may need on any particular point arising out of the Indian Contract Act, from within its covers. To practitioners in the mofussil who may not always find the references in the original within easy reach, the book will furnish a weapon of offence and defence which is by no means to be despised. Heavy as the volume is, it is kept in place by means of stout covers and effective binding, the printing and other details being as nearly as possible perfect.

The Digest of Indian Case-Law for 1915. *By M. B. Doraisamiengar, B.A., B.L., Vakil, High Court. Printed at the Modern Printing Works, Mount Road, and published by the Editor at Rama Vilas, Mylapore, Madras. 1916. Price Rs. 4.*

The reputation which the late Mr. S. Srinivasaiyar won for his annual digests of Indian Case-law is not likely to suffer, if the annual issues continue to be prepared with as much industry and care as the one under notice. The notes of cases are concise and well digested. There is of course the index of cases noticed, and what needs special mention in this issue is the improvement in paper, printing and in fact in the get-up of the compilation generally.

The Transfer of Property Act and Easements Act. *By Trikamlal R. Desai, B.A., LL.B., Vakil, High Court, Bombay. Fifth Edition, January 1916. Price Rs. 4-8. Bombay, The Lawyer Office, Girgaon. 1916.*

This is a student's edition of the two Acts, not over-burdened with case-law, but annotated with sufficient fulness to suit the requirements of students. That it is appreciated is proved by the fact that this is the fifth edition of the work. It is both handy and attractive.

The Yearly Digest of Indian and English Cases. *1915. By K. Bhashyam Iyengar, B.A., B.L., and R. Narayanaswami Iyer, B.A., B.L., Vakils, High Court, Madras. Printed by G. Ramasawmy Naidu & Son at the Commercial Press, Madras, South East. Price Rs. 4.*

This is the second year of the appearance of this annual compilation. It has been brought out with commendable despatch and bears ample evidence of the care and industry employed in classifying and arranging the materials, collected as they have been from a large variety of reports. There is the usual list of cases judicially noticed and altogether it appears to be as useful a compilation as any of this character can be expected to be.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—Before the Lord Chief Justice and Justices Lawrence, Rowlett, Atkin and Low. *Zadig* v. *The King*. 20th January 1916.

The executive has the power of interning a British subject under a regulation made under the Defence of the Realm Act.

This was a rule *nisi* granted at the instance of Arthur Zadig, a naturalized British subject, for a writ of *habeas corpus*. In pursuance of

regulations made under the Defence of the Realm Act, 1914, the petitioner was interned by an Order of the Executive.

Regulation 14 (*b*) of June 1915, was made under the Defence of the Realm Act, 1914, sec. 1, sub-sec. 1.

The words relied upon by the Crown as justifying the regulation now questioned were "His Majesty in Council has power . . . to issue regulations for securing the public safety and the defence of the realm." The regulation was as follows :—

Where on the recommendation of a competent naval or military authority . . . it appears to the Secretary of State that for the securing of the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith . . . to be interned.

"Provided that any such order shall, in the case of any person who is not a subject of a State at war with his Majesty, include express provision" for the consideration by an advisory committee "of any representations he may make against the order."

The *Attorney-General* (*Sir F. E. Smith, K. C.*) with him *Mr. Branson*, in shewing cause against the rule, submitted that the regulation was *intra vires*. The Crown could not without extremely wide powers secure the safety of the Realm in time of war. It was not only desirable, but vitally necessary that the Executive in these critical times should be armed with extraordinary powers in the interests of public safety.

Mr. Patrick Hastings in support of the rule submitted that the real question was whether the power to intern had in fact been given by the Defence of the Realm Act to the Executive. He submitted that the regulation was made *ultra vires*. Without the direct sanction of Parliament a British subject could not be deprived of his liberty without any trial. The Court discharged the rule.

The Lord Chief Justice in the Course of his Judgment observed as follows :—

The Order first recited that, on the recommendation of a competent naval or military authority, the Applicant, in view of his hostile origin and associations, was ordered to be interned. Then there followed a provision that within seven days the Applicant might submit any representations, and that such representations would be referred to the advisory committee appointed for the purpose, and presided over by a Judge. It was, therefore, not quite right to say that a person could be interned under the Order without any right of redress. That Order was made in pursuance of Regulation 14 (*b*).

It was said, however, that the regulation interfered seriously with the liberty of the subject, particularly because under it a subject could be imprisoned without trial, and that such a regulation was not authorized under the words of sec. 1, sub-sec. 1 of the Act. The words upon which the decision of the Court must turn were contained in the first three lines of the sub-section. The Attorney-General had submitted that the statute must be interpreted as if it stopped at the words "for securing the public safety and the defence of the Realm." In his (his Lordship's) opinion that contention was right. Looking at the whole statute he could see no reason why the interpretation of those words should be limited by the succeeding passages in the same section or in other sections of the Act . . . . . The statute was passed by Parliament to enable the King in Council to make regulations which otherwise he would not have power to make.

In the ordinary course, if it had been intended to impose restrictions upon the subject, the matter would have been brought before Parliament in a Bill, but because of the urgency of the case Parliament in the present instance said that matters for "securing the public safety and the defence of the realm" which had to be dealt with at once should be entrusted to His Majesty in Council. He could not see any reason why, looking at the words of the section and giving them a fair interpretation, and having regard to the obvious purpose of Parliament in passing the Act, they should be restricted in the way suggested by Mr. Hastings. They were words of the widest possible import; one could not, in fact, conceive wider language. It appeared to him that regulations of this character, including regulation 14 (*b*), were regulations which Parliament had given power to the King in Council to pass, and that these regulations, and in particular the one under consideration, were valid regulations and that consequently Mr. Zadig's application failed.

He would only add that their attention had been drawn to the case of *In re D.*, in which an application of a similar character was made to the Divisional Court in December last. They were taking the same view as that taken

by the Court on that occasion, and it was unnecessary to refer to it further.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

Civil Appellate Jurisdiction. Before Holmwood and Imam, JJ. Appeal from Appellate Order No. 480 of 1911. KARTICK CHANDRA MONDAL and ors., Decree-holders, Appellants *v.* NILMONI MONDOL and anr., Judgment-debtors, Respondents. 26th January 1916.

Application for execution—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 182—Suspension of execution—Continuation.

After numerous applications for execution of a decree which was passed in December 1901 the fourth application was made on the 21st July 1908. On the 16th September 1908 the present Respondent the judgment-debtor applied before the Court stating that the decree had been satisfied by payment which should be certified. On this a miscellaneous case was started. On the same day substitutions were made of an heir of one decree-holder and of one judgment-debtor and notices were issued under sec. 248 of the Code of Civil Procedure of 1882 fixing the 4th of November for hearing of this execution case. This miscellaneous case came up again on the 31st October and it was ordered that the execution case should come up too on that date. But in the meanwhile on the 4th November the decree-holder took no step after service of notices under sec. 248, and the execution proceeding was therefore struck off on the 5th November. Meanwhile the miscellaneous case as to certifying the payment was continued and the Munsif allowed the judgment-debtor's application on the 17th July 1909. But on appeal the finding of the Munsif was reversed by the learned District Judge on the 6th August 1909 and it was declared that the decree-holder had not been paid anything and that it was open to him to execute the whole decree. He took no step to renew the application for execution. Sometime afterwards the judgment-debtor appealed to the High Court. This appeal was rejected on the 11th January 1912. The present application for execution was made on the 12th September 1913.

Held, that the execution was barred by limitation.

When a decree-holder is obstructed by violence or fraud and litigation is necessary to get rid of such obstruction the execution is suspended during such litigation. Mere pendency of an appeal from a decision which had removed all obstacles from the decree-holder's way could not give him a right to defer execution for an indefinite period. The mere fact of appealing could not take away the decree-holder's right to execute. Nor could it relieve him of the ordinary duty of a decree-holder.

That the application was not a continuation of the previous application.

Babu Atul Krishna Roy for the Appellants.

Babu Sudhangsu Sekhar Mukerji for the Respondents.

A. T. M. *Appeal dismissed.*

Civil Appellate Jurisdiction. Before Newbould, J. Second Appeal No. 1520 of 1911. SYAMA SUNDARI, Plaintiff Appellant *v.* UMA CHARAN DAS and ors., Defendants, Respondents. 27th January 1916.

Limitation Act, Arts. 142, 144.

The first Court dismissed the suit which was for recovery of land, as barred by limitation and also held that even if the suit were not so barred the Plaintiff suing for joint possession with the Defendants was not entitled to any decree without bringing a suit for partition. The lower Appellate Court affirmed the finding regarding limitation and without considering the question of title dismissed the appeal.

It was contended on behalf of the Plaintiff Appellant that the facts found are not sufficient to establish that the suit was barred by limitation and that the suit was governed by Art. 144 of Sch. II of the Limitation Act and not by Art. 142.

On behalf of the Respondents, reliance was placed on the decisions reported in I. L. R. 1 Cal., p. 137 (P. C.) *Mahmud Amanulla Khan* v. *Badan Singh* and I. L. R. 16 Cal., p. 473 (P. C.) and it was urged that Art. 144 as to adverse possession only gives the rule of limitation where there is no other article in the schedule specially providing for the case.

Held, that the case was governed by Art. 142 and not by Art. 144 of the Indian Limitation Act.

Babu Prabodh Kumar Das for the Appellant.

Babus Kshitis Chandra Sen and *Prabhat Chandra Dutt* for the Respondents.

Appeal dismissed.

late decrees in respect of which these appeals have been preferred. The Appellant will pay the Respondents costs in this Court. We assess pleaders' fees at two gold mohurs for the four appeals.

Appeals allowed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

VISCOUNT HALDANE.
LORD PARMOOR.
LORD WRENBURY.
SIR JOHN EDGE.
MR. AMEER ALI.
1915,
22, November.

MUSAHAR SAHU and anr., Appellants,
v.
LALA HAKIM LAL & anr., Respondents.

Transfer of Property Act (IV of 1882), sec. 53—Transfer to defraud or delay creditor, when voidable under the section—Preferring one creditor to another, debtor himself not benefiting, if within the statute.

In a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts.

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor.

This was an appeal from a decision of the High Court at Calcutta (Mookerjee and Holmood, JJ.), dated the 3rd April 1907, reversing that of Babu Purna Chandra De, Officiating Subordinate Judge, second Court of Mozafferpore dated the 30th July 1904.

The facts of the case fully appear from the judgment of the High Court which was as follows :—

The circumstances which led to the litigations out of which these two appeals arise, so far as it is necessary to state them for the disposal of the questions raised before us, lie in a narrow compass; and although they were the subject of controversy in the Court below, were not disputed before us. On the 14th December 1900, the Plaintiffs-Respondents commenced an action against Kishun Binode Upadhya, one of the Defendants in these suits, for recovery of money due under a usufructuary mortgage. The Plaintiffs apprehended that the Defendant might alienate his properties before judgment and made an application for attachment *pendente lite*. The application, however, proved infructuous and was rejected on the 12th February 1901. On the 29th November following, the Plaintiffs obtained a decree for a large sum of money against the Defendant, and subsequently in execution of this decree attached the properties now in suit. Two claims under sec. 278 of the Civil Procedure Code, were preferred by two different sets of persons, who are the appellants before us; their claim was founded upon two conveyances alleged to have been executed in their favour on the 2nd September 1901 by the Defendant in the suit of the Plaintiffs-Respondents. The claims were allowed on the 13th September 1902. On the 12th September 1903 the decree-holders commenced the suits out of which these appeals arise under sec. 283 of the Civil Procedure Code, and in each case they asked for a declaration that the properties in dispute still belonged to their judgment-debtor and were liable to be sold in execution of their decree against him. Suit No. 73 of 1903 impeached the conveyance executed by the judgment-debtor in favour of Lala Hakim Lal; suit No. 74 of 1903 related to the conveyance executed in favour of Kamta Prasad. Both the suits were defended substantially on the ground that the conveyances were *bonâ fide* and for consideration and had consequently created a good title in the purchasers which could not be successfully impeached by the execution creditor of the vendor. As regards the conveyance executed in favour of Lala Hakim Lal, the Subordinate Judge found upon the evidence that the consideration recited in the document was genuine, but he set aside the conveyance on the ground that it had not been executed *bonâ fide* and

that the effect of it had been to delay, if not to defeat, the creditors of the transferor As regards the conveyance executed in favour of Kamta Prasad, the Subordinate Judge found on the evidence that the consideration recited in the document was fictitious and that it was a contrivance by the vendor to place the property out of the reach of his creditors. In this view of the matter, the Subordinate Judge made a decree in favour of the Plaintiffs in both the suits and declared that the conveyances were inoperative as against the creditors. The purchaser Defendant in each case has appealed to this Court. The two appeals have been argued, one after the other, and we propose to deal with them separately. As regards the conveyance executed in favour of Lala Hakim Lal which was the subject-matter of suit No. 73 of 1903 in the Court below, the question arises in appeal No. 433 of 1904. As regards the conveyance of Kamta Prasad which was the subject-matter of suit No. 74 of 1903, the question arises in appeal No. 440 of 1904. We shall take up the latter case first, because no serious argument was advanced on behalf of the appellant to show that the decision of the Subordinate Judge is erroneous.

As regards the conveyance executed in favour of Kamta Prasad, we may observe that the consideration recited in it purports to be a sum of Rs. 11,835 composed of two items, namely a sum of Rs. 5,500 alleged to be due to the present Plaintiffs and another sum of Rs. 6,335 stated to be due to the purchaser. The deed sets forth that out of the total consideration, Rs. 5,500 was to be paid to the present Plaintiffs in part satisfaction of their claim under their usufructuary mortgage of the 23rd April 1890 and the remainder Rs. 6,335 was to be applied in satisfaction of the sum due under a registered mortgage bond executed by the vendor in favour of the purchaser on the 14th October 1900. The Lower Court has found on the evidence that no portion of the consideration money was ever advanced by the purchaser. The sum of Rs. 5,500, which was alleged to be due to the present Plaintiffs under their usufructuary mortgage was admittedly never paid to them. The debt of Rs. 6,335, which was alleged to be due to Kamta Prasad under a registered mortgage bond, is proved to be entirely fictitious. Under these circumstances, the Subordinate Judge held that the conveyance executed in favour of Kamta Prasad was absolutely devoid of consideration and consequently inoperative. The learned vakil for the appellant has very fairly conceded that he cannot possibly challenge the accuracy of the facts found by the Subordinate Judge, and after examination of the evidence on the record, we are satisfied that the findings at which the Lower Court arrived cannot be successfully assailed. We must take it, therefore, that the transfer in question was made gratuitously; and that the effect of the transfer has been to delay, if not to defeat, the creditors of the transferor, cannot be questioned. It follows consequently, under sec. 53 of the Transfer of Property Act, that the transfer was voidable at the option of any person who has been defeated or delayed thereby, because the transfer may be presumed to have been made with intent to defraud. Under these circumstances, we must hold that the transferee has not acquired any valid title to the properties covered by the conveyance of the 2nd September 1901 executed by Kishun Bihari Upadhya in favour of Lala Kamta Prasad. The Plaintiffs are therefore clearly entitled to the declaration which has been made in their favour. In this view of the matter, Appeal No. 440 of 1904 fails and must be dismissed with costs.

As regards the conveyance executed in favour of Lala Hakim on the 2nd September 1901, the Subordinate Judge has found that it was for consideration. This finding has not been assailed before this Court on behalf of the Plaintiffs-Respondents, and after an examination of the evidence on the record, we are satisfied that it cannot be successfully impeached. The conveyance recites that the transferor Kishun Binode was indebted to the transferee Lala Hakim Lal to the extent of Rs. 30,309 and was also indebted to the extent of Rs. 12,347 to various other creditors whose debts are specifically set out in the document. The total amount of indebtedness of Kishun Binode at the time of execution of this document, so far as the creditors mentioned in the document were concerned, therefore, amounted to Rs. 42,656,

and the deed purports to convey to Lala Hakim Lal various properties in satisfaction of those debts. The purchaser was to set off against the consideration for the conveyance, the debt due to himself, and the remainder of the consideration was to be left in deposit with him for payment to the other creditors, for the obvious reason that most of the debts were secured by mortgages. Now it has been satisfactorily established in the present litigation that the debts mentioned in the document, all represented genuine transactions, and the learned Subordinate Judge has found that they were in reality due at the time of the execution of the conveyance. He has further found that not only has the debt due to the purchaser been satisfied by a set-off against the consideration for the deed, but also that the sum left in deposit with the transferee for payment to the other creditors has been duly applied in discharge of their claims. These facts have not been, and upon the evidence on the record as it stands, cannot be controverted. The Subordinate Judge, however, has declared the conveyence inoperative, because, in his opinion, the effect of it was to give an undue preference to some out of the many creditors of the transferor. This conclusion has been assailed on behalf of the appellants, substantially on three grounds; namely, *first*, that inasmuch as the case of the Plaintiffs was that the conveyance was nominal and without consideration and as this case has failed, they are not entitled to succeed on the ground that the transaction was in fraud of the creditors of the transferor; *secondly*, that if the action be treated as one to set aside a fraudulent conveyance under sec. 53 of the Transfer of Property Act, it has not been properly framed, inasmuch as a suit of this description can be maintained only by, or on behalf of, all the creditors of the transferor; and *thirdly*, that in any event, the conveyance is not void or voidable under sec. 53 of the Transfer of Property Act merely on the ground that, by means of it, preference was given to some among the many creditors of the transferor.

In support of his first contention, it has been argued by the learned vakil for the appellants that the suit was in substance one under sec. 283 of the Civil Procedure Code, that the object of it was to establish the right which the Plaintiffs claimed unsuccessfully in the execution proceedings and that the only ground upon which they impeached the validity of the conveyance was that it was without consideration and a mere device on the part of the transferor to keep his property out of the reach of his creditors. It must be conceded that there is considerable force in this contention. An examination of the plaint as a whole convinces us that the suit was not framed with a view to obtain a declaration that the transfer in question was voidable at the option of the Plaintiffs because it had been made with intent to defeat or delay the creditors of the transferor. It is not necessary, however, to deal with this aspect of the case in detail; because in our opinion the Appellants are entitled to succeed upon the merits.

In support of his second contention, it was argued by the learned vakil for the appellants that a suit to set aside a conveyance alleged to be fraudulent within the meaning of sec. 53 of the Transfer of Property Act, must be brought by or on behalf of all the creditors and that this suit which had not been brought on behalf of all the creditors, was not maintainable in its present form. In our opinion this contention is manifestly well-founded. It was pointed out by Mr. Justice Telang in the case of *Burjorji v. Dhan Bai* (3), that a claim to set aside a deed of settlement on the ground that it is fraudulent and void as against the creditors, can only be enforced in a suit either filed by all, or on behalf of and for the benefit of, all the creditors. The same view was adopted by Sir Lawrence Jenkins, C. J., in *Iswar v. Dewar* (4), in which it was ruled that when a creditor sues to set aside a deed executed by his debtor on the ground that the deed was voidable under sec. 53 of the Transfer of Property Act, the creditor can only sue on behalf of himself and all the other creditors. This view receives support from the decision of their Lordships of the Judicial Committee in the case of *Chuttarpat v. Maharaj Bahadur* (5). The question there arose as to the validity of

(3) I. L. R. 16 Bom. 1 (19) (1891).

(4) I. L. R. 27 Bom. 146 (1902).

(5) L. R. 32 I. A. 1 (15): s. c. 9 C. W. N. 225 (1904).

certain transfers alleged to have been made to one Chattarpat. The transfers were challenged under sec. 52 of the Transfer of Property Act, and it was suggested that if they were not actually void under that section, they were at least voidable under sec. 53 of the Act at the instance of the Plaintiffs who had been eventually defeated and defrauded thereby. Their Lordships held that an issue upon such a question could be raised and a decree could be made only in a suit properly constituted for the purpose and that the suit as framed which was between the purchaser on the one hand and one only of the creditors on the other, was not so constituted either as to parties or otherwise. This view, it may be observed, is in harmony with what has been regarded as the settled rule in England, where it has been held that if the settlor is alive and not a bankrupt at the time the action is brought to set aside a conveyance on the ground that it was voidable under Stat. 13 Eliz. Ch. 5, it should be by a creditor or creditors on behalf of himself or themselves and all other creditors of the settlor. [See *Reese River Silver Mining Co.* v. *Atwell* (6): see also White and Tudor's Leading Cases on Equity, 7th Edition Vol. II p. 882.] The rule appears to us to be based upon a perfectly sound and intelligible principle. To allow one creditor to impeach the validity of a conveyance would expose the transferee to separate attack by different creditors each of whom might litigate the same question in a different suit, and it is not inconceivable that the Court might arrive at different conclusions in different suits brought at the instance of different creditors. We must, therefore, hold that if the present suit be regarded as commenced under sec. 53 of the Transfer of Property Act with a view to obtain a declaration that the conveyance in question is voidable at the instance of the creditors of the transferor, the suit has not been properly framed and is not maintainable. It was argued, however, by the learned vakil for the Plaintiffs-Respondents that as this objection to the frame of the suit was not taken in the Court below, it is too late for the Appellants to raise it now, and that, in any event, if the objection prevails, the Plaintiffs ought to be allowed an opportunity to amend the plaint, so as to make this a suit on behalf of themselves and all other creditors of the transferor. It cannot be disputed that there is considerable force in this contention. Although, therefore, we must hold that the second ground taken on behalf of the Appellants ought to prevail, we are not disposed to dismiss the suit on this ground alone, and we must consequently examine the validity of the third ground upon which the judgment of the Subordinate Judge is assailed.

The third ground taken on behalf of the appellant was that as the transfer was for adequate consideration, as it was not a mere cloak for the ultimate benefit of the transferor himself, and as most of the debts which were satisfied out of the consideration for the deed, were secured by the mortgages, the transaction is not voidable under sec. 53 of the Transfer of Property Act. In support of this position reliance was placed on the cases of *Alton* v. *Harrison* (7), *Exparte Games* (8), *Wood* v. *Dixie* (9), *Sankarappa* v. *Kamayya* (10), *Tilak Chand* v. *Jitu Mull* (11), *Rajan Harji* v. *Ardeshir* (12), *Bhagwant* v. *Kedari* (13), *Hanifa Bibi* v. *Punnamma* (14), *Mahamadunnessa* v. *Bachelor* (15), and *Ramasamiya* v. *Adi Narain* (16). It was contended on the other hand by the learned vakil for the Plaintiffs-Respondents that it was not enough to examine whether the conveyance which is the foundation of their title was for consideration, but that the Court must also investigate whether or not it was *bonâ fide* and in support of this proposition reliance was placed upon a passage from the judgment of this Court in the case of *Ishan Chandra* v. *Bishu Sirdar* (17).

We are of opinion that in order to establish the validity of a conveyance impeached as fraudulent on creditors, it is not enough to prove that it was for consideration; it must also be proved that it was made in good

(6) L. R. 7 Eq. 347 (1869).

(7) L. R. 4 Ch App 622 (1869).
(8) 12 Ch D. 314 (1879).
(9) 7 Q B. 892; 66 R. R. 590 (1845).
(10) 3 Mad. H C. R. 235 (1866).
(11) 10 Bom H. C. R 206 (1873).
(12) I. L. R. 4 Bom. 70 (1879).
(13) I. L. R. 25 Bom. 202 (1900).
(14) 17 Mad. L. J. R. 11.
(15) I. L. R. 29 Bom. 428 (1905).
(16) I. L. R. 20 Mad. 465 (1897).
(17) I. L. R. 24 Cal. 825 (1897).

faith. The question, however, remains, under what circumstances may a transfer be said to have been made in good faith; to determine this we have to consider the provisions of sec. 53 of the Transfer of Property Act. That section, in so far as it applies to the present case, provides that every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defrauded, defeated or delayed; but this does not impair the rights of any transferee in good faith and for consideration. The section, as is well-known, is founded upon Stat. 13 Eliz., Ch. 5, although there has been some divergence of judicial opinion as to how far the Indian Law as comprised in sec. 53 of the Transfer of Property Act was intended to vary from the English Law as laid down in the Statute of Elizabeth [see *Bhagawant* v. *Kedari* (16), and *Ishan Chandra* v. *Bishu Sirdar* (17), the former of which supports the view that the section under consideration did not alter the pre-existing law governing these matters, and the latter supports the view that although the Statute of Elizabeth forms a substantial part of the ground-work of sec. 53, its language is different and the Indian Code goes much further than the English Statute.] One point, however, is fairly beyond the domain of controversy. The third paragraph of sec. 53 which lays down that nothing contained in the section shall impair the rights of any transferee in good faith and for consideration is based upon Stat. 13 Eliz. Ch. 5, sec. 6 which protects transfers made "upon good consideration and *bonâ fide*." We may take it therefore that the Legislature when it used the words "good faith" in sec. 53 did not intend to depart from the interpretation which had been put upon the term '*bonâ fide*' in the Statute of Elizabeth. Reference to English authorities under these circumstances, is not only legitimate, but essential; as was observed in *Mansell* v. *Reg.* (18), if a Statute upon which a particular construction has been long put is re-enacted *ipsissimis verbis*, this construction must be considered to have the sanction of the Legislature; likewise, if Acts are framed using the forms of words or clauses in prior Acts which have received judicial construction, unless a contrary intention appears, the Courts will presume that the Legislature has adopted the judicial interpretation, or has used the words in the sense attributed to them by the Courts; this view is amply supported by the observations of James, L. J., in *Exp. Campbell* (19), and of Lord Coleridge, C. J., in *Barlow* v. *Teal* (20), and is in no way inconsistent with the rule laid down in *Bank of England* v. *Vagliano* (21) and *Narendra Nath* v. *Kamal Bashini* (22), to the effect that the language of an enactment by which the law is codified must receive its natural meaning without an assumption that the probable intention of the Legislature was to leave unaltered the law as it existed before. If we turn, therefore, to the leading authorities in England upon the matter, we find that in *Middleton* v. *Pollock* (2), Sir George Jessel observed that the meaning of the Statute is that the debtor must not retain a benefit for himself; it has no regard whatever to the question of preference or priority among the creditors of the debtor. A settlement, therefore, which preferred certain creditors and tended to defeat others, might be good under the Statute of Elizabeth. Nor again is it material under that Statute whether the assignment by the debtor is of the whole of his property, present or future, or of any part of it. Again Lord Justice Thesiger in *Exparte Games* (8), quotes with approval the words of Giffard, L. J., in *Alton* v. *Harrison* (7): "I have no hesitation in saying that it makes no difference in regard to the Statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the Statute of Elizabeth." It is clear therefore that a deed is *bonâ fide* within the meaning of the Statute of Elizabeth if it is not a mere cloak for retaining a benefit to

(16) I. L. R. 25 Bom. 202 (1900).
(17) I. L. R. 24 Cal. 825 (1897).
(18) 8 E. & B 78 (1857).
(2) 2 Ch D 104, 108 (1876).
(8) 12 Ch D. 314 (1879).
(7) L. R 4 Ch. App. 622 (1869)
(19) L. R. 5 Ch App. 703 (1870).
(20) 15 Q. B. D. 493 (1885).
(21) [1891] A. C. 107.
(22) I. L. R. 28 Cal. 563 (1896).

the grantor. A similar construction has been put upon sec. 53 of the Transfer of Property Act. Thus in *Nathu* v. *Madan Chand* (23), Mr. Justice Chandavarkar pointed out that the test of good faith is whether the transfer is a mere cloak for retaining a benefit to the grantor or whether it was intended thereby that the grantee should have the property and keep it. The same view was adopted in the case of *Mahammadunnissa* v. *Bachelor* (15), in which the learned Judges observed that the test of good faith is whether it was a genuine or colourable transaction, and pointed out that, as laid down by Denman, C. J., in *Wood* v. *Dixie* (9), if a conveyance is made *bonâ fide* and with a full intention that the property should be parted with, it will not be fraudulent, if made with intent to defeat a pending or an intended execution, for such a motive does not defeat the assignment. Substantially the same view appears to have been adopted under the law as it existed before sec. 53 of the Transfer of Property Act was added to the Statute book. As an example, reference may be made to *Sankarappa* v. *Kamayya* (10), where it was ruled that if there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transanction is valid even as against a creditor, though the object may have been to defeat an expected execution. To the same effect are the cases of *Tilak Chand* v. *Jitu Mull* (11), *Rajan Harji* v. *Ardeshwar* (12) and *Ramasamiya* v. *Adi Narain* (16). If the test laid down in these cases is applied to the circumstances of the present litigation, it is obvious that the Plaintiffs are inevitably placed out of Court. It has not been, and cannot be disputed that the transfer was for adequate consideration, and was in no sense a mere cloak for the benefit of the grantor; it must be taken, therefore, that the transaction was not only for consideration but was also entered into in good faith, and cannot consequently be successfully assailed.

(9) 7 Q. B. 892; 66 R. R. 590 (1845).
(10) 3 Mad. H. C. R. 235 (1866).
(11) 10 Bom. H. C. R. 206 (1873).
(12) I. L. R. 4 Bom. 70 (1879).
(15) I. L. R. 29 Bom. 428 (1905).
(16) I. L. R. 20 Mad. 465 (1897).
(23) I. L. R. 27 Bom. 322 (1902).

Our attention, however, was invited to a passage in the judgment of this Court in the case of *Ishan* v. *Bishu Sirdar* (17), in which the learned Judges overruled the extreme contention that all that is necessary to impress upon a transfer the character of good faith within the meaning of sec. 53 is to prove that the transfer is real, and that although the transferee may share the intention of the transferor to defeat or delay the creditors, he is still a transferee in good faith. It was argued by the learned vakil for the Appellant that the rule thus laid down in *Ishan Chandra* v. *Bishu Sirdar* (17), is inconsistent with what has been accepted as the settled construction of the Statute of Elizabeth, and in support of this view, reliance was placed upon *Wood* v. *Dixie* (9), and *Hale* v. *Saloon Omnibus Co.* (24). After careful examination of these and other cases to which we shall presently refer, we are not prepared, however, to hold that they lay down any inflexible rule which might rightly be regarded as in conflict with the observations contained in the judgment of this Court in *Ishan Chandra* v. *Bishu Sirdar* (17). The decision in *Wood* v. *Dixie* (9), goes no further than determining that the intent to defeat a particular creditor in the case of a *bonâ fide* sale for value, does not, *per se* as a matter of law, render the conveyance fraudulent. We may refer to the judgments *In re Moroney* (1), in which the case of *Wood* v. *Dixie* (9), is analysed and the true foundation of the decision explained. We agree with the observation of Palles C. B. that if the intent of the transferor is not only to sell the property but forthwith to abscond with the proceeds so as in effect to withdraw the property from the fund available for the creditors without providing an equivalent, in such cases there would be an intention to defraud creditors which, if the purchaser had notice of it, would avoid the sale. To put the matter in another way, although a transfer which is a mere cloak for the retention in the grantor of a benefit in the property transferred, is not a transfer in good faith, the test is by no means exhaustive; there may be cases in which the

(1) L. R. 21 Ir. 27 (1887).
(9) 7 Q. B. 892; 66 R. R. 590 (1845).
(17) I. L. R. 24 Cal. 826 (1897).
(24) 4 Drewry. 492 (1859).

transferee is intended to take an absolute title in the property, but the object of the transfer is to convert land into money and thus place it beyond the reach of the creditors of the grantor; a transfer of this description cannot legitimately be regarded as a transfer made in good faith. A similar view appears to have been adopted by the learned Judges of the Madras High Court in *Chidambaram* v. *Sami Ayer* (25), when they declined to give effect to the contention that whenever there is any real consideration, however small, for the transfer, the question of intention is immaterial and the transaction must be held to be one entered into in good faith and therefore not inoperative as against creditors, even though it was in fact intended to delay or defeat creditors and had the intended effect. After a careful examination of the authorities on the subject, we are disposed to hold that under the Transfer of Property Act, as under the Statute of Elizabeth, good faith as well as consideration is made in terms an essential condition of the validity of a transfer, and that there may be cases in which a transfer, although made for consideration, may be voidable on the ground that it was made *mala fide*, in other words, in the language of Lord Coke "a good consideration doth not suffice if it be not also *bonâ fide*." (*Twyne's* case) (26).

The distinction is supported by a considerable body of authorities. Lord Mansfield said in discharging rule for a new trial in *Cadogan* v. *Kennett* (27): "If the transaction be not *bonâ fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the Statute. I have known several cases where persons have given a fair and full price for good and where the possession was actually changed, and yet being done for the purpose of defeating creditors, the transaction has been held fraudulent and therefore void." To the same effect are his observations in *Worseley* v. *DeMattas* (28), in which he said that if a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods for a full price to enable him to defeat the creditor's execution, it is fraudulent. Since the time of Lord Mansfield, conveyances founded upon adequate consideration have been held fraudulent by reason of the bad faith of the participants and the principle has become one of vital interest and paramount importance to the parties concerned. That a conveyance whether it be of real or personal property founded upon adequate consideration may be avoided and annulled at the suit of creditors for fraud, is established in an endless variety of cases [see, for instances, *Holbird* v. *Anderson* (29), *Pickstock* v. *Lyder* (30), *Corlett* v. *Radcliffe* (31), *Bott* v. *Smith* (32), *Golden* v. *Gillam* (33). *In re Sinclair* (34), *Grocer* v. *Wakeman* (35), *Stenson* v. *Hawkins* (36). The same view has been adopted in the American Courts. In *Wordsworth* v. *Williams* (37), Mr. Justice Hoar in delivering the opinion of the Supreme Court of Massachusetts said: "A conveyance made with an actual purpose and intent to defraud creditors, present or future, is not valid against them in favour of a grantee who participates in that fraudulent intention, although made for a full consideration and by a grantor in the possession of any amount of property." The distinction is brought out nowhere more concisely and effectively than in the judgment of Black, C. J., in *Coranhoran* v. *Hart* (38), in which that learned Judge observes as follows: "If a debtor with the purpose of cheating his creditors, converts his lands into money, because money is more easily shuffled out of sight than land, he of course commits a gross fraud. If his object in making the sale is known to the purchaser and he nevertheless aids and assists in executing it, his title is worthless as against creditors, though he may have paid the full price. But the rule is different when property is taken for a debt. One creditor of a failing debtor is not bound to take care of

(25) I. L. R. 30 Mad. 6 (1906).
(26) 1 Smith, L. C. 1; reported3 Coke 80.
(27) Cowper 234 (1776).
(28) 1 Burr. 467 (1758).
(29) 5 T. R. 235 (1793).
(30) 3 Maul. and Sel. 371; 16 R. R. 300 (1815).
(31) 14 Moo. P. C. C. 136 (1860).
(32) 21 Beav. 511 (1856).
(33) 20 Ch. D. 392 (1881).
(34) 26 Ch. D 338 (1884).
(35) 11 Wendell 192.
(36) 4 McCrary 500; 18 Fed. Rep. 833.
(37) 100 Mass. 130.
(38) 21 Pa St. 500; 60 Am Dec. 57.

another. It cannot be said that one is defrauded by the payment of another. In such cases, if the assets are not large enough to pay all, somebody must suffer. It is a race in which it is impossible for every one to be foremost." To the same effect is the decision in *Werner* v. *Zierfuss* (39). The view taken in these cases appears to be substantially identical with the view adopted by this Court in *Ishan Chandra* v. *Bishu Sirdar* (17), in which the learned Judges observed that a transferee for value who accepts the transfer for the purpose of helping the transferor to convert his immoveable property into money, which can easily be concealed and kept out of the reach of his creditors, and thus defeat or delay the creditors, is not a transferee in good faith within the meaning of sec. 53. The rule, however, as we have just pointed out, does not apply to the case in which a creditor takes property in satisfaction of an existing debt, although the effect of the transfer to him is to defeat or delay the other creditors of the transferor. It is well settled that in the absence of a Bankruptcy Act, a debtor may make preference amongst his creditors even to the extent of transferring all his property to one creditor to the exclusion of the others. The object of a Bankruptcy Act, so far as creditors are concerned, is to secure as far as practicable, equality of distribution of property of the bankrupt among them; this, however, is not the object of sec. 53 of the Transfer of Property Act. It is firmly settled in England that a debtor, provided the transaction is not invalidated as a fraudulent preference under the Bankruptcy law, may openly prefer a particular creditor to the rest, and may transfer property to him for the *bonâ fide* purpose of discharging his debt, even after the other creditors have brought actions or recovered judgment, and such transfers are not void under the Statute of Elizabeth against the preferred creditors. [*Alton* v. *Harrison* (7), *Halbird* v. *Anderson* (29), *Estwick* v. *Caillaud* (12), *Exp. Elliott* (2), *Exp. Games* (8), *Maskelyne* v. *Smith* (41), *Morris* v. *Morris* (42). The learned Subordinate Judge, when he relied upon passages from Benjamin on Sales, 5th Ed., Book III, Chapter III, Section IV, pp. 494-496, overlooked this distinction and the history and policy of the Bankruptcy laws in England [*Nunes* v. *Carter* (43), Parker on Frauds on Creditors Ch. VII, X and XII]. This is in accordance with the view taken in the cases of *Bhagwant* v. *Kedari* (13), and *Chidambaram* v. *Sami Ayer* (25), the principle of which appears to us to be consistent with the rule of justice, equity and good conscience. The law favours and rewards the vigilant and active creditor. The right of a debtor to devote his whole estate to the satisfaction of the claims of particular creditors, results, as Chief Justice Marshall declares, from that absolute ownership which every man claims over that which is his own; [*Brasnear* v. *West* (44)], while a man retains his property in his own hands, if the right of giving preference should be denied, he would so far lose the dominion over his own that he could not pay any body, because whoever he paid would receive a preference. It makes no difference that the creditor and debtor both knew that the effect of the application of the property to the satisfaction of a particular claim, would be to deprive other creditors of the power to reach the debtor's property by legal process or enforce satisfaction of their claims. If there is no secret trust agreed upon or understood between the debtor and creditor in favour of the former, but the sole object of the transfer is to pay or secure the payment of a debt, the transaction is a valid one. It cannot rightly be said that a conveyance of property which pays one creditor his just debt and nothing more, is fraudulent as against other creditors of the common debtor. The mere preference in payment of one honest creditor over another, is no evidence of fraudulent intent. [*Abegg* v. *Bishop* (45)]. The

(2) 2 Ch. D 104, 103 (1876).
(7) L. R. 4 Ch. App. 622 (1869).
(17) I. L. R. 24 Cal. 825 (1897).
(29) 5 T. R. 235 (1893).
(39) 62 Pa. St. 366; 29 Atlantic Rep. 737.
(40) 5 T. R. 420 (1793).
(8) 12 Ch. D. 314 (1897).
(13) I. L. R. 25 Bom. 202 (1900).
(25) I. L. R. 30 Mad. 6 (1906).
(41) [1902] 2 K. B. 158.
(42) [1895] A. C. 625.
(43) L. R. 1 P. C. 342 (348) (1868).
(44) 7 Peter 608, 618.
(45) 142 N. Y. 298.

distinction is between a transfer of property made by way of preference to one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage from it to the debtor, which is fraudulent [*Bonfield* v. *Whipple* (46), *Giadings* v. *Sears* (47)]. In the fair race for preference, if a creditor by diligence secures some advantage, it should be maintained; but if his purpose is not to realise his debt, but to help the debtor to cover up his property, he cannot shield himself by showing that his debt was *bonâ fide* [*Smith* v. *Schneel* (48)]. This view is also supported by the case of *In re Moroney*, (1) in which Palles C. B., observed as follows with reference to the Statute of Elizabeth: "Its object was to protect the rights of creditors as against the property of their debtor and not to regulate the rights of creditors *inter se* or to entitle them to an equal distribution of their property. The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. It follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the Statute, because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the Statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

Upon a review then of the authorities and upon an examination of the principles which underlie them we are of opinion that the following rule is deducible. A conveyance or transfer, whether founded on a valuable or adequate consideration or not, if entered into by the parties thereto with the intent to hinder delay or defraud creditors is void as to them [*Bott* v. *Smith* (32), *Harman* v. *Richards* (49), *Corbett* v. *Radcliffe* (31), *Chandler* v. *Von Raeder* (50), *Alexander* v. *Todd* (51), *Gilmore* v. *North American Land Co.* (52), *Parish* v. *Danford* (53)]. It is not enough in order to support a conveyance or transfer as against creditors that it be made for a valuable consideration, it must also be *bonâ fide*. [*Blennerhassett* v. *Sherman* (54)]. When it appears that the parties to a transaction impugned for fraud, were actuated by a motive which is denounced as fraudulent, namely a motive to hinder, delay or defraud creditors, it is utterly immaterial how valuable a consideration may have passed from the grantee or transferee, for the conveyance is nevertheless void in law. [*Macdonald* v. *Hoover* (55)]. A mere fraudulent intent on the part of the grantor alone, will not invalidate the transfer, if it is for valuable consideration and there is no want of good faith on the part of the grantee. Where, however, the transferee is himself a creditor, he occupies a more favoured position [*Bramberger* v. *Schoolfield* (56)]. In the absence of a law of Bankruptcy, a preferential transfer of property to one creditor cannot be declared fraudulent as to other creditors although the debtor in making it intended to defeat their claims, and the creditor had knowledge of such intention; if the only purpose of the creditor is to secure his debt, and the property is not worth materially more than the amount of the debt, and the transaction is not fraudulent. If, however, the transfer is not in reality a preference of an actual debt, but is a mere colourable device to place the debtor's property beyond the reach of his creditors, or if the transaction extends beyond the necessary purpose of a mere preference so as to secure to the debtor some benefit or advantage, or to unnecessarily hinder and delay other creditors, the transfer is fraudulent.

(1) L. R. 21 Ir. 27 (1887).
(46) 14 Allen. 13.
(47) 115 Mass. 507.
(48) 9 Fed. Rep. 488.
(31) 14 Moo. P. C. C. 136 (1860).
(32) 21 Beav. 511 (1856).
(49) 10 Hare 81 (1852).
(50) 24 Howard 224.
(51) 1 Band. 175; 1 Fed. Cas. 383.
(52) Peter. C. C. 460; 10 Fed. Cas. 413.
(53) 1 Band. 345; 18 Fed. Cas. 1231.
(54) 105 U. S. 100.
(55) 142 Ma. 484; 44 S. W. 384.
(56) 160 U. S. 149.

MUSAHAR SAHU *v.* LALA HAKIM LAL.

The preferred creditor participates in the fraudulent intent of the debtor where his purpose is not to secure the payment of his own debt but to aid the debtor in defeating other creditors, in covering up his property, in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit. Proof of a valid indebtedness does not necessarily disprove the existence of a fraudulent intent. The reasons for the distinction between one who purchases for a present consideration and one who purchases in satisfaction of a pre-existing debt have been very clearly formulated in the case of *Lockren* v. *Rusten* (57). "A person who purchases for a present consideration is in every sense a volunteer; he has nothing at stake, no self-interest to serve; he may with perfect safety keep out of the transaction. Having no motive of interest prompting him to enter into it, if yet he does enter, knowing the fraudulent purpose of the grantor, the law very properly says that he enters into it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness; he has an interest to serve, he can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept voluntary preference that he has to obtain a preference by superior diligence; he may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and if he go no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge." These reasons appear to us to be sound and unassailable and we adopt them in justification of the principle laid down by us.

If now we apply these principles to the facts of the case before us, it is incontestable that the claim of the Plaintiffs is unfounded. It cannot be disputed that the conveyance in favour of Lala Hakim Lal is for adequate consideration. It has been conclusively proved that the debts for the satisfaction of which the transfer was made, were genuine debts and they have all been discharged out of the consideration for the conveyance. It has also been satisfactorily established that the consideration for the deed represented the value of the properties transferred. Under these circumstances it is impossible to hold that the conveyance was voidable at the instance of the Plaintiffs.

The result, therefore, is that appeal No. 433 of 1904 must be allowed, the decree of the Subordinate Judge reversed, and the suit dismissed with costs in both the Courts.

The effect of our decision is that the Plaintiffs-Respondents will be at liberty to execute their decree against the property included in the conveyance executed by their judgment-debtors in favour of Kamta Prasad on the 2nd September 1901, but they cannot proceed against the properties which were on the same day conveyed to Lala Hakim Lal.

The Plaintiffs preferred this appeal to His Majesty in Council.

Mr. Bhagwandin Dubé for the Appellants submitted that the two *kobalas* one of which the High Court had found to be fraudulent within the meaning of sec. 53 of the Transfer of Property Act and the other not, were parts of a scheme whereby the executant had sought to delay or defeat the execution of the decree that was to be passed in the suit. By the *kobalas* the debtor had conveyed practically the whole of his immoveable properties to the Respondents or their near relations, the mere fact that valuable consideration was, as is found by the Courts below, paid in the case of the *kobala* under appeal did not take the case out of the section. Referred to *Cadogan* v. *Kennett* (27), *Middleton* v. *Pollock* (2) and *Narayana* v. *Veraraghava* (58).

Mr. Dunne for the Respondents was not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD WRENBURY.—On the 2nd Septem-

(57) 9 North Dakota 43 (48); 81 N. W. 60.

(2) 2 Ch. D. 104, 108 (1876).

(27) Cowper 284 (1776).

(58) I. L. R. 28 Mad. 184 (1899).

ber 1901 Kishun Benode executed two *kobalas* or conveyances, the one to Kamta Prashad and the other to Hakim Lal. They were conveyances of certain lands, the parcels in the second deed being much more numerous than those in the first deed. Kamta Prashad was the nephew of Ram Aotar Lal, a brother of Hakim Lal. He was a minor and Ram Aotar Lal was his guardian.

The Plaintiff, Musahar Sahu, was at this date a creditor of Kishun Benode. He had on the 14th December 1900 sued for the debt and on the 5th January 1901 had presented a petition for security by way of attachment before judgment. On the 11th February 1901, Kishun Benode had made an affidavit that he did not intend to transfer any of his properties, and accordingly on the 11th February 1901 the petition was dismissed.

In this state of facts the two *kobalas* were executed by the debtor on the 2nd September 1901.

On the 5th December 1901 the Plaintiff obtained judgment in his action for Rs. 12,695-10 and costs. The Defendant did not appear at the trial. On the 21st December 1901, Kishun Benode applied for a re-hearing, but on the 2nd August 1902 that application was dismissed by default. In the interval, *viz.*, on the 11th June 1902, the transferees had obtained an order for registration of their names in respect of the properties transferred.

Under these circumstances two suits were brought to set aside the *kobalas* on the ground that within sec. 53 of the Transfer of Property Act IV of 1882, the transfers were made with intent to defeat or delay the creditors of Kishun Benode.

The Subordinate Judge set aside the first *kobala* on the ground that no consideration was paid, that a debt of Rs. 6,335 therein alleged to be due to Kamta Prashad was fictitious, that the transfer was made gratuitously, and that the transfer was made with intent to defraud. An appeal was dismissed with costs, and this decision is not questioned before this Board.

As regards the second *kobala*, there are concurrent findings that the consideration for this deed was real and not fictitious. The Subordinate Judge nevertheless decided in favour of the Plaintiff. Upon appeal this decision was reversed, and the second *kobala* upheld. From that decision the Plaintiff has brought this appeal.

The Appellant has not argued that the law is wrongly laid down in the judgment of the High Court. His contention is that the two deeds of the 2nd September 1901 form really one transaction, and that the second *kobala* must fall with the first.

As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of Bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion rightly stated by Palles, C. B., *In re Moroney* (1), where he says :—

"The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice It follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the Statute, because notwithstanding such an act, the entire property remains

(1) L. R. 21 Ir. 27 (1887).

available for the creditors or some or one of them, and as the Statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or effected."

The transfer which defeats or delays creditors is not an instrument which prefefs one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid [*Middleton* v. *Pollock*: *Exp. Elliott* (2)]. So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the Plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy.

The argument presented to their Lordships has in substance been that the transaction of the 2nd September 1901 was one transaction: that (1) Kamta Prashad, the nephew, the minor and ward, and (2) Hakim Lal, the uncle of Kamta and brother of Ram Aotar Lal, the minor's guardian, are for this purpose not distinguishable as independent transferees, that from the 11th February 1901 until after the 11th June 1902 Kishun Benode was playing for time, and that this fact and the fact that the former *kobala* was fictitious and fraudulent show that the latter *kobala* was fraudulent also. Their Lordships do not accept this contention. The *kobala* in favour of Hakim Lal must stand or fall on its own merits. The concurrent findings that the consideration for the deed was real reduces the case to one in which the debtor has preferred one creditor to the detriment of another, but this in itself is no ground for impeaching it under the section even if the debtor was intending to defeat an anticipated execution by the Plaintiff.

Their Lordships will humbly advise His Majesty that the Appeal should stand dismissed with costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Watkins* and *Hunter* for the Respondents.

Appeal dismissed.

(2) 2 Ch. D. 104, 109 (1876).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3144 OF 1912.

JENKINS, C. J. HOLMWOOD, J. 1915, 9, August.	LALU DOME and anr., Plaintiffs, Appellants, *v.* BEJOY CHAND MAHATAP, Defendant, Respondent.

Chaukidari Act (VI B. C. of 1870, sec Simanadari land, if chaukidari chakran land—Bengal District Gazetteer for Bankura, reference to, in the absence of findings by Courts.

Where the question was whether certain lands in thana Indas in the District of Bankura and called "simanadari lands" were "chakran lands" within the meaning of sec. 1 of Act VI, B. C. of 1870, the High Court, in second appeal, in the absence of any finding on the point of the lower Appellate Court, held, on reference to the Bengal District Gazetteer of Bankura, that the simanadars *performed the duties of* chaukidars *and so Act VI of 1870 applied to the case.*

This was an appeal preferred on the 14th November 1912, against the decree of Mr. L. Palit, District Judge of Zillah Bankura, dated 2nd August 1912, reversing the decree of Babu Sita Nath Ghosh,

LALU DOME *v.* BEJOY CHAND MAHATAP.

Munsif of Kotulpur, dated 23rd June 1911.

The Plaintiffs asked for recovery of 8½ bighas of land as their father's *simanadari* land describing it as situated in Mauza Patti Thakuran Pushkarini in Gobindpur. They alleged that the *simanadari* land was resumed under the provisions of Act VI, B. C. of 1870 and settlement was made with the first Defendant, the Maharaja of Burdwan, and that this Defendant granted settlement of this land to the second Defendant, who dispossessed them by virtue of that settlement. The landlord Defendant in his written statement said that no land in Gobindpur Patti Thakuran Pushkarini was transferred to him or settled by him with the second Defendant. The first Court decreed the suit which was reversed on appeal.

It was argued *inter alia* in second appeal that the land in suit was *simanadari* land and not *chaukidari chakran* land, and therefore Act VI, B. C. of 1870 did not apply. Whether this land was *simanadari* or *chaukidari chakran* was left undecided by the lower Appellate Court.

Babus Baidya Nath Dutt and *Bhupendra Kumar Ghose* for the Appellants.

Babus Basant Coomar Bose, Shoroshi Charan Mitra, Bepin Behari Ghose and *Satyendra Nath Roy* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

Two points arise in this appeal. One is as to the location and identity of the parcels. On that there has been a finding of fact by the lower Appellate Court on an issue sent down which is conclusive against the present Appellants and there is no ground on which we can interfere.

It is contended however that the land in suit is *simanadari* land and not *chaukidari chakran* land, and therefore, it is said, Act VI of 1870, B. C., does not apply. The learned Vakils who appear before us are agreed on this that if the Act does not apply then the Appellants are entitled to succeed, and if the Act applies then the Appellants must fail. Now, the words "*chaukidari chakran* lands," by the express provisions of the Act, mean "lands which may have been assigned, otherwise than under a temporary settlement, for the maintenance of the officer who may have been bound to keep watch in any village and report crime to the police and in respect to which such officer may be at the time of the passing of this Act liable to render service to a zemindar." Whether this land was *simanadari* or *chaukidari chakran* was left undecided by the lower Appellate Court. This, we think, is to be regretted. But we have the authority of the Bengal District Gazetteer for Bankura that "in thanas Indas and Kotalpur, there are a body of men called *simanadars*, who perform the duties of chaukidars. They have grants of lands in lieu of wages; but in some instances these service lands have been resumed under Act VI of 1870." We are entitled to use this book of reference for the purpose of seeing what the duties of *simanadars* are, that is to say, whether their duties correspond with those of which description is given in sec. 1 of the Chaukidari Chakran Land Act. What is stated in the Gazetteer shows that in thana Indas which is the thana with which we are concerned in this case the *simanadars* perform those duties which are described in sec. 1 of the Act. If they perform those duties it does not matter in the slightest what they may be called. The definition requires that the duties should be of a particular character. That being so, we must hold that Act VI of 1870 applies. It perhaps may seem a hard

case on the Appellants before us, but there is no escape from it. Certainly there is no escape from it in the suggestion of occupancy right. It is made for the first time in this Court.

We must therefore dismiss the appeal with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 909 OF 1914.

MOOKERJEE, J. ROE, J. 1915, 28, May.		LENGA LALUNG, Plaintiff, Appellant, *v.* PENGURI LALUNGNI and anr., Defendants, Respondents.

Custom, tribal—Marriage-custom, requiring husband to live in wife's parents' household, the children being additions to wife's clan—Custom not immoral or opposed to public policy—Suit for restitution of conjugal rights by husband against wife—Removal of wife from parents' house if may be decreed.

There is nothing immoral or opposed to public policy in a tribal custom which requires a son-in-law to reside in the family of his father-in-law in order to have access to his wife.

Quære :—*Whether Lalungs are governed by Hindu Law.*

Assuming that they are Hindus,

Held—*That their marriage relations must be governed by customs which prevail amongst the tribe provided that the customs are neither immoral nor opposed to public policy.*

Their marriage custom, according to which the parents of the girl find a husband for her and take him to their house—as a member of their family—the offsprings of the marriage entering the clan of their mother—is a valid custom and is a good defence to a suit by the husband for restitution of conjugal rights by removal of the wife from her father's house.

It was not injurious to the public interests, that is, to the interests of the tribe to which the parties belonged, nor was it in conflict with any express law of the ruling power.

TEKAIT MONMOHINI *v.* BASANTA KUMAR SINGH (1) *referred to.*

This was an appeal from a decree of J. A. Dawson, Esq., Subordinate Judge of Zillah Nowgong, dated 15th January 1914, reversing a decree of Babu Hem Ch. Goswami, Munsif of Nowgong, dated 20th September 1913.

The facts of the case appear from the judgment.

Babu Jadu Nath Kanjilal for the Appellant.

Babu Akhil Bandhu Guha for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff in a suit which has been described as a suit for possession of a wife or for restitution of conjugal rights. The first Defendant is the wife of the Plaintiff and the second Defendant is his father-in-law. The parties are Lalungs, a semi-aboriginal tribe, who are governed by many customs peculiar to themselves. One of their marriage customs is that the parents of the girl find a husband for her and take him to their house as a member of their family ; the offsprings of the marriage enter the clan of the mother. The Defendants place reliance upon this custom and contend that the Plaintiff is not entitled to a decree for possession of his wife and for her removal from the residence of her

(1) I. L. R. 28 Cal. 751 : s. c. 5 C. W. N. 673 (1901).

father as it is incumbent upon him to reside in the family of his father-in-law. They allege that the Plaintiff is always welcome in the household of his father-in-law where he may have free access to the society of his wife. The Subordinate Judge has held that this custom cannot be disregarded in a Court of law and that the Plaintiff is consequently not entitled to succeed in this litigation. On the present appeal it has been argued that the Lalungs are Hindus governed by the Hindu Law, and that the Plaintiff is, under that law, entitled to possession of his wife, regardless of the custom, which it is said, is, if not immoral, at least clearly opposed to public policy, as it serves to restrict the personal liberty of the husband.

It is not disputed that as was ruled in the case of *Tekait Monmohini* v. *Basanta Kumar Singh* (1), the duty imposed upon a Hindu wife to reside with her husband wherever he may choose to reside, is a rule of Hindu Law and not merely a moral duty, and that consequently, an antenuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her paternal abode, would defeat that rule of Hindu Law and is invalid on that ground as well as on the ground that it is opposed to public policy. It is also not disputed that under the Mahomedan Law a condition that the wife shall, though adult, be at liberty to live in the house of her parents is void, though this question is by no means settled by authority, as is clear from the decision in *Hamidunnessa Bibi* v. *Zohuruddin* (2). But there is nothing to show that the Lalungs are governed by the Hindu Law, in all respects. Even if it be assumed however that the Lalungs are Hindus, their marriage relations must be governed by customs which prevail amongst the tribe, provided that the customs are neither immoral nor opposed to public policy. The case before us is clearly not of an immoral custom such as came before the Courts in *R.* v. *Karson* (3), *R.* v. *Manohar* (4), *Uji* v. *Hathi* (5), *Khemkar* v. *Umai Shankar* (6), *Narayan* v. *Laving* (7) and *Koraga* v. *R.* (8). We are also unable to accept the contention of the Appellant that the custom alleged in this case is opposed to public policy. As Mr. Justice Burrough observed in *Richardson* v. *Mellish* (9), public policy is a very unruly horse and when once you get astride of it you never know where it will carry you. These weighty words were adopted and approved by Lord Esher, M. R., in *Cleaver* v. *Mutual Reserve Association* (10). To the same effect are the observations of Cave, J., *In re Mirams* (11) "Judges are more to be trusted as interpreters of the law than as expounders of what is called "public policy." We do not see that there is anything opposed to "public policy" or "the policy of the law" as Kekewich, J., puts it in *Hope Johnston* v. *Hope Johnston* (12), in a tribal custom which requires a son-in-law to reside in the family of his father-in-law; the Plaintiff is also entitled to free access to his wife, if he chooses to go to the house of his father-in-law. It is worthy of note that the Courts have recognised the validity of a custom or contract whereby the wife

(1) I. L. R. 28 Cal. 751 : s. c. 5 C. W. N. 673 (1901).
(2) I. L. R. 17 Cal. 670 (1890).
(3) 2 Bom. H C. R. 124 (1864).
(4) 5 Bom. H C. R. 17 (1868).
(5) 7 Bom. H. C. R. 133 (1870).
(6) 10 Bom. H. C. 331 (1873).
(7) I. L. R. 2 Bom. 140 (1877).
(8) I. L. R. 6 Mad. 374 (1883).
(9) 2 Bing. 252 (1824).
(10) [1892] 1 Q. B. 147.
(11) [1891] 1 A. R. 594.
(12) [1904] 1 Ch. 470.

is to remain in her parents' house till puberty is established, *Kateeram* v. *Gendhenee* (13), *Santosh* v. *Gera* (14), *In re Dharanidhur* (15), *Suryamani* v. *Kali-Kanta* (16), *Arumuga* v. *Viraraghava* (17), though a different view is possibly indicated in *Dadaji* v. *Rukmabai* (18). We are clearly of opinion that the Court should not assist the Plaintiff to violate the tribal custom and to remove his wife from the home of her father. We are not prepared to say that it is injurious to the public interests, that is, to the interests of the tribe to which the parties belong, nor is it in conflict with any express law of the ruling power. [*Khoja's* case (19), *Howard* v. *Pestonji* (20), *Tarachand* v. *Reebram* (21), *Bhau* v. *Sundarbai* (22) and *Mathura* v. *Esu* (23)]; and we are not bound by any rule of public policy to disregard this custom, subject to and with full knowledge of which the Plaintiff married the first Defendant.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(13) 23 W. R. 178 1875).
(14) 23 W R 22 (1874).
(15) I. L. R. 17 Cal. 298 (1889).
(16) I. L. R. 28 Cal. 37: s. c. 5 C. W. N. 195 (1900).
(17) I. L. R. 24 Mad. 225 (1900).
(18) I. L. R. 10 Bom. 301 (1886).
(19) Perry 110 (1847).
(20) Perry 535 (1852).
(21) 3 Mad. H. C. 56 (1866).
(22) 11 Bom. H. C. 249 (1874).
(23) I. L R. 4 B m. 545 (1883).

[CIVIL APPELLATE JURISDICTION.]

Appeal from Appellate Decree No. 3929 of 1913.

Mookerjee, J. N. R. Chatterjea, J. 1915, 17, August.	Bouwang Raja Chellaphroo Chowdhuri, Defendant, Appellant, *v.* Banga Behari Sen, Plaintiff, Respondent.

Bond, signed by Defendant only and registered, suit upon—Limitation—Limitation Act (IX of 1908), Sch. I, Art 116—Interest, rate of, excessive—Court's power to declare rate a penalty and award reasonable interest.

Art. 116 of the Limitation Act applies to a suit brought by the Plaintiff to enforce a debt due upon a bond executed by the Defendant alone and accepted by the Plaintiff and subsequently registered.

A contract in writing in this country does not necessarily imply that the document must be signed by both the parties thereto.

Apaji Bapuji v. Nil Kanta (1), Ramasami Chetti v. Sekhanoda Chetti (2), Girish Chandra v. Kunjo Behary (3), Ambalayani Pandarama v. Vaguram (4), Kotappa v. Vallur Zemindar (5), Zemindar of Vizianagram v. Behara Suryanarayana (6) *and* Sanney Kotappa v. Venkata Narasimham Naidu (7) *referred to.*

The Court is competent to grant relief whenever the rate of interest appears to it to be penal.

The fact that the rate of interest is ex-

(1) 3 Bom. L. R. 667 (1901).
(2) 1 M. L. J. 737 (1887).
(3) I. L. R. 35 Cal. 688: s. c. 12 C. W. N. 628 (1908).
(4) I. L. R. 19 Mad. 52 (1895).
(5) I. L. R. 25 Mad. 50 (1901).
(6) I. L. R. 25 Mad. 587 (1901).
(7) 11 M. L. J. 125 (1901).

cessive may be sufficient by itself to justify the inference that the rate was penal and unenforcible.

Once the stipulated rate of interest is found to be unenforcible, the Plaintiff is in the hands of the Court which will decree such rate of interest as may appear to it to be reasonable.

ABDUL MAJID *v.* KHERODE CHANDRA PAL (10) *and* KHAGARAM DAS *v.* RAM SANKAR DAS (11) *referred to.*

This was an appeal from a decision of R. E. Jack, Esq., District Judge, Chittagong, dated 30th June 1913, confirming that of Babu Jagan Mohon Sirkar, Subordinate Judge, Chittagong, dated 6th May 1912.

The material facts of the case will appear from the judgment.

Babu Probodh Chandra Roy for the Appellant.

Babus Khitish Chandra Sen and *Pares Chandra Sen* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendant in a suit for recovery of money. On the 16th January 1895, the Defendant borrowed from the Plaintiff Rs. 400, on interest at 4 per cent. per mensem, with six monthly rests :—the money was made repayable at the end of a year. These terms were incoroporated in a bond executed by the Defendant, and subsequently registered and delivered to the Plaintiff. On the 25th December 1901, the Defendant paid the Plaintiff Rs. 20 on account of interest, and on the 22nd December 1904, he made a similar payment of Rs. 30. These payments were duly endorsed on the back of the bond and the entries were signed by the Defendant. On the 15th December 1910, the Plaintiff instituted this suit for recovery of his dues on the bond. The schedule to the plaint set out an elaborate statement of accounts which showed that on the date of the commencement of the suit, a sum of Rs. 3,75,345-8 ans. was payable by the Defendant to the Plaintiff. In the third paragraph of the plaint, however, the Plaintiff stated that he could not possibly realise this large sum from the properties of the Defendant, and he consequently confined his claim to the modest sum of Rs. 3,000. The Defendant pleaded in answer to the suit, *first*, that the claim was barred by limitation, and *secondly*, that the rate of interest was unconscionable and should not be enforced by a Court of Justice. The Courts below have overruled these contentions and have decreed the suit for the amount claimed. On the present appeal, the decree of the District Judge has been assailed on two grounds; namely, *first*, that the claim is barred by limitation, and *secondly*, that interest is not recoverable to the extent claimed by the Plaintiff.

As regards the first ground, the Appellant has argued that Art. 116 of the Schedule to the Indian Limitation Act is of no assistance to the Plaintiff. That Article provides that a suit for compensation for the breach of a contract in writing registered must be instituted within six years from the date when the period of limitation would begin to run in a suit brought on a similar contract not registered. The argument of the Appellant is that there is no contract in writing registered, because the bond whereon the suit is instituted was not signed by the Plaintiff as well as by the Defendant. In support of this contention, reliance has been

(10) I. L. R. 42 Cal. 690 : s. c. 19 C. W. N. 809 (1914).

(11) I. L. R. 42 Cal. 652 : s. c. 21 C. L. J. 79 ; 19 C. W. N. 775 (1914).

placed upon the decisions in *Apaji Bapuji* v. *Nil Kanta* (1) and *Ramasami Chetti* v. *Sekhanoda Chetti* (2). The first of these decisions, we observe, was not followed by this Court in *Girish Chandra* v. *Kunjo Behary* (3). The second case, we observe, enunciates a rule contrary to what has been subsequently adopted by the Madras High Court in *Ambalayani Pandarama* v. *Vaguram* (4), *Kotappa* v. *Vallur Zemindar* (5), *Zemindar of Vizianagram* v. *Behara Suryanarayana* (6) and *Sanney Kotappa* v. *Venkata Narasimham Naidu* (7). We are not prepared to accept the contention of the Appellant, for as was pointed out by Sir Francis Maclean, C. J., in *Girish Chandra* v. *Kunjo Behary* (3), if we were to adopt this view, we would have to read into Art. 116 words not to be found there. There is in this case unquestionably a registered document. Does, then, that document constitute a contract in writing? No doubt a contract implies two parties, but a contract in writing in this country does not necessarily imply that the document must be signed by both the parties thereto. In the case before us, the bond was executed by the Defendant and delivered to the Plaintiff. Acceptance by the Plaintiff completed the agreement between the parties, and, there was, consequently, in law a contract in writing which was subsequently registered. We may add that there are expressions in the judgment in *Apaji Bapuji* v. *Nil Kanta* (1), which indicate that the principle adopted there would not have been applied to the case before us. Sir Lawrence Jenkins, C. J., stated with reference to the document then before him that it was important to know that the document was not signed at its foot by the Defendants who were sought to be made liable on the basis thereof, nor by any one on their behalf; and he added with reference to the decision in *Ambalayani Pandarama* v. *Vaguram* (4), that the case was distinguishable, because there the contract was signed at the foot by the party sought to be charged in the suit. We need not, consequently, express an opinion upon the question, whether the decision in *Apaji Bapuji* v. *Nil Kanta* (1), may be defended on its special circumstances, because it is manifest that the principles there recognised does not govern the case before us. We hold accordingly, that Art. 116 is applicable to cases of the description now before us, and this view has been followed by implication, in a long series of decisions of this Court such as *Nobo Kumar* v. *Siru Mallik* (8) and *Ethel Geogiana Kerr* v. *Clara Ruxton* (9).

As regards the second ground, the Appellant has argued that the provision for interest contained in the bond is in the nature of a penalty and is not enforcible in a Court of Justice. In support of this view reliance has been placed upon the decisions in *Abdul Majid* v. *Kherode Chandra Pal* (10) and *Khagaram Das* v. *Ram Sankar Das* (11). In the case last mentioned, it was pointed out upon a review of the earlier authorities on the subject, that the more modern decisions recognise

(1) 3 Bom. L. R. 667 (1901).
(2) 1 M. L. J. 737 (1887).
(3) I. L. R. 35 Cal. 683: s. c 12 C. W. N. 628 (1908).
(4) I. L. R. 19 Mad. 52 (1895).
(5) I L. R. 25 Mad. 50 (1901).
(6) I. L. R. 25 Mad. 587 (1901).
(7) 11 M. L. J. 125 (1901).
(8) I. L. R. 6 Cal. 94 (1880).
(9) 4 C. L. J. 510 (1906).
(10) I. L. R. 42 Cal. 690: s. c 19 C. W. N. 809 (1914).
(11) I. L. R. 42 Cal. 652: s c. 21 C. L. J. 79; 19 C. W. N. 775 (1914).

the rule that the Court is competent to grant relief whenever the rate of interest appear to the Court to be penal. It was further explained that the fact that the rate of interest was excessive, might be sufficient by itself to justify the inference that the rate was penal and unenforceable. In support of this view, reliance may be placed on *Webster* v. *Bosanquet* (12) and *Clyde Bank Engineering Company* v. *Don Castaneda* (13). Reference may also be made to the observations of Lord Loreburn, Lord Macnaghten and Lord James in *Samuel* v. *Newbold* (14). Lord Loreburn said "We are asked to say that an excessive rate of interest could not be of itself evidence that the transaction was harsh and unconscionable. I do not accept that view. Excess of interest or charges may of itself be such evidence and particularly if it be unexplained. If no justification be established, the presumption hardens into a certainty." Lord Macnaghten was still more emphatic: "The rate of interest may be so monstrous as to show of itself that the transaction is harsh and unconscionable. There may be, as Lord Thurlow said in the case of *Gwynne* v. *Heaton* (15), an inequality so strong, gross and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it." Lord James added "Excessive interest of itself is sufficient to render a contract harsh and unconscionable. Proof of excessive interest may of itself, therefore, be sufficient to entitle the debtor to relief. What amounts to excessive interest is to be determined by the tribunal in each case, the question of risk being a material matter for consideration. When excessive interest is apparently established, any facts that tend to show that such excess does not render the contract harsh and unconscionable, should be proved in evidence by the lender. The burden is on him." In the case before us, the result of the contract is that the Plaintiff has become entitled to interest on his loan at the rate of 5858 per cent. a year; no Court of Justice will enforce such a contract. The Respondent argues, however, that the modest sum he now claims gives him interest at the rate of 40 per cent. a year. But this contention entirely overlooks the fundamental fact that once the contract between the parties is deemed unenforceable, the Plaintiff is entirely in the hands of the Court; he is not entitled to substitute for the original contract another contract which may appear to him to be reasonable. The Court has now to consider what sum should be decreed to the Plaintiff by way of damages for the detention of his money. We are of opinion that the Plaintiff should not have more than 12 per cent. per annum simple interest on the sum advanced by him.

The result is that this appeal is allowed and the decree of the District Judge varied. A decree will be made in favour of the Plaintiff for Rs. 400 with interest thereon at the rate of 12 per cent. per annum from the date of the loan to the date of the institution of the suit, that is, from the 16th January 1895 to the 15th December 1910. Allowance will be made in the accounts for the two sums admitted to have been paid towards interest. The sum thus determined will carry interest at 6 per cent. per annum from the date of the institution of the suit to the date of realization. Each party will pay his own costs in all the Courts.

Appeal allowed.

(12) [1912] App. Cas. 394.
(13) [1905] App. Cas. 6.
(14) [1906] A. C. 461.
(15) 1 Bro. C. C. 9 (1778).

[CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORDER
No. 354 OF 1913
WITH
RULE No. 796 OF 1913.

N. R. CHATTERJEA, J.	SURAJMALL AGARWALLAH, Objector, Appellant,
GREAVES, J.	v.
1914,	RAM CHANDRA MAINTRI & ors., Petitioners, Respondents.
Heard, 9, 21 and 22, December.	
1915,	
Judgment, 13, January.	

Civil Procedure Code (Act V of 1908), Or. 21, r. 52—Scope of—Attachment of money in the custody of Court.

One S mortgaged to the Respondents his beneficial interest in his trade or business of a contractor. Subsequently he executed a similar mortgage in favour of the Appellant. The Respondents recovered judgment on their mortgage against the representatives of the estate of S and an order was made by the Court directing the registration and attachment of the money due to the estate of S from the Executive Engineer, Lower Ganges Bridge, and a letter was written by the Court to the Examiner of Accounts, Lower Ganges Bridge, stating that the moneys due to the heirs of S were attached by the Court at the instance of the Respondents and requesting the Examiner to hold the moneys under attachment until further order of the Court. Thereafter the Appellant obtained a decree against the heirs of S on his mortgage and an order was made by the Court for the registration and attachment of the bills payable to S in the office of the said Executive Engineer and the Court requested this officer to send two specified sums to the Court for payment to the Appellant. After the money was sent to the Court the Respondents filed a petition to the effect that the Appellant was trying to take out the money but that it might be kept under attachment by an order of the Court. On this petition the Court ordered that the Appellant was not to receive payment of the money unless and until the Respondent's application was disposed of. At the hearing of the execution cases the Respondents contended that the question of title and priority in respect of the money in Court should be decided under Or. 21, r. 52.

Held—That the order of the Court withholding payment of the money to the Appellant virtually amounted to an attachment of the money after it came into the custody of the Court.

That Or. 21, r. 52, was clearly applicable to a case like the present and there was no reason to narrow the words of the rule so as to make it applicable only to a case in which the property sought to be attached was in the custody of a Court other than the Court executing the decree.

That as regards the question of priorities neither party perfected their charge by giving notice to the persons who were to make the payments to their mortgagor and accordingly apart from any question of notice the Respondents' charge which was prior in date must prevail.

This was an appeal against an order of Babu Kunja Behary Gupta, Subordinate Judge of Pabna and Bogra, dated 16th April 1913.

The facts of the case will appear from the judgment.

Babus Provash Ch. Mitter and *Susil Madhab Mullick* for the Appellant.

Mr. C. R. Das and *Babu Hira Lal Chakrabarty* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

By an indenture of mortgage dated the 24th January 1910 and made between

SURAJMALL AGARWALLAH v. RAM CHANDRA MAINTRI.

Shyam Lal Chatterjee of the one part and the Respondents to this appeal, Ram Chandra Mistry and others (thereinafter called the mortgagees) of the other part. Shyam Lal Chatterjee in consideration of a previous advance of Rs.5,178-11-9 made to him by the mortgagees and of further advances to be made to him by them up to Rs. 20,000 (including the said sum of Rs. 5,178-11-9) mortgaged by way of floating charge his beneficial interest in the trade or business of contractor of stone collections, petty contracts and all and every kind of contract works undertaken by him and carried on at Jainti and elsewhere under the Quarrying Division, Lower Ganges Bridge or wherever the trade or business might be carried on thereafter either under the Quarrying Division, Lower Ganges Bridge, or under anyone else who employed him and also all books and other debts then due or thereafter to become due and owing to him on account of the said trade or business either from the Quarrying Division, Lower Ganges Bridge, or from any other source including all cheques, cash, etc., that he might receive or become entitled to in connection with his said work or business of a contractor that were then existing or which might thereafter be secured by him and all contracts and agreements, benefits and advantages that had been or might thereafter be entered into with him or which he might or could be entitled on account or in respect of the said trade or business and also all stock in trade materials, goods, fixtures, etc., present or future, in connection with the contract business. The indenture contained a provision for the payment of interest on all sums advanced or to be advanced at the rate of 12 per cent. per annum with half yearly rests and also a provision that Shyam Lal Chatterjee would not without the mortgagee's consent in writing charge, hypothecate or mortgage the mortgaged premises.

The mortgage was presented for registration at Darjeeling on the 26th January 1910 and was registered there on the 2nd February 1910.

Subsequently by an indenture, dated the 22nd November 1910 and made between Shyam Lal Chatterjee of the one part and Surajmall the present Appellant of the other part after reciting that Surajmall had already advanced money to Shyam Lal Chatterjee to the extent of about Rs. 8,000 and that Surajmall had agreed to make from time to time further advances not exceeding with the sum already advanced Rs. 20,000 at any one time which Shyam Lal Chatterjee agreed to repay with interest at the rate of 36 per cent. per annum and that Shyam Lal Chatterjee would execute a power-of-attorney in favour of Surajmall authorising him to receive all monies which should from time to time be payable to Shyam Lal Chatterjee by or from the Eastern Bengal State Railways in respect of the work done by Shyam Lal Chatterjee in terms of the contract already secured or to be secured in connection with the left or right bank of the Lower Ganges Bridge and would get the power-of-attorney registered with the Eastern Bengal State Railway authorities Shyam Lal Chatterjee covenanted with Surajmall to repay the sums already advanced with interest at the rate of 36 per cent. per annum and not to draw or receive from the Eastern Bengal State Railway authorities any money payable in respect of the said work until the advance and interest were repaid and not to revoke the power-of-attorney.

Shyam Lal Chatterjee executed a power-of-attorney on the same day in favour of Surajmall nominating Surajmall his attorney to apply for payment and to

receive all sums of money due and payable to Shyam Lal Chatterjee from the Eastern Bengal State Railway authorities in respect of any bill or bills of Shyam Lal Chatterjee in connection with any work done or to be done by Shyam Lal Chatterjee under any contract or contracts already secured or to be secured by him and to give proper receipt for the same. It does not appear that this power-of-attorney was ever registered with the Railway Company.

On the 9th March 1912 the mortgagees under the indenture of the 24th January 1910 recovered judgment against the representatives of the estate of Shyam Lal Chatterjee in the Court of the Subordinate Judge at Darjeeling for Rs. 34,388-15-9 and costs and a declaration of lien was made in their favour over the property covered by the mortgage to the extent of Rs. 20,000. The Appellant was made a party to the suit but was subsequently dismissed therefrom, the Judge agreeing with the contention put forward on his behalf that he was not a necessary party and stating that if the Appellant had any claim to the property covered by the deed of hypothecation he could put it forward in the execution proceedings.

On the 15th May 1912 an order was made by the Subordinate Judge of Pabna in the Respondents' suit directing the registration and attachment of the money due to the estate of Shyam Lal Chatterjee from the Executive Engineer of the left bank division, Paksey, and Quarries Division, Lower Ganges Bridge, Paksey, for the work done at Jainti and on the 28th May 1912 a letter was written by the Subordinate Judge of Pabna to the Examiner of Accounts, Lower Ganges Bridge, Paksey, stating that the sum of Rs. 4,000 and other money bills due to the heirs of Sham Lal Chatterjee for the works scheduled to the letter were attached by the Court at the instance of the Respondents and requesting the Examiner to hold the moneys as per bills or otherwise under attachment until further order of the Court. The Appellant on the 28th January 1911 instituted a suit for recovery of the moneys due under the indenture of the 22nd November 1910 and applied for attachment, the order for which was made absolute on the 5th April 1911 and on the 22nd May 1912 the Appellant obtained a decree against the heirs of Shyam Lal Chatterjee for Rs. 12,771-5-3 and costs and on the 23rd May 1912 an order was made in the suit for the registration and attachment of the bills payable to Shyam Lal Chatterjee's estate in the office of the Executive Engineer, left bank and Quarry Division, Lower Ganges Bridge, Paksey, and on the 30th May 1912 and 1st June 1912 the Officiating Subordinate Judge of Pabna wrote two letters to the Executive Engineer, Quarry Division, Lower Ganges Bridge, Paksey, requesting that two sums of Rs. 4,006-8-10 and 9,970-12-8 be sent to the Court for payment to the Appellant. The Examiner of Accounts on the 12th and 13th June 1912 sent Rs. 12,284-5-4 in payment of the amounts referred to in the letters of the 30th May 1912 to the Subordinate Judge of Pabna but on the 20th June 1912 an order was made that the Appellant was not to receive any payment of the money pending the disposal of the Respondents' application for rateable distribution.

The two execution cases eventually came on for hearing together before the Subordinate Judge of Pabna, the Respondents asking that the question of title and priority in respect of the money in Court should be decided under Or. 21, r. 52, C. P. C., and that a declaration should be made in their favour that the Appellant's

right to the money in Court was subject to the charge created in favour of the Respondents by the indenture of the 21th January 1910 and the decree of the 9th March 1912 of the Darjeeling Court and in the alternative they asked for rateable distribution under sec. 73 of the Code of Civil Procedure. The Appellant contended that Or. 21, r. 52 did not apply and that the executing Court could not decide the question of priority between rival decree-holders except under sec. 73 of the Code of Civil Procedure and that the Respondents had no lien on the money and had abandoned their position as charge-ho'ders. The Subordinate Judge decided against the Appellant's contentions and found that the Respondents had established their lien on the whole of the money in Court. The Appellant now appeals against this decision on the following grounds—(1) That Or. 21, r. 52, is not applicable as it only applies when the money is in some other Court than that it which the order for attachment is made, the object of the rule being to prevent a conflict of jurisdiction between two Courts and not to attach property and that the proper section to proceed under in a case like the present is sec. 73 of the Civil Procedure Code : (2) that even if the order is applicable, it is only applicable to a case in which the money is in the custody of the Court before the application for attachment is made and that it does not apply to case like the present where the money did not come into Court until after the application for attachment was made, and when if in fact any attachment was made the money was not then in Court; (3) that there never was in fact any attachment by the Respondents after the money came into Court and that the Court accordingly could not decide the question of priority: (4) that the decree of the Respondents was not executed as a mortgage decree and is in fact only a money decree and we were referred to the case of *Harsukh* v. *Meghraj* (1). The decree was further attacked on the ground that it contained no direction for sale and that it is too vague to be enforced as it does not specify the property to be included.

With regard to the first contention, in our opinion, Or. 21, r. 52, is clearly applicable to a case like the present and we see no reason to narrow the words of the rule so as to make it applicable only to a case in which the property sought to be attached is in the custody of a Court other than that executing the decree and there is no other section in the Act providing for attachment where the property is in the custody of the same Court. Or. 21, r. 46, excepts property deposited in or in the custody of any Court from the operation of the rule and sec. 73 relates to rateable distribution.

This really disposes of the appeal but as the other contentions were argued in considerable detail before us and as we are asked to exercise our revisional jurisdiction under sec. 115 of the Code of Civil Procedure we have considered them and embody our conclusions in this judgment.

With regard to the second and third grounds, the facts appear to be these. The Respondent in his application dated the 16th May 1912 for execution of his decree prayed for attachment and sale of the propetries of the judgment-debtor, and the Court ordered that the money due to the judgment-debtor from the Executive Engineer might be attached. There is on the record the draft of a letter from the Court to the Examiner of Accounts, informing him that the moneys and bills due to the judgment-debtor in his hands were attached by the Court, and requesting him

(1) I. L. R. 2 All. 245 at p. 247 (1879).

to hold the moneys as per bills or otherwise, under attachment until further orders of the Court. It is said that there is nothing to show that the letter was actually sent. But in the Respondent's application dated the 15th June to the Court, he stated that *rubakar* of attachment had been sent. The Court ordered the petition to be put up in the presence of the pleaders of both parties on the 17th June, and we do not find any exception taken to the said statement in the petition, either by the Court or by the Appellant, which indicates that the statement was not correct. The said attachment, however, related to the monies in the hands of the Engineer. They had not then come into Court. The cheques arrived in Court on the 13th June 1912 in pursuance of the Court's order on the application of the Appellant. On the 15th June the Respondents presented two petitions to the Court, by one of which he complained that the Appellant was trying to take out, in disobedience of the Court's order, the monies and bills and praying that they might be kept under attachment and that a *rubakar* might be sent soon, and by the other petition he prayed that the cheque which had arrived in Court that day and which the Appellant was trying to take out might be kept under attachment by an order under a *rubakar* of the Court and that the same might not be made over to the Appellant. He also prayed for criminal prosecution of certain persons for disobedience of the Court's order passed in his execution case. The Court thereupon made the following order :—" On the application of the decree-holder for withholding the payment of money to Surajmall Agarwallah, decree-holder in execution case No. 84 of 1912. Let the prayer be allowed," and it appears from the order-sheet in execution case No. 84 of 1912 that the Appellant was directed not to receive any payment of money deposited into the treasury unless and until the application of the Respondent (erroneously described in the order as an application for rateable distribution) was disposed of. It is true the order-sheet merely mentions the prayer for withholding the money, but *we think the order virtually amounted to an attachment*. There is no doubt that the Respondent did apply for attachment of the money in the custody of the Court, and though there was not the formal order that the money be attached, (that being the ground for the Appellant's contention that there was no attachment), the Court ordered the money to be held subject to the orders of the Court. Now, where the property to be attached is in the custody of any Court, the attachment in the words of Or. 21, r. 52, shall be made by a notice to such Court, that such property may be held subject to the further order of the Court, and this was what was done.

On the 4th January 1913, the Subordinate Judge directed the Respondent to put in a petition within two weeks stating the section of the Code under which he could set up a Miscellaneous Case making the decree-holder in the other execution case as Opposite Party and try the matter in controversy between them in a regular way, as he was unable to find from the records in the two execution cases " a regular petition of claim to or objection to the payment of money brought under attachment," and that " till then the money under attachment will be held as it is." The Respondent accordingly on the 11th January 1913 made an application praying that a formal order of attachment in strict literal compliance with the provisions of Or. 21, r. 52 might be made, but he asserted that the application for attachment of the money in Court which was made on the 15th June 1912 had been

granted by the Court, and that attachment was in effect made, but that in order to obviate any objections that thereafter might be raised, he applied for a formal order of attachment under Or. 21, r. 52.

On the 26th April the Respondent applied for amendment of his application for execution of decree. These petitions were rejected on the 10th May 1913 and on the 16th May 1913 the Court decided the case in favour of the Respondent. The Appellant relies upon these petitions and the order rejecting them, and upon the fact that Respondents' Counsel pressed for the said amendment and for the attachment of the amount in Court, as showing that no attachment was effected at all. It seems to us however that the Court in rejecting the petitions considered them to be unnecessary. In any case if there was an attachment, as we think there was, effected on the 17th June 1912, the mere fact that the Respondent by way of abundant caution prayed for formal attachment in strict compliance with the terms of Or. 21, r. 52, would not take away the effect of the attachment already made. The order of the 4th January that "till then the money under attachment will be held as it is," shows that the Court also thought that the money was under attachment.

We are accordingly of opinion that there was also an attachment of the money after it came into the custody of the Court.

With regard to the 4th ground urged by the Appellant and the form of the decree, we do not see that there was any necessity to direct an account of what was due to the Respondents in respect of their mortgage as the amount due was found by the judgment and is stated in the decree and the property charged is sufficiently identified in the decree and in fact it was not seriously disputed before us that the money in Court was covered by the Respondents' charge. With regard to the contention of the Appellant that the decree is faulty in form as it contains no order for sale, of course the decree-holder is responsible for getting a decree in such a form that he can enforce it but we see no difficulty here in the Respondents' way on this account as they have a decree declaring a charge on certain sums of money and other things and as there is now in Court a sum of money which as above stated is clearly covered by their charge, we see no reason why once the priority of the charge is established (as in fact has been done) they should not receive payment of this sum. We know of no authority that debars us from so holding on the ground that the mortgage decree in a case like the present must be in a particular form. With regard to the case of *Harsukh* v. *Meghraj* (1) it does not appear from the report what property was there charged but the case of *Fuqueer Bakhsh* v. *Manohur Das* (2) which was referred to and which is stated in the head-note to have been followed was a case of a charge upon immovable property where different considerations apply. Accordingly if the property charged in *Harsukh* v. *Meghraj* (1) was immovable property the decision is not applicable to the present case but in any case the decree in that case did not as here contain a reference to the property covered by the deed of hypothecation which is sufficient to distinguish it from the present case. The other cases quoted to us depend on the particular circumstances of the cases and do not cover the present case.

There remains for consideration the question of priorities. In the present case neither party seems to have thought fit to perfect their charge by giving notice to the

(1) I. L. R. 2 All 345 at p. 347 (1879).
(2) 2 N. W. P. H. C. R. 29 (1870).

persons who were to make the payments to their mortgagor and accordingly apart from any question of notice the Respondents' charge which is prior in date must prevail. The District Judge moreover has fixed the Appellants with notice and although in our view this is not clearly established, it is difficult to believe in view of the rate of interest charged that the Appellants did not know of the Respondents' charge.

The appeal accordingly fails and must be dismissed with costs—10 gold mohurs.

No order will be made upon the rule which will be dismissed.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1774 OF 1913.

N. R. CHATTERJEA, J. NEWBOULD, J. 1915, Heard, 3, December. Judgment, 13, December.	GOLAM ABDIN SARKAR and anr., Defendants, Appellants, *v.* HEM CHANDRA MAJUMDAR and anr., Plaintiffs, Respondents.

Evidence Act (I of 1872), sec 115—Estoppel—Minor if may be estopped from repudiating contract induced by representation that he was sui juris—Misrepresentation, not fraudulent—Contract Act (IX of 1872), sec. 10.

The law of estoppel must be read subject to other laws such as the Indian Contract Act and a minor cannot be made liable upon a contract by means of an estoppel under sec. 115 of the Indian Evidence Act.

DHURMADAS *v.* BROHMO DUTT (2) *followed.*

SURENDRA NATH ROY *v.* KRISHNA SAKHI DASI (4) *where there was fraudulent misrepresentation, distinguished.*

(2) I. L. R. 25 Cal. 616 : s. c. 2 C. W. N. 330 (1898).

(4) 15 C. W. N. 239 (1911).

This was an appeal preferred on the 11th June 1913 against a decree of Mr. G. S. Dutta, District Judge of Zillah Pabna and Bogra, dated the 11th March 1913 modifying a decree of Babu Surendra Nath Ghosh, Subordinate Judge of Bogra, dated the 15th July 1912.

The facts of the case will appear from the judgment.

Babu Brojo Lal Chuckerbutty (for *Babu Roma Kant Bhuttacharja*) and *Babu Jatindra Nath Lahiri* for the Appellants.

Babu Kumar Sankar Ray for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

The question involved in this appeal is whether Plaintiff No. 2 is entitled to have the *kabuliyat* executed by him while he was a minor declared void so far as he is concerned, and to recover possession of his share in the property in dispute. The Court of Appeal below has decided this question in his favour and the Defendants have appealed to this Court.

It appears that the Plaintiff's mother obtained certificate of guardianship in respect of his person and property, and the Plaintiff therefore was a minor until he attained the age of twenty-one years. The conveyance was executed by him when he had not attained that age. There can be no doubt therefore that the conveyance was void. See the case of *Mohori Bibee* v. *Dharmodas Ghosh* (1).

It is contended on behalf of the Appellant that the minor is estopped from pleading invalidity of the *kabuliyat* under sec. 115 of the Indian Evidence Act. The lower Court has found that the Plaintiff had no knowledge that a certificate of

(1) I. L. R. 30 Cal. 539 : s. c. 7 C. W. N. 441 (1903).

guardianship had been obtained and that his minority had been extended. In fact that Court has found that there was no misrepresentation by Plaintiff No. 2. It has however been contended on behalf of the Appellant that even if Plaintiff No. 2 had no knowledge that his minority had been extended, the fact that he sold the property as if he was of age was a representation upon which the Defendants have acted and the Plaintiff was therefore estopped.

The question whether the law of estoppel applies to a minor was considered in the case of *Dhurmadas* v. *Brohmo Dutt* (2). Mr. Justice Jenkins, (as he then was), held in that case that the general law of estoppel as enacted by sec. 115 of the Indian Evidence Act would not apply to an infant unless he has practised fraud operating to deceive and observed that fraud on the part of an infant operating to deceive must be found as a fact, and whether in any particular case there is such fraud must depend upon its own peculiar circumstances. On appeal Maclean, C. J., and Prinsep, J., held that sec. 115 has no application to contracts by infants. The learned Chief Justice observed as follows :—"A minor cannot be estopped by a deed or by the recitals in a deed and if he cannot be so estopped it seems incongruous to say that he can be estopped by a parol declaration, for this is the contention. We must read the language of the Legislature if we can, so as to make it harmonise and not conflict with the general law, though remembering at the same time that the office of the Legislature by its legislative acts is to define and even alter the law. The term "person" in sec. 115 is amply satisfied by holding it to apply to one who is of full age and competent to enter into a contract and I cannot bring myself to think that it could have been the intention of the Legislature by such a general expression to institute such a grave change in the law of estoppel in relation to minors." Mr. Justice Ameer Ali also was of opinion that when the law declares that an infant shall not be liable upon a contract he cannot be made liable upon the same contract by means of an estoppel under sec. 115. See *Brohmo Dutt* v. *Dhurmodas* (3). When the case went up to the Privy Council their Lordships did not think it necessary to deal with the question of estoppel because the vendee in that case was fully aware that the vendor was a minor; and no question of estoppel arises where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. But there is nothing to show that their Lordships did not approve of the view taken by this Court on the question of estoppel as is contended by the learned Vakil for the Appellants.

It is unnecessary to consider whether a minor can be estopped in any case, but we think that the law of estoppel must be read subject to other laws such as the Indian Contract Act, and that a minor cannot be made liable upon a contract by means of an estoppel under sec. 115 of the Indian Evidence Act, when some other law (the Contract Act) expressly provides that he cannot be made liable in respect of the contract. We see no sufficient reason for differing from the view taken in the case of *Dhurmadas* v. *Brohmo Dutt* (2).

In the recent case of *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (4), it was held that if there was misrepresentation by a

(2) I. L. R. 25 Cal. 616 ; s. c. 2 C. W. N. 330

(2) I. L. R. Cal. 616 : s. c. 2 C. W. N. 330 ( ).

(3) I. L. R. 26 Cal. 381 : s. c. 3 C. W. N. 468 (1898).

minor operating to deceive, and if the vendees were deceived by it, the minor would be bound by the transaction. In this case, as we have already stated, the Court found that there was no fraududent representation on the part of the minor. We are therefore of opinion that the Plaintiff No. 2 is not estopped.

The only other question for consideration is whether the circumstances of this case require that the Plaintiff No. 2 should return the money received by him from the Defendants. The lower Appellate Court apparently thought that the purchase money should be set off as against the amount of *wasilat* which the Defendants might be directed to account for if the Plaintiff was ordered to refund the purchase money to the Defendants. The share of Plaintiff No. 2 was purchased by the Defendant for Rs. 150 and the value of the suit in respect of his share is Rs. 1,250. In these circumstances we do not think that we should order a refund of the purchase money.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION]

APPEALS FROM ORDERS

NOS. 3 AND 6 OF 1915.

HOLMWOOD, J.
NEWBOULD, J.
1915,
Heard, 19 and 20, August.
Judgment, 23, August.

NRIPENDRA NATH SAHU and anr., Creditors, Appellants,

v.

ASHUTOSE GHOSH, Receiver to the estate of Nilratan Mondal, Respondents.

Provincial Insolvency Act (III of 1907), sec. 37—Mortgage to creditor, challenged as preference—Preference to be shown intentionally fraudulent—Pressure—Previous understanding.

In order to [illegible] *insol-*

vent, at the date of a transaction sought to be annulled under sec. 37 of the Insolvency Act, was unable to pay from his own money his debts as they fell due, money locked up which may be available at a later period for the payment of debts cannot be considered. But from this it does not follow that all unliquidated assets of the debtor must for that purpose be excluded from consideration

IN RE WASHINGTON DIAMOND MINING Co. (1) *referred to.*

A preference to a creditor to come within the prohibition of sec. 37 must be shown to have been fraudulent, with reference to the state of mind of the debtor.

SHARP *v.* JACKSON (2) *referred to.*

A preference given under pressure is no ground for annulment under sec. 37. Such pressure need not be threat of criminal proceedings. Threat of civil suits would equally take away from its spontaneous character.

A previous oral agreement to mortgage sufficient property would take a mortgage given later on out of the operation of sec. 37.

These were appeals preferred on the 11th January 1915 against an order of Mr. H. P. Duval, Additional District Judge of Zillah 24-Parganas, dated 8th December 1914. This judgment was passed in pursuance of an order of remand made by the High Court and previously reoprted. See *Nripendra Nath Sahu* v. *Ashutosh* (5).

The material facts will appear from the said order and the judgment now reported.

Mr. Caspersz and *Babus Jnanendra Nath Sarkar* and *Bhupendra Nath Bose* for the Appellant in Appeal No. 3.

Sir Rash Behary Ghosh and *Babu*

(1) [1893] 3 Ch. 95 at p. 101.
(2) [1899] A. C. 419 at p. 421.
(5) 19 C. W. N. 157 (1914).

NRIPENDA NATH SAHU v. ASHUTOSE GHOSH.

Panchanan Ghosh for the Appellant in Appeal No. 6.

Babus Umakali Mukerjee, *Bepin Behary Ghosh* and *Khettra Gopal Banerjee* for the Respondent in both appeals.

The JUDGMENT OF THE COURT was as follows :—

These two appeals arise from an order made on remand by the learned Additional District Judge of the 24-Parganas in an insolvency matter. It appears that Babu Ashutose Ghosh, the Receiver in bankruptcy to the estate of Nilratan Mondal and others, sought to set aside three mortgage-deeds on the ground that they were void against him under sec. 37 of the Provincial Insolvency Act. The insolvency proceedings were started by one Kissen Chand Kesori Chand, a creditor of Nilratan Mondal, for Rs. 2,500 at the instigation, it is said, of Mr. Palit, a secured creditor, for Rs. 45,000 odd who had advanced Rs. 5,000 to Gopinath Mondal, the Appellant in Appeal No. 6, to give to Nilratan his brother-in-law on a note of hand dated the 1st March 1911. It further appears that Gopinath had advanced Rs. 1,200 on a note of hand dated the 17th June 1911 and Rs. 2,000 on a note of hand dated the 1st December 1911, both of which sums he had borrowed from Dr. Satya Ch. Mukerjee, the next heaviest secured creditor of Nilratan.

In Appeal No. 3 the Appellant Nripendra Nath Sahu, a distant connection of the insolvent, had advanced four sums on hand-notes in July 1911, namely, Rs. 2,500 on the 11th July, Rs. 2,500 on the 20th July, Rs. 2,000 on the 21st July and Rs. 2,000 on the 26th July, making a total of Rs. 9,000. A stamp paper was purchased on July 26th, the date of the last transaction, for Rs. 45 for the purpose, it is alleged, of engrossing a mortgage security for this Rs. 9,000. Interest was to run on the hand-notes at the rate of 12 per cent. per annum. On the 4th December 1911 a mortgage-deed for this Rs. 9,000 was executed by Nilratan and his four brothers, one of them a minor under his guardianship in favour of Nripendra Nath Sahu. This was a second mortgage of the property already mortgaged to Nripendra's father Upendra Nath Sahu who had had continuous transactions with Nilratan's firm for years.

On the 27th December Nilratan executed a mortgage-deed for Rs. 6,000 in favour of Gopinath. It is stated in the evidence to have been on account of the hand-note for Rs. 5,000 above referred to after making up accounts. It is further stated that Rs. 3,000 was paid in cash to Gopinath in the beginning of February and that the balance Rs. 10,000 formed the subject of another mortgage on the 14th February 1912. The mortgage for Rs. 6,000 was the third mortgage of the land already mortgaged to Nripendra and Upendra. The mortgage for Rs. 10,000 was the second mortgage of the lands already mortgaged to Mr. Palit for Rs. 45,000 odd.

Now, the only question that arises in this litigation was whether these three mortgage-bonds fell within the mischief of sec. 37 of the Provincial Insolvency Act. At the first hearing the learned Additional Judge held that they did. On appeal Mr. Justice Mookerjee and Mr. Justice Beachcroft remanded the case setting out clearly the law on the subject for the Judge's guidance and formulating four conditions as essential to bring a transfer of the insolvents' property within the section. As to two of these, namely, the 2nd and the 4th that the transaction must be in favour of some creditor and that the debtor must be adjudged an insolvent on an insolvency petition presented within three months

after the date of the transaction sought to be impeached there was never any doubt. The two points the learned Judge had to consider in the light of the judgment of this Court in remand were whether the debtor at the date of the transaction was unable to pay from his own money his debts as they fell due, and *secondly*, whether the debtor had acted with a view to give any creditor a preference over his other creditors so as to render the transaction fraudulent and void as against the Receiver. Now, the Receiver in his oral evidence says that he found the liabilities to be Rs. 1,92,576 from an inspection of the books, on the 4th December 1912, while he gives an account of the assets which is not very intelligible without a reference to the accounts themselves. From these we find that the landed property was sold for Rs. 1,30,950 besides Rs. 10,257 which had to be paid in by the minor brother on partition as balance of his excess share. This makes Rs. 14,207. The stock in trade was Rs. 13,499-5-0, the cash balance Rs. 767-14-0 and the book debts Rs. 37,056-10-6. This makes a total of Rs. 1,92,530-9-8 or within Rs. 46 of the liability as alleged by the Receiver. But the Appellants have given us a total liability of Rs. 1,80,000 by detailed figures from the books. And the Receiver on whom the onus lay has not taken the trouble to show what debts had actually fallen due on the 4th December and the order in which they fell due. The words "as they become due" in the section seem to have been ignored both by the Receiver and by the lower Court. It is true, he says, they only borrowed Rs. 15,000 on *hundis* after the 18th of Aghran that fell due after the last mortgage on the 14th February 1912 But the accounts show a large outstanding of *hundis* of much earlier date and there is nothing to show when they fell due.

Be that as it may, although it is clear that the insolvent had not money in his hands sufficient to meet the liability on the 4th December 1911 having only Rs. 767-14-0 in cash, and on the authority of *In re Washington Diamond Mining Co.* (1), the fact that the debtor has money locked up which may be available at a later period for the payment of debts cannot be considered for the purpose of excluding the debtor from falling within the category of bankrupt; "Yet," says Vaughan Williams, J., "when you come to deal with the question whether the payment was made with the view of giving the creditors a preference it is quite obvious that one cannot for that purpose leave out of consideration the fact, if it was a fact, that the directors might well anticipate that they would be able to get in moneys of the Company in sufficient time to render it extremely improbable that they would be driven to a liquidation of the Company's affairs by a winding up; because it is much less likely that the directors would seek to give a preference to creditors in such a case than it would be in a case where the condition of the Company was such that it must have been plain to the directors themselves that a stoppage of payment or winding up was inevitable." It has been pointed out to us that the decision of Vaughan Williams, J., which was in that case that there was no fraudulent preference, was upset in the Court of Appeal on the ground that a Company stands in a different position to an individual, who has since become bankrupt, by reason of the Companies Act, 1862, and it was found as a fact that the directors were guilty of a misfeasance, but the dictum of Vaughan Williams, J., as regards the propriety of taking into consideration the unliquidated assets of the debtor on the question of in-

(1) [1893] 3 Ch. 95 at p. 101.

tention was not questioned. We may therefore find that the condition (1) was not fulfilled and need not be further adverted to, but that condition (3), the second question before the learned Judge and before us in appeal, depends on considerations which do not seem to have been adequately weighed by the learned Judge. As was pointed out by Lord Halsbury in *Sharp* v. *Jackson* (2) the first thing to be considered is the question of fact "what were the reasons why the deeds were executed?" Lord Esher says: "The question whether there has been a fraudulent preference depends not upon the mere fact that there had been a preference but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor but that he has fraudulently done so. It depends upon what was in his mind. It has been argued that the debtor must be taken to have intended the natural consequences of his acts. I do not think that this is true for this purpose. I think one must find out what he really did intend. The recitals in the deed seem to show what was really his object." Now applying this to the case before us we have the fact that the assets covered, or possibly more than covered, the liabilities, that the intention was to secure debts payable on demand by the security of a mortgage which would relieve the pressure on the debtor's ready cash and so put him in a better position to pay his debts, as they become due, with his own money. There was no idea of insolvency certainly up to the time of Mr. Palit's visit on the 7th February. This the learned Judge seems to have realised in a passage towards the end of his judgment. On the principles therefore laid down above there is nothing to bring the mortgage in Appeal No. 3 or the first mortgage in Appeal No. 6 within sec. 37 of the Act.

If we went into the further considerations of pressure on the debtor and of previous understanding the facts would equally compel us to find in favour of the Appellants. There was pressure in the threat of civil suits. The learned Judge was mistaken in thinking that it is necessary to threaten criminal proceedings to constitute pressure. It appears, from the argument before us, to have been based on a misreading of the remarks of Jessel, M. R., in *Ex parte Hall* (3). As Mookerjee, J., pointed out, if it is established that the transaction was the result of real pressure brought to bear by a creditor on his debtor it cannot be deemed as a spontaneous act; and the deeds recite such pressure.

As to previous understanding we think in Appeal No. 3 the purchase of the stamp paper by the debtor on the 26th July for Rs. 45, the exact sum necessary for the Rs. 9,000 mortgage, shows clearly that there was such an understanding. We think that an oral agreement to mortgage sufficient property to cover the debt, is sufficiently specific to constitute an agreement within the meaning of the English authorities cited in the judgment of this Court on remand. One of those at least was a "prior voluntary promise." There does not appear to have been any understanding in the case No. 6, though the parties were brothers-in-law, but there was pressure. In *Ex parte Lancaster; In re Marsden* (4) it was held that the argument "You must infer that this man suffered judgment to be recovered and execution to go against him for the purpose of preferring his father-in-law" was a view for which there was no kind of support. It was not an act of bankruptcy to give in

(2) [1892] A. C. 502 at p. 421.

(3) 19 Ch D. 580 (1882).

(4) 25 Ch. D. 811 [illegible].

to a clamorous creditor even if he be your brother-in-law. It is not the duty of the debtor invariably to resist him. It is very much like "bounty," as it is called by Lord Esher, when he does it for his brother-in-law. But the onus is on the Receiver to show that it was an outcome of a fraudulent preference and this, in the case of the mortgages of the 4th and the 27th December 1911, we think, he has entirely failed to discharge.

As regards the mortgage of the 14th February 1912 we cannot see that there was any preference either. Kissen Chand's debt of Rs. 2,500 did not fall due till the 17th February 1912. Mr. Palit's demand for money on the 7th February 1912 had been met by payment of Rs. 471 odd as interest. He was not entitled to anything but interest. No other creditor was pressing. Gopinath was threatening with a suit. Nilratan's idea was to save himself and not to give preference. Suspicion is not enough in these cases as was pointed out by Cotton, L. J., in *Ex parte Lancaster* (4) cited above. The mortgage of the 4th December 1911 had been registered the day before. Gopinath wanted his decree of the 27th December to be registered and another deed to cover the balance of his dues. Both were registered on the 15th February 1912. The learned Judge seems to think that there was something suspicious in the delay in registration. On the contrary if Nilratan had suspected that, the deeds of the 4th December 1911 and the 27th December 1911 would be impugned he would have hastened to register them. But for the first time in argument by the Respondents' Vakil in this Court a sinister suggestion was thrown out that the deeds of December were antedated and that they were all got up in February 1912 after Mr. Palit's visit. There is no evidence of this; and the case has passed through the hands of the Judge in the lower Court twice and of two Judges of the Court in appeal without such a thing being hinted at. Mr. Palit's visit appears from the evidence, oral and documentary, to have been to demand money and for nothing else. If he secretly got Kissen Chand to file the petition of the 19th February two days after his debt of Rs. 2,500 had become due, that is all the more reason for holding that Nilratan certainly could not have suspected any such act beforehand. All the persons who said that Nilratan had refused them security and said he had no money refer to a period beyond three months. The latest is the 18th November 1911 and the petition is dated the 19th February 1912. There is no reason to doubt the genuineness of the advances made by Nripendra and Gopinath. They were held genuine by this Court before remand, and Gopinath's are strongly corroborated by his transactions with Mr. Palit and Dr. Satya Ch. Mukerjee. The circumstances of Nilratan are shown on the record to have been slightly better in February than they were in December. We do not think that any distinction can be made as against the mortgage of the 14th February 1912.

The result is that the appeals are decreed and the applications of the Receiver dismissed.

The Appellants are entitled to their costs out of the estate in each case throughout. We assess the hearing fee in each case at five gold mohurs.

Appeals allowed.

(4) 25 Ch D. 811 (1883).

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REPORTS (See Index).

Attorney's lien on cause-papers.

We report in this issue two judgments delivered on Appeal from the Original Side (*Prabhu Lal and anr.* v. *Kumar Krishna Dutt*) which are of importance on the question of relationship between an attorney and client and in particular on the question of the former's lien on the client's cause-papers in a pending suit. The same question had come up before the Judges on the Original Side on two previous occasions for decision, and Sale, J., had expressed some doubt with regard to the question of lien (*Basanta Kumar Mitter* v. *Kusum Kumar Mitter*, 4 C. W. N. 767). But Mr. Justice Ameer Ali in a later case (*Atool Ch. Mukerjee* v. *Shoshee Bhusan Mukerjee*, 6 C. W. N. 215) made precisely the same order that the Court of Appeal has now made relying on the identical authority of *Robins* v. *Goldingham* (I. L. R. 12 Ex. 440). The judgment of the Appeal Court which says that an attorney by refusing to go on with the case [illegible] in practice he may be, [illegible] often is, deprived out-of-pocket costs are paid, discharges him and cannot detain client's papers but m make them over to such other attorney as client may appoint on the latter giving undertaking to protect the former's lien, moves the doubt expressed by Sale, J., in t behalf and affirms the view of Mr. Jus Ameer Ali.

Appointment of Court Crier.

We are glad to note that the post of Cc Crier which had recently fallen vacant has b filled by the Hon'ble the Chief Justice i manner which has given immense satisfact to the ministerial staff of the High Co There were outside candidates with no spe qualifications besides personal recommendati but before making any selection His Lords enquired if any fit candidate might be found fr amongst the officers already serving in Cc to whom the appointment might be given by v of preferment. A number of officers then plied and after trial, one with a good voice a a respectable presence was selected. The pointment served as a promotion to the offi selected. The principle on which the appoi ment has been made, has also been greatly preciated by the members of the legal professi

Legislation to authorise deposit of unsecu debt in Court.

When a debtor tenders payment to his c ditor but the latter refuses to accept, accord to law the debt indeed is not discharged, interest ceases to run from the date of tend provided of course the tender is valid in l The elements which go to constitute a v tender may differ in different circumstanc but once it is established that the tender valid, the debtor is protected from liability further interest.

But though in theory the debtor is protec

this protection by his inability to prove tender, the onus of proof being rightly on him. This has been appreciated by the legislature which in cases between mortgagors and mortgagees and between landlords and tenants has sought to obviate the debtor's difficulty by authorising the mortgagor or the tenant, as the case may be, to deposit the amount in Court. The agricultural tenant, in this country, is, according to the accepted theory of Government, in a peculiarly helpless condition in his relation towards his landlord, and the tenderness shown to the mortgagor in the Transfer of Property Act is no doubt derived from the traditions of English Equity Courts of the helplessness of mortgagors.

But is there any reason, (a correspondent asks in a communication which unfortunately is too long for publication in this journal) why this liberty to tender by deposit in Court should be reserved to the mortgagor and the tenant only? The relation between the unsecured creditor and his debtor with reference to this particular point is indistinguishable from the relation between an agricultural tenant and his landlord and between a mortgagor and his mortgagee. It is further a fact that in most instances the debtor, the mortgagor and the tenant is one and the same person, the ereditors only being different. If the reason for permitting deposit in Court is the helplessness of the debtor, then no ground exists for discrimination between a case of a mortgage-debt or of a debt due on account of rent and an unsecured debt, at least in the mofussil. The only conceivable objection is that by permitting debtors indiscriminately to deposit their dues in Court, the business of the Court may be increased to an inconvenient extent necessitating further expenditure on the part of the State. We have however no doubt that the increased business will pay its way. If we are correctly informed such a procedure exists (under local statutes) in the United Provinces and in the Punjab. There is no valid reason why it should not be extended to Bengal.

Criminal Procedure Code, sec. 145 (4), prov. (1).

A Magistrate acting under sec. 145, Cr. P. C., has to decide which of the parties before him is in actual possession of the land in dispute on the date of the proceeding drawn up by him without reference to the merits of the claim of either party to the legal right of possession. If on the evidence before him he can come to a finding as to the possession of one party or the other he shall declare that party who establishes his possession to be entitled to retain such possession until ousted by due course of law and shall forbid any disturbance of such party's possession in the meantime. If however the Magistrate decides that none of the parties was in possession of the disputed land on the date of the proceeding or is unable to satisfy himself as to which of them was in possession thereof he may attach the property until a competent Court has determined the rights of the parties thereto or the person entitled to possession thereof. In the former of these cases the Magistrate is to pass an order in terms of form XXII of Sch. V of the Code and in the latter case, of form XXIII. Any disobedience of these orders is punishable under sec. 188 of the Indian Penal Code but the difficulty arises when we come to proviso 1 of clause 4 of sec. 145.

That proviso lays down that if it appears to the Magistrate that either party has within two months next before the date of the proceeding been forcibly and wrongfully dispossessed he shall treat the party so dispossessed as if he was in possession at the date of the proceeding. In the recent case of *Tulshi Ram* v. *Abraz Ahmed*, I. L. R. 37 All. 654, the Magistrate found that one of the parties was dispossessed in the manner and within the time contemplated in the proviso and he accordingly declared his possession. The Magistrate however further ordered that "the possession of the house in question will be given to Tulshi Ram (the successful party who according to the Magistrate's finding had been dispossessed of the house) through the police." Tulshi Ram applied to the trying Magistrate to enforce this portion of the order and that officer sent on the petition to the Superintendent of Police for compliance but the Superintendent referred the matter to the District Magistrate who as head of the police refused to carry out the order in question. On the matter coming up before the High Court for revision before Tudball, J., his Lordship held that the order of the trying Magistrate was *ultra vires* and the District Magistrate's order was not open to revision by the High Court. So it appears that proviso 1 of cl. 4 of sec. 145, Cr. P. C., creates an anomalous position.

Chap. XII of the Code nowhere gives a

Magistrate any such power as to oust one person and to place another in possession and the only section of the Code (sec. 522) which entitles a Magistrate to dispossess a person of property and replace him by another person who is entitled does not apply unless there has been a conviction of an offence. As the learned Judge points out it is curious that under sec. 145 of the Code the Legislature has allowed the Magistrate to treat a person who has been wrongfully and forcibly dispossessed as having been in actual possession on the date on which he passed his initial order under cl. 1 of the section but provides no machinery by which the Court may proceed to remove the wrong-doer from possession and put the other man in his place. Every Court has inherent power to enforce its own order but that question does not arise if the Court has no power under the law to make the order and it is clear that sec. 145 should be so amended as to authorise the Magistrate in cases covered by proviso 1 of cl. 4 to direct the ousting of the trespasser. Unless this is done Magistrates will find themselves helpless and their orders will be nugatory.

CURRENT INDIAN CASES.

(CRIMINAL.)

Indian Penal Code, secs. 366, 372.

EMPEROR *v.* EWAZ ALI, I. L. R. 37 All. 624.

A married girl about 13 or 14 years old voluntarily left the keeping of her guardian with intention to remain out of that keeping and the accused with full knowledge of the circumstances gave her a home and finally transferred her to the keeping of two other persons on receipt of a sum of money and these latter reprsenting her to belong to a higher caste than her own induced a person to purchase her for the purpose of marriage.

Held—That the accused could not be convicted either under sec. 366 or sec. 372, I. P. C.

Cumulative sentences—Irregularity in procedure.

EMPEROR *v.* BATESHAR, I. L. R. 37 All. 628.

Different persons were injured, grievous hurt was caused in one case and simple hurt in others.

Held—That it was competent for the Court to impose separate and cumulative sentences.

In this case their Lordships while not setting aside the conviction on the ground of irregularity in the Magistrate's procedure in summoning the accused before examining the complainant observed as follows:—We wish very strongly to impress upon the Magistrate that the provisions of the Code as to procedure ought to be strictly followed, non-observance thereof leads to much confusion and waste of public time not to speak of involving the parties in unnecessary expense.

Criminal Procedure Code, sec. 145.

TULSHI RAM *v.* ABRAR AHMED, I. L. R. 37 All. 654.

Under sec. 145 of the Code of Criminal Procedure the Magistrate cannot oust the party whom he finds to have forcibly and wrongfully dispossessed the rightful party and put the latter in possession.

(CIVIL.)

Transfer of Property Act, sec. 54.

KANKSHAR PROSAD *v.* ABEDI BIBI, I. L. R. 37 All. 631.

In a deed of sale it was stipulated that the purchase money would be paid on the purchaser getting possession of the property transferred and no payment at all would be made if he did not get possession.

Held—That the stipulation in question did not prevent the transaction amounting to a sale within the meaning of sec. 54 of the Transfer of Property Act.

That there is nothing contrary to public policy in providing that the payment of the consideration should be postponed in certain events and that it should not be paid at all in the event of the property being lost.

Indian Limitation Act, sec. 6.

Sec. 6 of the Indian Limitation Act cannot give any exemption from the provisions of sec. 48 of the Code of Civil Procedure.

Civil Procedure Code, Or. II, r. 2.

ABDUL HAKIM *v.* RAHIM ALI KHAN, I. L. R. 37 All. 646.

Where the Plaintiff knowing perfectly well what relief he is entitled to, omits to claim the right relief, his subsequent suit in respect of the same cause of action for the right relief is barred by the provisions of Or. II, r. 2, C. P. C.

Contract Act, sec. 61.

Kundan Lal v. Jagannath, I. L. R. 37 All. 619.

The meaning of sec. 61 of the Contract Act is that the debtor is to make his appropriation at the time of paying and the creditor to make his appropriation at the time of receiving the money.

The Indian Legislature in enacting secs. 59 to 61 of the Contract Act adopted the rule of Civil law laid down in *Clayton's* case (1816, 1 Mr. 572) with certain modifications.

Indian Limitation Act, Art. 134.

Drigpal Sing *v.* Kallu, I. L. R. 37 All. 660.

The omission of the words "good faith" from Art. 134 in the present Limitation Act (IX of 1908) does not entitle a person who purchases with full knowledge that his vendor's title was merely that of mortgagee to the benefit of Art. 134.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—Before Viscount Haldane, and Lords Kinnear, Shaw, Parmoor and Wrenbury. *John Leng & Co., Ld.* v. *Langlands.* 21st January 1916.

The law of libel in relation to newspapers—It is for the Judge to decide whether the language of an article supports an alleged libellous innuendo.

The Plaintiff sued the "Dundee Advertiser" for libel. The first Court held that no reasonable body of men could extract the innuendo from the published article, and dismissed the action. But the Appellate Court remitted an issue for trial. The Court allowed the Defendant's appeal. Viscount Haldane in the course of his judgment said as follows:—

The question whether the language used supported that innuendo was a question to be decided by their Lordships as Judges of law. Was it possible if that language was read in its ordinary sense to say that it was such as could reasonably and naturally support the innuendo? It was not enough for the Respondent to say that the language was ambiguous, that it was equally susceptible of either of two meanings, and that that was for the jury to decide. He must prove his case. He must *show that the language, either by itself or taken with he surrounding circumstances, supported the innuendo.*

In England the question of libel or no libel was for the Judge, but owing to a great controversy which occurred in the early part of the last century Fox's Act was passed, which said that in future in criminal proceedings the question of libel was for the jury. The result was that for some time the tendency was to leave the whole matter to the jury, and for the Judge not to interfere; but Lord Blackburn and the majority of the Judges who decided the *Capital and Counties Bank* v. *Henty* (7 App. Cas., 745) said that it was the law of England to-day that the question whether the words could reasonably bear the construction sought to be put upon them by the person who was said to be libelled was for the Court in the first instance; and the broad principle was the same in England and in Scotland.

In practice in England this question was usually determined upon motion in arrest of judgment, but in Scotland there had always been a very useful procedure under which at an early stage of the action issues were settled by the Court. In determining whether these words could support the innuendo it was not to the point that some Judges had thought they could. This was a question of law which it was their Lordships' duty, sitting in that House, to decide for themselves.

The first thing he wished to say was that in dealing with a newspaper article written about a matter of public interest, considerable latitude was allowed by the law. Any person in the position of an architect to a school board must submit to a large amount of public criticism—such criticism would not be permissible in the case of a private person. In such cases malice in law was rebutted and malice in fact must be proved. Applying that principle to the document before their Lordships there was here a pretty severe comment on the system which enabled the Respondent to hold the position he did and an intimation that that could not be a good system, but he found nothing that went beyond the limits of the principle which he had stated.

As he read this article it contained no imputation upon the Respondent in his private or professional capacity. It was important that the Press should be at liberty to criticize fairly public men, but it was equally important that people should have their private character sustained and should not be exposed to slander or

libel. He was not suggesting for a moment that if he thought the Dundee Advertiser had touched the Respondent in his private capacity he would have given the advice which he now gave.

Mr. Condie Sandeman, K. C., and *Mr. Charles Lippe* (Scottish Bar) for the Appellants.

The Lord Advocate (Mr. Munro, K. C.) and *Mr. James B. Paton* (Scottish Bar) for the Respondent.

B. D.

KING'S BENCH DIVISION. Before THE LORD CHIEF JUSTICE, and JUSTICES SANKEY and LOW. *The King* v. *Brighton Town Council.* 20th January 1916.

A Town Council ought to decide matters according to judicial principles.

This was a rule taken out against the Borough of Brighton to shew cause why they should not hear and determine according to law an application of the petitioners for grant of licenses. The Town Council refused the license on the ground that there was already a local omnibus service, and that the streets of Brighton being narrow the grant of license to the petitioner would be dangerous to the public. In refusing the petitioner's application, however, the Town Council gave no reason. It was urged in support of the rule that the Council had not considered the application in a judicial manner. The Court made the rule absolute. The Lord Chief Justice in the course of his judgment said :—

The only question for the Court was whether there was evidence to show that in refusing the licenses for omnibuses the Council had acted from bias or in an improper exercise of their discretion. It appeared that the Council had taken the advice of their chief constable upon the traffic conditions, and had been guided by his opinion, and the Court could not possibly say that they had been actuated by improper or immaterial considerations. As regards the omnibus licences, therefore, the rule must be discharged.

The case of the charabancs was somewhat different. The Watch Committee had recommended that licenses should be granted to Tilling's for charabancs, and the Council had refused Tilling's application and had granted licences for extra charabancs to the local company. They had given no reason for their *refusal, and in the circumstances he felt that Tilling's had made out a primâ facie case, and it was for the Council to show that they had* exercised their discretion in a judicial manner. Further affidavits had now been put in, and it did appear that in refusing the charabanc licences the Council were showing their annoyance that Tilling's persisted in sending their omnibuses from Hove into Brighton though licences for Brighton had been refused to them.

The principle on which the Court acted in such a case was laid down in *Sharp* v. *Wakefield* [(1891) A. C., 179] and *Reg.* v. *Bowman* [(1838) 1 Q. B., 666] and *R.* v. *London County Council* [(1915) 2 K. B., at 475].

The Court should be very slow to interfere with the decisions of local authorities. It was the policy of Parliament to leave the decision of certain matters to those authorities, and the Court had always taken the view that it could not interfere with a decision reached by a local authority which had dealt with a case on its merits without considering matters which were inadmissible, even though on the facts the Court itself would have come to a different determination. But it was the duty of the Court to interfere when it came to the conclusion that the local authority had not properly exercised its discretion and had been influenced by extraneous matters. It was purely a question of fact on the evidence. Here it seemed that on the evidence the Council acted on extra-judicial considerations. He was sure that the Council had not intended to do anything which was not according to law, but it had strayed from the path marked out by law. So far as regarded the charabancs the rule must be made absolute.

Mr. Montgomery, K. C., and *Mr. Rowand Harker* for the Town Council.

Mr. Macmorran, K. C., and *Mr. Barrington-Ward* in support of the rule.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CHITTY and WALMSLEY, JJ. MISCELLANEOUS No. 13 OF 1916. RAM PROSHAD ROY AND ORS., Petitioners *v.* THE EMPEROR. 18th February 1916.

Criminal Procedure Code, sec. 526—Transfer on the ground of expression of strong opinion by Magistrate.

The Sub-divisional Magistrate of Gopalgunj in the District of Saran called upon some of the Petitioners under sec. 144, Cr. P. C., to show cause why they should not be ordered to abstain from interference with certain lands in dispute. On cause being shown the proceeding under sec. 144 was discharged. Thereafter the police submitted a report stating that there was still a likelihood of a breach of the peace. On this the Sub-divisional Magistrate issued warrant of arrest against the Petitioners and directed them to show cause why they should not be bound down under sec. 107, Cr. P. C. The order of the Magistrate was as follows :—

Whereas the police report of Barauli thana, dated 14th December 1915, taken in connection with the sec. 144, case No. 106 constituted absolutely clear *primâ facie* evidence not only that a serious breach of peace occurred on 12th December 1915, during the pendency of sec. 144 proceedings, but that there is every fear of a repetition of such a disturbance; and whereas this likelihood is increased by the fact that in case No. 106 I was misled by a misapprehension of the facts on 16th December 1915 to discharge a rule under sec. 144 against the 2nd party who have been sent up as accused in this sec. 107 report; and whereas there have been three reports now under sec. 144 against these same parties who have already shown their disregard of the law by the riot of 12th December 1915 when, as abundant evidence is tendered to prove, some crops were evidently cut and removed, and who have subsequently made preparations for further rioting and have threatened the injured 1st party and whereas the fact that three of accused are servants of an influential *malik*, and a fourth a *chaukidari* president makes the danger more imminent, and whereas I am therefore clearly of opinion that the feared breach of the peace cannot be prevented otherwise than by the immediate arrest of the men of the 2nd party mentioned in the police report and whereas the connection of Mohommed Ishaq (one of the Petitioners) with the dispute about which I expressed doubt in my order of 16th December 1915 is amply proved by the facts now brought forward. I call upon you to show cause why you should not be ordered to execute a bond each to keep the peace for one year.

The Petitioners moved the High Court for a transfer of the case from the file of the Sub-divisional Magistrate and obtained a rule.

Their Lordships made the rule absolute.

Babus Dasarathi Sanyal and *Rajendro Proshad* for the Petitioners.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before JENKINS, C. J. and HOLMWOOD, J. APPEALS FROM APPELLATE DECREES NOS. 2152 AND 2153 OF 1912. MOKHODA PROSAD BANDAPADHYA AND ORS., Defendants, Appellants *v.* BAIDYA NATH GHOSH AND ORS., Plaintiffs, Respondents. 10th August 1915.

Suit to set aside decree on ground of fraud—Readiness of Courts to find fraud, commented on.

This was an appeal preferred on the 26th of July 1912, against the decree of R. L. Datta, Esq., District Judge of Zillah Bankura, dated the 25th March 1912, reversing the decree of Babu Sarada Prosad Bakshi, Munsif, 3rd Court, Bankura, dated the 29th June 1911.

JENKINS, C. J., in the course of his judgment, in which Holmwood, J. concurred, said—

"Appeal No. 2152 is against a decision of the District Judge of Bankura who differing from the Munsif has held that a previous rent decree in suit No. 763 of 1909 was procured by fraud and is therefore liable to be set aside.

"Having considered the materials before us, I must confess that I am wholly at a loss to understand how the District Judge could have come to the conclusion he has reached. He seems to have acted in the absence of evidence and in the absence of evidence to have found a case of fraud. I have had occasion before now to comment on the readiness of some of the lower Courts to find fraud. It seems as if fraud only has to be suggested for some Courts to be irresistibly attracted to it and none the less, if

it involves the reversal of a decision of a Court of first instance.

"Here the marks of fraud alleged are non-service of summons in rent suit No. 763 of 1909, amendment by the Court in the course of the trial of the plaint and evidence given in that suit which for some reason which I confess I do not appreciate the learned District Judge in this case thought had been improperly appreciated by the learned Judges who had preceded him and was false.

"The case only has to be stated to show how flimsy and unworthy of serious consideration are the materials upon which this grave conclusion has been reached by the District Judge. So far as the non-service of summons is concerned the facts are these: the decree shows that all Defendants in that suit were present. As a matter of fact the first Defendant actually put in a written statement and attended the trial through his pleader. Further than that he made an application under Or. IX, r. 13, to have the decree set aside. That was decided against him by the Court of first instance and on appeal. Yet forsooth the District Judge sweeps all that aside as if it had never existed. In that application under Or. IX, the first Defendant Baidya Nath Ghose did not venture to suggest that he had not been served. It is just as well that he did not, seeing that he actually put in a written statement. So his non-service goes. What evidence then is there as to the non-service of other Plaintiffs whose presence has been asserted in the decree? It is the evidence of the same Baidya Nath Ghose. The other Defendants are the persons who could have spoken to and could have negatived service but they have refrained from coming into the witness-box. Yet these are the materials on which the learned Judge ventures to speak of the suppression of summons of the suit so far as all the Plaintiffs are concerned. It appears to me that there is no legal foundation in the evidence for this conclusion. As a matter of law I hold that there is no fraud established as to the suit in its inception.

"How the learned District Judge could have suggested that an amendment made in open Court in the course of the trial was evidence of fraud I confess I do not know. It is sufficient to say that it clearly cannot be made a foundation of a charge of fraud. Nor can the learned Judge's appreciation of the evidence in the case be regarded as a foundation on which to set aside the decree. As to that I have nothing to add to what was said by a Bench of which I was a member in the case of *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (18 C. W. N. 681 : s. c. I. L. R. 41 Cal. 990).

The decree of the lower Appellate Court must be set aside and that of the Court of first instance restored with costs throughout.

Babu Bijoy Kumar Bhattacharji for the Appellants.

Babus Karunamoy Bose and *Panchanan Ghose* for the Respondents.

Appeal allowed.

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and TEUNON, JJ. APPEAL FROM APPELLATE DECREE No. 1967 OF 1914. LALA DEOSARAN LALL AND ORS., Defendants, 1st Party Appellants *v.* BATESVAR MANDUL, Plaintiff and the remaining Defendants, Respondents. 23rd February 1916.

Co-sharer landlord purchasing non-transferable occupancy holding—Effect.

The appeal arises out of a suit for confirmation of possession and in the alternative for recovery of possession of the land in suit, by declaration of Plaintiff's title.

The Plaintiff purchased the property, a portion of a non-transferable occupancy-holding, from the Defendants, 2nd party, by a *kobala*, dated 11th September 1907. The same property was purchased by Defendant, 1st party, co-sharer landlords, in execution of their own decree against Defendants, 2nd party in 1911 and they took delivery of possession and hence this suit.

The lower Appellate Court decreed the suit. On appeal, it was contended that the Full Bench decision in *Dayamayi's* case, I. L. R. 42 Cal. 172, was an authority for the proposition that a co-sharer landlord could question the validity of a transfer.

Held, that a co-sharer landlord is in no better position than a stranger and hence the transfer by a raiyat of his non-transferable holding is binding against him.

Babu Rajendra Prosad for the Appellants.

Babu Panchanan Ghose (for *Babu Harihar Prasad Sinha*) for the Respondents.

CIVIL APPELLATE JURISDICTION. Before NEWBOULD, J. APPEAL FROM APPELLATE DECREE No. 2528 OF 1914. ASUTOSH PAL, Plaintiff, Appellant *v.* KHODA BUKSH AND ORS., Defendants, Respondents. Heard, 24th January. Judgment, 7th February 1916.

Execution sale—Rent decree—No application by judgment-debtor to set aside the sale—Payment out of Court—Payment not certified—Sale confirmed.

The appeal arose out of a suit for recovery of 10 bighas of land upon establishment of the Plaintiff's title thereto. The Plaintiff purchased the holding at a sale in execution of a rent decree obtained by Defendant No. 2 against Defendant No. 3. The Defendant No. 1 purchased the holding from Defendant No. 3 before the execution sale. The first Court gave the Plaintiff a decree. On appeal by Defendant No. 1 the lower Appellate Court dismissed the suit.

The first Court recorded in the Order-sheet that the statement of the judgment-debtor (Defendant No. 3 in the present suit) that he did not deposit the money to have the sale set aside must be accepted.

Held, that on that finding the executing Court was justified in refusing to set aside the sale and it had jurisdiction to come to such a finding.

It was found by the lower Appellate Court that the decree in the rent suit was satisfied by Defendant No. 1 before the sale. The payment however was not certified to the Court before the date fixed for the confirmation of the sale. On that day the decree-holder (Defendant No. 2 in the present suit) filed a petition for setting aside the sale on the allegation that the Defendant No. 1 had satisfied the decree before its execution. The executing Court rejected that petition and confirmed the sale. In the present suit the first Court found that this payment of the decretal amount was made long after the sale and held that the sale was valid.

Held, where a person, a stranger to the proceedings, purchases property *bonâ fide* at an auction sale held in execution of a decree, the sale to him cannot be set aside on the ground that the decree had already been satisfied out of Court at the time the sale was held.

Telappa v. *Ram Chandra* (I. L. R. 21 Bom. 463) and *Mothura Mohun* v. *Akhoy Kumar* (I. L. R. 14 Cal. 376) followed.

Janukdhari Lal v. *Gossain Lal* (I. L. R. 37 Cal. 107) distinguished.

Babus Mahendra Nath Ray and *Satcouripati Roy for* the Appellant.

Mr. Zahid (Counsel) and *Babu Jyotis Chandra Sarkar* for the Respondents.

A. T. M. *Appeal decreed.*

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA, and RICHARDSON, JJ. APPEAL FROM APPELLATE DECREE No. 466 OF 1914. REYAZDDIN, Defendant No. 5 *v.* ASHRAF ALI PAL AND ORS. (Plaintiffs) and SALIMUDDIN AND ORS. (Remaining Defendants), Respondents. Heard, 11th and 14th February. Judgment, 14th February 1916.

Limitation Act (IX of 1908), Sch. I, Arts. 75, 132—Acceptance of part of overdue instalment —Waiver.

The appeal arose out of a suit based on an instalment mortgage-bond. There was a stipulation in the bond that on default of two consecutive instalments, the whole of the instalments would become due. The Court of first instance found that the Plaintiffs accepted part of the instalments due in 1305 and 1306 and that the full instalment for those years was never paid. On appeal the learned District Judge held with reference to the endorsement of payment on the bond that the instalments due up to 1307 had been fully paid. But the endorsement on the bond did not show that all the instalments for 1305 had been paid up. There was thus not a payment of the instalments up to 1306 in full in 1307.

Held, that as all the instalments became due more than 12 years before the suit, the suit was barred.

The acceptance of a part of overdue instalments did not constitute waiver.

Mohesh v. *Prosanna* (I. L. R. 30 Cal. 83) followed.

Quære: Whether the question of waiver which arises under Art. 75 is relevant in a case falling under Art. 132 of the First Schedule to the Limitation Act.

Babu Bhudeb Chandra Roy for the Appellant.

Babu Sarat Chandra Dutt for the Respondents.

[illegible] *Appeal decreed.*

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

VISCOUNT HALDANE.
LORD PARMOOR.
LORD WRENBURY.
SIR JOHN EDGE.
MR. AMEER ALI.

1915,
14, December.

PANDIT PARBHU DYAL, Appellant,
v.
KALYAN DAS and ors., Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 583—Restitution—Decree for redemption against mortgagee with possession in first Court reversed on appeal—Mortgagee's application to first Court for recovery of mesne profits for period of dispossession in execution of first Court's decree—Jurisdiction—Remedy when jurisdiction wrongly exercised by appeal or revision.

Where the Plaintiffs in a suit for redemption of a mortgage with possession having obtained a decree in the Court of a Subordinate Judge recovered possession in July 1878, but the High Court on appeal varied that decree by directing the Plaintiffs to pay a further sum of Rs. 9,000 but on their failure to do so, the mortgagee recovered possession in April 1880 and then applied to the Subordinate Judge for an order for mesne profits for the period he was out of possession, and obtained a decree for a sum of over Rs. 5,000, and in execution of that decree, the Plaintiffs' equity of redemption was sold and purchased by the decree-holder, and an application under sec. 311 of the Civil Procedure Code of 1882 to set aside the sale failed.

Held, *in a second suit for redemption brought by an assignee of the mortgagors, that the Subordinate Judge had jurisdiction to make the decree for mesne profits by way of restitution, and if he exercised that jurisdiction wrongly the persons aggrieved had their remedy, under the Code of Civil Procedure, either by appeal to the High Court or by an application for revision, and the present action was wholly misconceived.*

The facts of the case will appear sufficiently from their Lordships' judgment. The main question raised was whether the Court of the Subordinate Judge had jurisdiction to pass a decree dated the 31st March 1881 for mesne profits upon the application of the mortgagees against whom in a suit by some of the mortgagors for redemption a decree for possession had been made by that Court and executed but was on appeal reversed by the High Court with the result that the mortgagees were restored to possession. The decree of the High Court had directed the Plaintiffs to pay a sum of Rs. 8,956-12-11 over and above what they had paid in accordance with the decree of the Subordinate Judge. It did not however contain any provision directing foreclosure in the event of the Plaintiffs' failure to pay this amount. The Plaintiffs having failed to pay this amount, the mortgagees recovered possession on 1st April 1880, having been out of possession from 12th June 1878, the date on which the Plaintiffs had taken possession in execution of the Subordinate Judge's decree.

Under the mortgage-deed the mortgagees were entitled to take the rents and profits in lieu of interest.

Upon this part of the case, the High Court (Stanley, C.J., and Banerjee, J.) observed as follows :—

"This contention is based on the argument that the decree of the High Court varying that of the Court below did not direct the award of usual profits . . . In our opinion the reversal by an Appellate Court contains, by necessary implication, a direction to the Court below to cause restitution to be made of all the benefits of which the successful party in the appeal was deprived by the enforcement of the erroneous decree of the Court of first instance . . . The absence of a specific direction in the decree of the High Court for payment of mesne profits did not

deprive the Court, which made the order of 31st March 1881, of its jurisdiction to award mesne profits. It is clear that the Court which could enforce the liability of the defeated Plaintiffs to make restitution was the Court of first instance.' That Court had jurisdiction not only to restore to the mortgagee the possession which he had lost, but all other benefits of which he had been deprived . . . The only Court which would determine the question thus raised, and had jurisdiction to decide that question was the Court of the Subordinate Judge. It had jurisdiction to decide whether mesne profits should or should not be awarded. Whether its decision was correct or erroneous is immaterial, as the Court had jurisdiction to decide rightly and to decide wrongly. Even if it be assumed that it erred in awarding mesne profits, it cannot be said that it acted without jurisdiction. Dr. Satish Chandra Banerjee, the learned advocate for the Appellant, strenuously relied on the ruling of their Lordships of the Privy Council in *Kalka Singh* v. *Parasram* (1). There a Court had made a decree for possession but not for mesne profits. The Court executing the decree, in spite of the absence of a direction in the decree itself as to payment of mesne profits awarded such property to the decree-holder and sold the judgment-debtor's property for the realisation thereof. It was held that the order of the Court executing the decree for the award of mesne profits was without jurisdiction. This is not the case here. As we have pointed out above, the Court of first instance was competent to determine the question of restitution."

Sir Erle Richards, K.C., and *Mr. Kenworthy Brown* for the Appellant, submitted that the decree which awarded mesne profits was made without jurisdiction, it was a nullity—and that the sale of the property in dispute to realize the amount of the mesne profits, was null and void. Reference was made to secs. 244 and 583 of the Code of Civil Procedure, (1877). *Kalka Singh* v. *Parasram* (1).

In any case the Appellant was entitled to redeem the shares of the daughters of Zahur Ahmed, which were not affected by the previous litigation, as they were not parties to it.

Mr. L. DeGruyther, K.C., and *Mr. Bhagwandin Dubé*, Counsel for the Respondent, were not heard.

THEIR LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The facts on which the two suits that have given rise to the present appeals were brought in the Court of the Subordinate Judge of Aligarh, are fully set out in the judgment of the High Court of Allahabad. It is sufficient, therefore, to state shortly the circumstances which form the basis of the Appellant Parbhu Dyal's claim. He was the Plaintiff in one of the actions (24 of 1906) which was a suit for the redemption of a mortgage, whilst in the other (173 of 1906) he was joined as a Defenadnt. Both suits, however, related to a village called Lodhamai. A half share of this property, in the nomenclature in vogue in this part of the country described as a 10-biswas share, belonged originally to one Ram Bakhsh. In the year 1863, Ram Bakhsh executed a usufructuary mortgage in respect of this share for a term of eleven and a half years in favour of one Debi Das since deceased. It may be noted here that just as 16 annas constitute the integral unit in Bengal and other places, 20 biswas form the unit in

(1) L. R. 22 I. A. 68-70: s. c. I. L. R. 22 Cal. 434 (1894).

(1) L. R. 22 I. A. 68 70: s. c. I. L R. 22 Cal 434 (1894).

most parts of Upper India; 20 biswansis going to a biswa. The mortgage-deed in favour of Debi Das provided that the mortgagee should remain in undisturbed possession of the mortgaged property and take the rents and profits in lieu of interest. The principal money secured by the mortgage was never repaid and Debi Das continued to hold the share after the expiration of the term for repayment. In the meantime, Ram Bakhsh was dealing with the equity of redemption; in 1866 he assigned his right in 7 biswas of his 10 biswas to the minor sons of a person named Zahur Ahmed; a little later he sold to Zahur Ahmed himself 2 biswas 19 biswansis, and subsequent thereto the remaining fraction left in his hands to the mortgagee Debi Das. The outstanding equity of redemption in respect of 9 biswas 19 biswansis thus vested in Zahur Ahmed and his sons. Zahur Ahmed died shortly after, leaving as his heirs besides his sons several daughters and two widows. His estate, including the right to redeem the mortgage to Debi Das, accordingly devolved on his heirs. In 1877 his sons under the guardianship of their mother brought a suit for redemption against Debi Das; and in May 1878 they obtained a decree for possession on payment to the mortgagee of a specified sum. This money appears to have been paid into Court, and the Plaintiffs obtained possession of the property in July 1878. The decree of the Court of first instance was, however, varied on appeal by the High Court, which directed payment by the Plaintiffs of a further sum of Rs. 9,000. This they failed to do and the mortgagee was restored to possession by an order of the Court in April 1880. Debi Das then applied to the Court for an order for mesne profits for the period during which he was out of possession, and in [illegible] 1881 he succeeded in obtaining a decree for a sum of over Rs. 5,000. In execution of this decretal order he caused the outstanding equity of redemption to be attached and sold, and at the auction sale purchased the same himself. After his purchase as aforesaid he purported to deal with the property as absolute owner; he mortgaged the property to one Sagar Mal who obtained a decree on his mortgage, and in execution of that decree the Defendants in suit 173 of 1906 purchased the share in question in 1897. In suit 173 of 1906, which has given rise to Appeal 75, the heirs of Debi Das are the Plaintiffs, and they seek to redeem the property on the ground that although Debi Das after his purchase in 81 became the absolute owner, the Defendants had in the auction sale held in 1897 only acquired his mortgagee right.

The sons of Zahur Ahmed on the other hand continued to deal with their right to the equity of redemption as still subsisting in them; and, by two deeds of sale, assigned to Parbhu Dyal, the Appellant, a 5 biswas share of the property. Parbhu Dyal, after failing in one suit in 1905 on the ground of non-joinder of parties, brought in 1906 the present action to redeem the mortgage executed by Ram Bakhsh in 1863 and for ancillary reliefs. He contended in the Courts below, as has been contended before this Board on his behalf, that the decree for mesne profits and all the proceedings thereunder, culminating in the sale at which Debi Das purported to purchase the equity of redemption, were made without jurisdiction and conveyed no title to the purchaser; and as they were mere "nullities" the right of his assignors was unaffected, and by virtue of the assignment to him he is entitled to redeem.

Both Courts have overruled his contentions and dismissed his suit. Their Lord-

ships fully concur in the reasons given by the High Court for disallowing the Plaintiff's claim. As the learned Judges point out, the Court which awarded the mesne profits had full jurisdiction in that behalf; if it exercised the jurisdiction wrongly, the persons aggrieved had their remedy under the provisions of the Indian Code of Civil Procedure, either by appeal to the High Court or by an application for revision. Objection was in fact taken under sec. 311 of the Civil Procedure Code (1882) to the sale for mesne profits, which was disallowed, and there was no appeal from that order. The present action, in their Lordships' opinion, is wholly misconceived. It was further urged on Appellant's behalf that he was at any rate entitled to redeem the share of Zahur Ahmed's daughters who were no parties to the suit of their brothers or to the subsequent proceedings held therein. Their Lordships are not satisfied that any right was in fact conveyed to Parbhu Dyal by those ladies, or that if any right was conveyed as alleged what its extent was.

The appeal will be dismissed with costs to be paid by the Appellant, Parbhu Dyal, to the Respondents who are represented at the hearing.

It is admitted that this judgment will govern appeal 75, which arises out of suit 173 of 1906 brought by the heirs of Debi Das. This appeal will also be dismissed.

And their Lordships will humbly advise His Majesty accordingly.

Solicitor: *Mr. Douglas Grant* for the Appellant.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for the Respondents.

B. D. *Appeal dismissed with costs.*

[FULL BENCH REFERENCE]

IN

APPEAL FROM APPELLATE DECREE

No. 577 of 1909.

Sanderson, C. J. Woodroffe, J. Mookerjee, J. Holmwood, J. D. Chatterjee, J. 1916, 7, February.	Jnanada Sundari Chowdhurani, Plaintiff, Appellant, *v.* Adu Sheik and ors., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 105—Decision of Special Judge in appeal from order of Settlement Officer in proceeding under sec. 105 allowing enhanced rent on basis of excess area, if open to second appeal to High Court—Finding of fact based on erroneous interpretation of contract.

In a proceeding under sec. 105 of the Bengal Tenancy Act the landlords' case was that the area in the occupation of the tenant as found on measurement in the settlement proceedings under Chap. X of the Bengal Tenancy Act by the revenue authorities exceeded the area mentioned in the kabuliyat *wherein it was stipulated that the landlord could have the land measured within the term and if the area or the classification was found to be wrong the tenant would be bound to pay additional rent or be entitled to a reduction as the case might be. The landlord claimed assessment of rent on the difference between these two areas and prayed for a fair and equitable rent being settled for all the lands in the holding. The tenant denied that he was in possession of excess lands. The Settlement Officer found that the tenant was in occupation of excess area and he assessed fair rent on this basis. In appeal the Special Judge held in substance that the tenant was not in occupation of excess lands because he must be deemed under his contract to be in occupation of the area mentioned therein. Against this decision of the Special Judge the landlord preferred an appeal to the High Court.*

JNANADA SUNDARI CHOWDHURANI *v.* ADU SHEIK.

Held—*That when in a proceeding under sec. 105 of the Bengal Tenancy Act the Settlement Officer is asked to increase the rent under sub-sec.* (4) *in accordance with the rules laid down in sec. 52 and the claim is refused on appeal to the Special Judge on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid a second appeal to the High Court is not barred by sec. 109A of the Bengal Tenancy Act.*

That in the present case a second appeal lay to the High Court and should also succeed on the merits, inasmuch as the finding of the Special Judge involved an error of law.

This reference arose out of an appeal from a decision of H. Walmsley, Esq., Special Judge of Mymensingh, dated the 14th July 1908, modifying a decision of Babu Beni Madhab Chatterjee, Settlement Officer of Mymensingh, dated the 14th February 1906.

The order of reference (WOODROFFE and COXE, JJ.) was as follows :—

These appeals arise out of proceedings for the settlement of a fair and equitable rent, and the substantial question in controversy between the parties is whether the landlord is entitled to rent for the whole area ascertained by measurement to be within the tenants' holdings at the rates mentioned in the *kabuliyats* which were executed by the tenants for these holdings before the passing of the Tenancy Act. One *kabuliyat* has been translated and laid before us as a sample of their terms. This was executed by the tenant in respect of six annas odd " described in the schedule " and the tenant promised to pay Rs. 29 odd as rent for the said lands " according to the description and rates given below." The schedule gives the area, boundaries and classification of each plot, and ended in an abstract showing (*i*) the total area of each class of land, (*ii*) the rate of rent per area of that class, and (*iii*) the total rent payable for the area in each class. It was stipulated in the *kabuliyat* that the landlord could have the land measured within the term, and if the area or the classification was found to be wrong, the tenant would be bound to pay additional rent or be entitled to a reduction of rent, as the case might be.

The Settlement Officer held that these stipulations in the *kabuliyats* regarding the payment of rent according to the result of a further measurement were valid and decided the point in controversy in favour of the Plaintiff. The learned District Judge has reversed the Settlement Officer's decision on that point and the Plaintiff appeals.

It appears to us that the Settlement Officer's decision is in accordance with the principles laid down in *Rajkumar Protap Sahay* v. *Ram Lal Singh* (4) and *Akbar Ali Mian* v. *Hira Bibi* (5), with which, on this point, we are in agreement. On the merits, therefore, we think that the appeal should succeed.

A preliminary objection, however, has been taken that no appeal lies on the ground that the decision of the District Judge is a decision settling a rent within the meaning of sec. 109A of the Tenancy Act. It was held in *Akbar Ali Mian* v. *Hira Bibi* (5), cited above, that in cases of this nature an appeal lay. The question, however, was not discussed and the decision proceeded on the principle of *stare decisis*, the rulings followed being *Mathura Mohan Lahiri* v. *Uma Sundari Debi* (3) and *Rajkumar Protap Sahay* v.

(3) I. L. R. 25 Cal. 84 (1897).
(4) 5 C. L. J. 588 (1907).
(5) 16 C. L. J. 82 (1912).

Ram Lal Singh (4), quoted above. The latter ruling is clearly in point. The facts were almost exactly the same as those of the case now before us. The decision of *Mathura Mohan Lahiri* v. *Uma Sundari Debi* (3), was under the unamended Act, but the principle on which it proceeded seems to us to be the same. Under the Act as it then stood an appeal lay to this Court from the decision of a Special Judge "in any case under sec. 106." Sec. 106 dealt with disputes over the correctness of an entry in the record-of-rights (not being an entry of a rent settled). Consequently disputes over an entry of a rent settled did not come within sec. 106, and so could not be the subject of an appeal to this Court. It was held, however, in the case cited that when, in proceedings taken on the application of a landlord for the settlement of rent, the liability of the tenants to pay rent on account of any alleged excess area was decided, an appeal lay to this Court.

On the other hand the opposite view was taken in *Rameswar Singh* v. *Bhooneswar Jha* (9) and *Grant* v. *Ram Rekha Bhagat* (10), that in cases of this nature no second appeal lay. A reference to the papers of the last-mentioned case shows that in it increased rent was claimed on the ground of an increase of area. In our opinion these two cases cannot be reconciled with the other cases mentioned above, and the point can only be settled by a Full Bench.

We would formulate the point as follows: "When in a proceeding under sec. 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-sec. (1) in accordance with the rules laid down in sec. 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by sec. 109A of the Act?"

We make this reference in Appeal No. 577. The other analogous appeals will remain pending till this is disposed of. The rules granted in these cases are discharged as no possible question of jurisdiction arises.

Babu Dwarka Nath Chakravarti (with *Babus Chandra Kanta Ghosh*, *Girija Prosonna Ray Chowdhuri* and *Nilkanta Ghosh*) for the Appellant.

If under sec. 105 of the Bengal Tenancy Act the Settlement Officer decides any matter which may come under sec. 105A or 106 the decision is open to appeal to the Special Judge. The proviso to sec. 109A shows that although the appeal is against a final decree settling rent the High Court may alter any of the particulars. In that case this Court shall settle fair rent again. Then the particulars are matters coming under sec. 105A or 106.

In the present case the landlord says that the tenant is in possession of more lands than he is paying rent for. The tenant says no. Thus the issue arises which can be decided under sec. 105A or 106.

[Sanderson, C. J.—Your contention is that the decision against which this appeal is, is not a decision setting rent.]

Yes.

[Holmwood, J.—Does the issue raised come under sec. 105A?]

The question was raised and the Settlement Officer apparently exercised jurisdiction under sec. 105A.

[Mookerjee, J.—It might come under cl. (*a*).]

[Sanderson, C. J.—The Settlement Officer was deciding [redacted] and there

(3) I. L. R. 25 Cal. 34 (1897).
(4) 5 C. L. J. 538 (1907).
(9) 4 C. L. J. 133 (1906).
(10) 14 C. L. J. 110 (1910).

was in each holding and not the question of liability to pay rent.]

[MOOKERJEE, J.—The tenant said that he was liable to pay rent for a certain area, if he had more land in his possession he was not liable to pay rent for the additional area. The landlord turned round and said you are liable to pay rent not only for the area admitted by you but also for the area which you are found to possess in addition to that. So the question was: Is there any land in the possession of the tenant which is not liable for rent as alleged.]

Referred to *Rajkumar Protap Sahay* v. *Ram Lal Singh* (1), *Akbar Ali Mian v. Hira Bibi* (5) and *Prithee Chand Lal Choudhury* v. *Basarat Ali* (1). The case in *Rajkumar Protap Sahay* v. *Ram Lal Singh* (4) was approved in *Prithee Chand Lal Choudhury* v. *Basarat Ali* (1) which was a Full Bench decision.

So the question is one which has been considered not only by Division Benches but by a Full Bench of this Court.

Babu Upendra Lal Roy (with *Moulavi Nuruddin Ahmed*) as *amicus curiae*.

Sub-sec. (3) of sec. 109A allows an appeal to the High Court from the decision of the Special Judge subject to the provisions of Chap. XLII of the Code of Civil Procedure of 1882 corresponding to sec. 100 of the present Code. The Special Judge has found as a fact that the tenant was not in occupation of any excess area. So the present appeal is barred. The right of appeal is given subject to sec. 100, C. P. C.

[MOOKERJEE, J.—That does not touch the question of the competence of the appeal. It only provides that such grounds can be taken as can be taken in a second appeal.]

I want to show that no appeal lay and therefore the question does not arise.

[MOOKERJEE, J.—In that case in every second appeal the vakil for the Respondent can say there is no point of law and therefore no appeal lies and saying this he may begin and show that there is no point of law.]

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—The question which was referred to this Court relates to a preliminary point as to whether there was a second appeal, under the circumstances of this case, and it is stated at page 2 of the paper-book before me as follows: "When in a proceeding under sec. 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-sec. (4) in accordance with the rules laid down in sec. 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by sec. 109A of the Act."

The Settlement Officer had decided that the tenants were in possession of land which was in excess of the area mentioned in the tenancy agreement. The tenancy agreement provided that the landlord could have the land measured within the term, and if the area or the classification was found to be wrong, the tenant would be bound to pay additional rent or be entitled to a reduction of rent, as the case might be. The Settlement Officer held that by reason of that provision it was open to the landlord to have the matter of the area enquired into. He, therefore, proceeded to enquire into it, and held, as I have already

(1) I. L. R. 37 Cal. 30 : s. c. 13 C. W. N. 1149 (1909).
(4) 5 C. L. J. 538 (1907).
(5) 16 C. L. J. 182 (1912).

said, that the tenants were in fact in possession of excess land.

The tenants thereupon appealed to the Special Judge, who reversed the decision of the Settlement Officer upon the question as to whether the tenants were in possession of excess land. He then proceeded to deal with the rates of rent with regard to the lands which were specified in the tenancy agreement. His judgment is to be found at pages 26 and 27 of the paper-book of Appeal No. 2915 of 1908. I need not read it. He begins his judgment, with regard to the first finding in this way, "Next comes the question of whether the tenants have been found to be in possession of any excess land"; and, his conclusion is that "for these reasons I hold that the Settlement Officer was wrong in finding that the tenants or many of them, are in possession of excess land. Then at page 27 he proceeds to deal with the question of rent. Now, the decision of this question depends upon a few sections of the Bengal Tenancy Act which I propose to read. The first section to which I need draw attention is sec. 52. I do not intend to read but merely mention it, for the purpose of showing that I have not forgotten it. Sec. 105, sub-sec. (*1*), provides that "when, in any case in which a settlement of land-revenue is not being made or is not about to be made, either the landlord or the tenant applies, within two months from the date of the certificate of the final publication of the record-of-rights under sec. 103A, sub-sec. (*2*), for a settlement of rent, the Revenue Officer shall settle a fair and equitable rent in respect of the land held by the tenant." Then sec. 105A provides, "where in any proceedings for the settlement of rents under this part, any of the following issues arise :—(*a*) whether the land, is, or is not, liable to the payment of rent, ... the Revenue Officer shall try and decide such issue and settle the rent under sec. 105 accordingly." Then sec. 109A, sub-sec. (3), provides, "subject to the provisions of Chap. XLII of the Code of Civil Procedure, an appeal shall lie to the High Court from the decision of a Special Judge in any case under this section (not being a decision sett'ing a rent) as if he were a Court subordinate to the High Court within the meaning of the first section of that Chapter: Provided that, if in a second appeal the High Court alters the decision of the Special Judge in respect of any of the particulars with reference to which the rent of any tenure or holding has been settled, the Court may settle a new rent for the tenure or holding" and so on.

Now, in my judgment, sec. 109A clearly contemplates an appeal from the Special Judge to the High Court, with reference to the particulars in respect of which the decision which settles the rent is given. It was argued by the learned Vakil who appeared for the Appellant that the matter upon which the judgment was given in this case was a particular "with reference to which the rent of any tenure or holding has been settled," or to put in the negative way, it was "not merely a decision settling a rent." I agree with his contention. I can quite see that a matter such as this between the landlord and tenant may be a matter of great importance which may involve not only a question of fact but a question of law, as it seemed to me the question in this case did involve a question of fact as well as of law. First of all, it was alleged that under the terms of the agreement the landlord was entitled to go beyond the area which was specified in the agreement, and was entitled to have the area of the land re-measured and settled which was clearly a question of law; and,

it also involved the question of fact whether the area contended for by the landlord was the right one or that contended for by the tenant was the right one.

For these reasons I come to the conclusion that that part of the judgment of the Special Judge in which he overruled the judgment of the Settlement Officer was "not merely a decision which settled the rent." Therefore, there was an appeal from the decision of the Special Judge to the High Court. The conclusion at which I have arrived upon a consideration of these sections is supported by the decisions which were cited on behalf of the Appellant. It is only necessary for me to say, therefore, that the answer which, in my opinion, ought to be given to the question that has been referred is that the appeal in this case is not barred by sec. 109A of the Act.

I, therefore, think that the appeal ought to be entertained, and having been entertained it ought to be allowed, and the decision of the Settlement Officer restored, with costs both of this Reference and in the Division Bench hearing-fee, one gold mohur for each hearing.

WOODROFFE, J.—I agree that the question referred to us should be answered in the negative and therefore an appeal lies. On the merits also, as is stated in the referring order, I think the appeal should succeed.

MOOKERJEE, J.—The question referred for decision by this Full Bench has been framed in the following terms :—"When, in a proceeding under sec. 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-sec. (4) in accordance with the rules laid down in sec. 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by sec. 109A of the Act." In my opinion, this question should be answered in the negative, on a true interpretation of sub-sec. 3 of sec. 109A of the Bengal Tenancy Act. That sub-section provides that, "subject to the provisions of Chap. XLII, of the Code of Civil Procedure of 1882, an appeal shall lie to the High Court from the decision of a Special Judge in any case under this section (not being a decision settling a rent) as if he were a Court subordinate to the High Court within the meaning of the first section of that Chapter." In the case before us, proceedings were initiated under sec. 105, which is mentioned in sub-secs. 1 and 2 of sec. 109A. Consequently, an appeal lies to this Court from the decision of the Special Judge provided his decision is not "a decision settling a rent."

To determine the precise scope of this expression, it is necessary to examine briefly the scheme of Chap. X of the Bengal Tenancy Act, in which sec. 109A finds a place. This Chapter is divided into four parts. The first part, which treats of the preparation and publication of records-of-rights comprises secs. 101 to 103B. The second part contains secs. 104 to 104J and deals with questions of settlement of rents, preparation of settlement rent rolls, and disposal of objections, in cases where a settlement of land revenue is being or is about to be made. The third part, which includes secs. 105 to 109A, treats of settlement of rents and decision of disputes in cases where a settlement of land revenue is not being or is not about to be made. The fourth part, which covers secs. 109B to 115A embodies supplemental provisions. Consequently, when a record-of-rights has been prepared and finally published under sub-sec. 2 of sec. 103A, if, as in the case before us, a settlement of land revenue is

not being or is not about to be made, it is open to the parties, landlord or tenant, to initiate proceedings, either under sec. 105 or under sec. 106. Sec. 106 enables them to institute a suit before a Revenue Officer to challenge the correctness of the entries made in the record-of-rights. This may be regarded as the procedure for a direct challenge of the entries in the record. If a proceeding is, on the other hand, instituted under sec. 105 for a settlement of the rent by the Revenue Officer, the duty is cast upon him to settle a fair and equitable rent in respect of the land held by the tenant. Such a proceeding may follow the result of a suit, if any, instituted under sec. 106 or recourse may be had to it without the prior institution of a suit under that section. In the latter event, there may be an indirect challenge of the correctness of the entries in the record-of-rights. The provision for this contingency is embodied in sec. 105A, which authorises the investigation of specified particulars in the course of settlement of a rent under sec. 105, provided there has been no prior decision upon those questions in a suit under sec. 106.

The history of the introduction of sec. 105A, which was explained in the judgment of the Full Bench in *Prithee Chand Lal Choudhury* v. *Basarat Ali* (1), and later on summarised in *Paltoo Pandey* v. *Sri Newas Prosad* (2), throws light upon the solution of the question raised before us. It was pointed out in these cases that although sec. 105 did not by itself, in its original form, contemplate an investigation into the question of correctness of the entries in the record-of-rights, yet a practice had grown up in proceedings under that section to decide questions which, the legislature contemplated, should be determined by a suit under sec. 106. To put the matter in another way, the parties were placed in the same position as if a suit under sec. 106 and a proceeding under sec. 105 had been simultaneously instituted and consolidated, and an amalgamated trial held for the investigation of the question of fair and equitable rent. This led to the enactment of sec. 105A, which regularises the practice that had gradually developed; and the Revenue Officers while seized of proceedings under sec. 105, were expressly authorised to determine questions mentioned in sec. 105A which, in the ordinary course, would form the subject of an enquiry under sec. 106. This conclusively answers the objection suggested in the course of the argument that the Settlement Officer in the case before us had no jurisdiction to determine the question of excess area. [*Paltoo Singh* v. *Newas Prosad* (2)]. It follows accordingly that if in any proceeding under sec. 105, questions under sec. 105A have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of questions within the scope of sec. 105A, and consequently of sec. 106. If the order is of that description, we cannot reasonably hold that the decision of the Settlement Officer is a decision merely settling a rent within the meaning of sec. 109A; and consequently not liable to be challenegd by way of second appeal to this Court. We cannot be invited to sacrifice substance to form, to look merely at the label and not the contents of the adjudication. If the questions specified in sec. 105A had been decided in a suit under sec. 106, the determination by the revenue authorities would not be final; the appellate decision of the Special

(1) I L. R. 37 Cal. 30: s. c. 13 C. W. N. 1149 (1909).

(2) 18 C. W. N. 165 (1913).

(2) 18 C. W. N. 165 (1913).

Judge would be liable to be tested in second appeal to this Court. It cannot, on principle, make any difference that those very questions have been determined by the very same authorities, in a proceeding under sec. 105. This view is amply borne out by the proviso to sec. 109A, which contemplates the possibility of interference by the High Court with the determination by the Revenue Officer and the Special Judge of the particulars essential for a settlement of fair and equitable rent. In the case before us, the substantial question in controversy between the parties was, whether the tenant was liable to pay rent in respect of what may be compendiously called "excess land." The case for the landlord was that the area in the occupation of the tenant exceeded the area mentioned in the contract of tenancy. The landlord, consequently, claimed assessment of rent on the difference between these two areas and prayed that a fair and equitable rent might be settled in respect of all the lands in the holding. The tenant repelled the suggestion that he was in possession of excess lands. The Settlement Officer came to the conclusion that the tenant was in occupation of excess area, in other words, that the area in his occupation exceeded the area for which rent had hitherto been paid by him; and he assessed fair rent on this basis. Upon appeal, the Special Judge has reversed that decision. Consequently, although the decision of the Special Judge has settled a fair and equitable rent, it has also determined a question of fundamental importance to the parties, namely, what are the lands liable to be assessed with fair and equitable rent. Clearly, a second appeal is not barred with regard to the determination of the latter question.

The distinction I have just explained was recognised as early as 1897 in *Mathura Mohun Lahiri* v. *Uma Sundari Debi* (3) where a question arose, whether the tenant was in occupation of excess land. The answer depended upon the determination of the length of the standard pole used for measurement of the land. The Court of first instance went into this question and came to a finding; but upon appeal, the Special Judge declined to investigate the matter. This Court held that a second appeal was competent, as the question was in essence not of fair and equitable rent, but of the area of the land included in the tenancy. Mr. Justice Macpherson observed that the appeal did not raise any question as to what the fair and equitable rent was, but it did raise questions as to a matter which must be decided before the Settlement Officer could settle the amount of rent payable, namely, the area of the land in respect of which the landlord was entitled to have the rent assessed. This view was followed in the cases of *Rajkumar Protap Sahay* v. *Ram Lal Singh* (4), *Akbar Ali Mian* v. *Hira Bibi* (5), *Lakhi Narain* v. *Sri Ram* (6) and *Paltoo Pandey* v. *Sri Newas Prosad* (2). The same principle underlies the decision of the Full Bench in *Prithee Chand Lal Choudhury* v. *Basarat Ali* (1), where the Courts below had decided a question falling within the scope of cl. (c) of sec. 105A, namely, a question as to the status of the tenant.

It has been argued, however, that a different view was taken in *Shewbarat Koer* v. *Nirpat Roy* (7), *Lala Kirat Narain* v. *Palakdhari Pandey* (8), *Rameshwar*

(1) I. L. R. 37 Cal. 30 : s. c. 18 C. W. N 1149 (1909).
(2) 18 C. W. N. 165 (1913).
(3) I. L. R. 25 Cal. 34 (1897).
(4) 5 C. L. J. 538 (1907).
(5) 16 C. L. J. 182 (1912).
(6) 16 C. W. N. 921 (1911).
(7) I. L. R. 16 Cal. 596 (1889).
(8) I. L. R. 17 Cal. 556 (1889).

Singh v. *Bhooneswar Jha* (9) and *W. M. Grant* v. *Ram Rekha Bhagat* (10). In my opinion, this contention is based upon an erroneous interpretation of the decisions mentioned. The case of *Shewbarat Koer* v. *Nirpat Roy* (7) plainly indicates that the question raised there related to the rent settled and not to matters now included in sec. 105A. This is emphasised in *Lakhi Kirat Narain* v. *Palakdhari Pandey* (8), where Mr. Justice Ghose expressly stated that no question arose before him as to the particulars entered in the record-of-rights; in fact, the question related exclusively to what was the fair and equitable rent. This, so far as I can gather, was also the view adopted in *Rameshwar Singh* v. *Bhooneswar Jha* (9) and *W. M. Grant* v. *Ram Rekha Bhagat* (10). I feel no doubt, accordingly, that the question propounded for the decision of the Full Bench should be answered in the negative.

As regards the merits, it has been argued that Chap. XLII of the Civil Procedure Code of 1882, mentioned in sub-sec. 3 of sec. 109A, which has now been replaced by sec. 100 of the Civil Procedure Code of 1908, effectively bars the present appeal. There is plainly no force in this contention. Sub-sec. 3 of sec. 109A merely provides that if the appeal is otherwise competent, it is to be heard as an appeal from Appellate Decree, subject to the rules laid down in that behalf in the Civil Procedure Code, in other words, this Court can interfere in an appeal of this description, only if the decision of the lower Appellate Court involves an error of law. In this connection, our attention had been drawn to a passage in the judgment of the Special Judge where he states that the tenant was not in occupation of any excess land. At first sight, this may bear the appearance of a finding of fact not successfully assailable in second appeal. But, upon closer examination, it appears that the finding involves an error of law. The Special Judge has held in substance that the tenant is not in occupation of excess land, because he must be deemed under his contract to be in occupation of the area mentioned therein. This overlooks the fundamental point that the contract itself provides that the landlord will be at liberty to re-measure the lands. The lands have been actually re-measured in the settlement proceedings under Chap. X of the Bengal Tenancy Act, and the landlord claims assessment of fair rent on the area so determined by the revenue authorities, which must, *primâ facie* be deemed correct under sec. 103B. The tenant Defendant might possibly, either by the institution of a suit under sec. 106 or by way of objection in this very proceeding, have established that the entry in the record-of-rights was erroneous; but he has not done so. Consequently, the landlord was entitled to have fair rent assessed on the basis of the area as found by the Settlement Officer, and this was the view accepted by him.

In my opinion, this appeal must be allowed, the decree of the Special Judge reversed and that of the Settlement Officer restored with costs throughout.

HOLMWOOD, J.—I agree with the judgment delivered by the learned Chief Justice that in the case before us a second appeal does lie under sec. 109A. I am of opinion that each case must depend on its own circumstances and that no general rule can be laid down as to what is or what is not a decision merely settling a rent. But it is clear that whatever is found in any case to go beyond that simple decision and to decide any of the particulars referred to

(7) I. L. R. 16 Cal. 596 (1889).
(8) I. L. R. 17 Cal. 326 (1889).
(9) 4 C. L. J. 188 (1906).
(10) 14 C. L. J. 110 (1910).

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in sec. 105A or sec. 106 of the Bengal Tenancy Act is open to second appeal. I also agree with my learned brother Mookerjee that there is no real conflict in the decisions that have been cited before us on either side.

I therefore agree that the appeal should be allowed and the judgment and decree of the Settlement Officer restored with costs.

CHATTERJEE, J.—I agree in answering the question referred to us in the negative. I think the proviso to sec. 109A supplies an important clue to the explanation of the bar to second appeals imposed in cl. (3) of the section. This proviso is to the effect that if in a second appeal the High Court alters the decision of the Special Judge in respect of any of the particulars with reference to which the rent of any tenure or holding has been settled, the Court may settle a new rent for the tenure or holding, etc. This therefore contemplates the case of appeals to the High Court lying in cases in which rents have been settled, not against the order settling the rent but against the decision of the Court upon the particulars in respect of which the order settling the rent has been passed. In view of this distinction made by the section itself the controversy that appeals against orders resulting in the settlement of rent are barred does not seem to be sound.

Then with regard to the merits of the case it has been contended that there is a finding of fact which will prevent our interference in second appeal. That finding of fact is that the tenant is not in possession of excess lands. This to my mind, upon the facts of this case, is an apparent finding of fact but based upon an erroneous view of the legal rights of the parties as determined by the contract entered into by them and is therefore liable to examination in second appeal.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 65 OF 1915.

SANDERSON, C. J. WOODROFFE, J. MOOKERJEE, J. 1916, 3, January.	PRABHU LAL and another, Appellants, *v.* KUMAR KRISHNA DUTT, Respondent.

Attorney discharging himself, if may detain client's papers, pending suit—Lien in such case how secured—When discharged by client, except for misconduct, it may detain papers.

SANDERSON, C. J. (WOODROFFE, J., *agreeing*).—*Where an attorney who had been acting for his client in the ordinary way refused to go on acting for him unless his out-of-pocket expenses were paid, that amounted to a discharge of the attorney by himself and he could not claim to retain the papers when they were wanted by his former client for continuing the litigation. He would, at most, be entitled to have his lien protected by an undertaking by the new attorney.*

The same rule would apply where it was part of the original retainer of the solicitor that he should only be bound to act as long as the money should be supplied from time to time for the necessary outgoings.

BLUCK *v.* LOVERING & CO. (1) *and* ROBINS *v.* GOLDINGHAM (3) *followed.*

MOOKERJEE, J.—*If a solicitor is discharged by his client, otherwise than for misconduct, he cannot, so long as his costs are unpaid, be compelled to produce or hand-over the papers; but if he discharges himself he may be ordered to hand over the papers to the new solicitor on the latter undertaking to hold them without prejudice to his lien.*

A solicitor could not be treated as finally

(1) 35 W. R. 232 (1866).

(3) L. R. 12 Eq. 449; 22 W. R. 277 (1873).

PRABHU LAL *v.* KUMAR KRISHNA DUTT.

discharged till the leave of the Court had been obtained.

ATUL CHANDRA GHOSH *v.* LAKSHMAN CHANDRA SEN (6).

The facts of the case were as follows :—

In suit No. 1171 of 1913 on the Original Side of the High Court at Calcutta the Appellants Prabhu Lal and Nunnumu'l who are father and son were Defendants in the said suit, and employed Babu Kumar Krishna Dutt as their attorney. In this suit a decree was made directing the Official Referee of the High Court to take accounts. The Official Referee took up the reference when Nunnumull had to leave Calcutta owing to the serious illness of his father at Firozabad so that he could not attend the reference and certain *ex parte* orders were made by the Official Referee during his absence. On his return he asked his attorney Babu Kumar Krishna Dutt to apply to have the reference restored which he did and the Official Referee ordered the restoration subject to the payment of Rs. 800 by Defendants to Plaintiffs for costs. Thereupon, the Appellants alleged, Nunnumull asked Babu Kumar Krishna Dutt to move for setting aside the said order on the ground of the costs of reference being excessive as also on the ground of its having been made as a condition precedent to restoration, that Babu Kumar Krishna refused to make the application unless his clients put him in further funds on account of his costs, Nunnumull remonstrated against this and on the 29th of June 1915 wrote to Babu Kumar Krishna a letter which he concluded thus :—

" Should you refuse to work further on my behalf please hand over the cause papers to me to engage another attorney to act on my behalf or proceed with the suit in person. You fully realize the gravity of the situation that I am now in and unless I hear from you in the course of day your views of the matter I will present my petition before the Judge in person which please note."

On the 1st of July 1915 Nunnumull gave a notice of motion for his discharge to Babu Kumar Krishna with grounds set out in a petition affirmed on that day.

Babu Kumar Krishna sent the following reply on the 2nd of July 1915 to the above letter of Nunnumull of the 29th June 1915.

Dear Sir,—I am sorry that extreme pressure of work prevented me from acknowledging your favour, dated the 29th ultimo received on the 30th ultimo.

I regret to find myself in a position to give a contradiction of distorted facts in your letter.

You may remember when you came to town this time you implored me to take Rs. 100 only although my dues against you would come to about Rs. 4,000 you having not hitherto paid anything for in-pocket costs and promised, not once, but several times that you will go on from day to day paying all out-of-pocket costs and go on paying in-pocket costs by monthly instalments.

You having failed to carry out the solemn undertaking given by you I did not find my way to go on unless out-of-pocket costs were paid.

I am sorry to find that you have construed it differently.

Moreover you are not entitled to have any change from me without prepayment because I have learnt very recently that you have made some *benami* of your properties in order to defeat the claim against you.

That being the case and the circumstances having changed since I got your

(6) I. L. R. 36 Cal. 609 (1909).

retainer I would be quite justified in refusing to act generally for you without rendering me liable to be compelled to allow a change without prepayment.

But all the same having regard to your attitude I think it will be pleasant for all of us to allow you to change and I would be glad to do so if my costs are somehow secured.

Yours faithfully,
KUMAR KRISHNA DUTT.

Affidavits and counter affidavits were then filed in support and against the allegations made by the client against the attorney and the attorney against the client but which are immaterial so far as this report is concerned.

On the 22nd of July 1915 Nunnumull in person made his application in Court for discharge of Babu Kumar Krishna Dutt and the Court made the following order :—

It is ordered that the said Babu Kumar Krishna Dutt be discharged from further acting as the attorney for the Defendants in this suit and that the Defendants be at liberty to appoint another attorney to act for them in the reference, before the Official Referee of this Court : And it is further ordered that the said Babu Kumar Krishna Dutt without prejudice to his lien for costs due to him in this suit do produce before the said Official Referee such papers and documents as may be in his possession when required by the said Defendants upon their paying beforehand to the said Babu Kumar Krishna Dutt his costs of and charges for such attendance : And it is further ordered that the said Defendants do pay to the said Babu Kumar Krishna Dutt his costs of and incidental to this application and the costs due to him in this suit to be taxed by the Taxing Officer of this Court as between attorney and client on scale No. 2.

Against this order the present appeal was preferred.

Messrs. Jackson and *B. N. Bose* for the Appellant.

Messrs. N. Sirkar and *K. K. Deb* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case the application was by one Nunnumull that his attorney should be discharged and that the attorney should be ordered to make over all the papers in a certain suit, No. 1171 of 1913, to another attorney : and the order which was made by the learned Judge—one of the Defendants Nunnumull appearing in person, and the attorney consenting—was "that the attorney be discharged from further acting as the attorney for both the Defendants, Prabhu Lal and Nunnumull in this suit and that the Defendants be at liberty to appoint another attorney to act for them in the reference before the Official Referee of this Court," and it was further ordered "that the attorney Babu Kumar Krishna Dutt without prejudice to his lien for costs due to him in this suit do produce before the said Official Referee such papers and documents as may be in his possession when required by the said Defendants upon their paying beforehand to the said Babu Kumar Krishna Dutt his costs of and charges for such attendance."

Now, just to dispose of one point at once : it was argued that inasmuch as the attorney had been acting on behalf of both the Defendants, the application ought to have been made by both of them and that the attorney could not be discharged unless the application were made by both of them. As a matter of fact, the order is to the effect that the attorney shall be discharged from acting for both the Defendants. Therefore the learned Judge must

have understood, when he made the order, that the application was made to that effect. The Defendants are father and son, and the son has sworn an affidavit that he has had control of the litigation not only on behalf of himself but also on behalf of his father, and this application was made on behalf of his father as well as for himself: and I do not think there is any substance in that objection. But the point of substance is whether under the circumstances of this case, the learned Judge has made a proper order when the effect of his order was that the papers should remain with the first attorney and that they should be produced for the purpose of being used in the suit by him and that the Defendants should be called upon to pay his costs of such production. In my opinion that is not a proper order. First of all, it appears that the attorney has been acting on behalf of the client in the ordinary way without any qualification at all. Then something happened, and there was a dispute between the parties, the Defendant saying that the attorney had refused to go on acting for the client unless money was provided by the client. As against that the attorney has sworn that he never did anything of the kind, and I am not going to arrive at or trying to arrive at any decision as to which of those two gentlemen is correct in his account of the interview. But there is a letter of the 2nd of July 1915 which is referred to at page 21 of the paper-book, and that appears to me to be an admission by the attorney that he had refused to go on acting for the client unless his out-of-pocket expenses were paid. Now, if the relationship between the attorney and the client was the ordinary relationship between an attorney and his client, I do not think it would be disputed that that would amount to a discharge of the attorney by himself, and if it were a discharge of the attorney by himself then he could not claim to retain the papers when they were wanted by his former client, for the purpose of continuing the litigation. The most he would be entitled to would be to have his lien protected by an undertaking given by the new attorney.

But it was said by the learned Counsel who appeared for the attorney that as a matter of fact the client had himself discharged the attorney, and he pointed particularly to a letter written in November 1914 which appears at page 41 of the paper-book, the effect of which was—it was written by another firm of attorney—to give the first attorney notice that Messrs. Prabhu Lal and Nunnumull desired to change their attorney and asking for a bill of costs in order that it might be delivered to the taxing office and he might be paid and the change effected as soon as possible, and he argued that that amounted to a discharge by the client of his attorney. I do not think that that can be so, having regard, at all events, to what happened afterwards. If we look at the document which is referred to at pages 26 and 40 of the paper-book it is clear that the attorney did continue to act as attorney right way down to the 13th of July 1915, and in those circumstances, I do not think it is possible for him now to come forward and say that he was in fact discharged by the client.

But he made a further point: He said that up to a time it is quite true that the attorney was acting in the ordinary way for the client, but there came a time when the attorney would not act without payment to him of his out-of-pocket costs. Thereupon a fresh arrangement was arrived at that the attorney would only be called upon to act, if and when the money were provided by the client and that

money was not provided by the client and consequently he was discharged by the client.

Now, the case to which Mr. Jackson drew our attention this morning, namely, *Bluck* v. *Lovering & Co.* (1) seems to me to be exactly in point. If I put the present case as highly as it can be put in favour of the attorney, and assume in his favour—although I do not think it is proved - that after a certain time—probably in June 1915, but the date is not material—the attorney was only bound to act if and when the client provided him with money for his out-of-pocket expenses, even then the order which was made by the learned Judge was not a proper order for this reason : In the case of *Bluck* v. *Lovering & Co.* (1) it was part of the original retainer of the solicitor that he should only be bound to act as long as the money should be supplied from time to time for the necessary outgoings. Then there came a time when the money for the necessary outgoings was not supplied by the client. Thereupon the solicitor said that he was not bound to act and that he was not bound to hand over the papers. But the learned Judges, Chief Justice Lord Coleridge and Mr. Justice Manisty, held that although that was a legitimate arrangement to make between the solicitor and the client, still the solicitor could not prevent or inconvenience the client in his prosecution of the litigation by refusing to hand over the papers, and the learned Chief Justice said this :—"The solicitor has a right to say that he will not go on with an action, and he has a lien; but he has no further right to embarrass a client in an action which he has himself refused to prosecute. Upon the authorities, and Mr. Lush-Wilson's admission, this would not be disputed in an ordinary case. But it is said that an express contract makes all the difference in the rights of the solicitor. I can see no principle of law upon which that can be founded. The contract, whether it is one by inference or express, is no more than a contract. If a case could have been found in which, on grounds of expediency, the Court had held that express words made this difference, it would have been arguable. But no such case has been produced; and, on the contrary, in *Clover* v. *Adams* (2) where solicitor refused to go on, the Court consisting of Grove and Lindley, JJ., expressly held that the client was entitled to have his papers delivered to him. It seems to me that the cases cited are authorities proving that the papers cannot be retained pending the conclusion of a suit. The attorney ought to have protection; but not so as to embarrass the proceedings." Then he goes on to say that the order of Pollock, B., was wrong. It seems to me, as I have said, that this case is directly in point. Putting the case as high as can be in favour of the attorney here, that he was not bound to act on behalf of his client unless the necessary sums were provided, he was not entitled to hold the papers so as to embarrass the client : and, both the learned Judges went on to say that in such a case as that which they were considering the proper order to make was that made in the case of *Robins* v. *Goldingham* (3). In that case, the headnote is this :—"When a solicitor applied to his client for funds to carry on a suit, and, upon the client not furnishing any, declined to continue to conduct the litigation and the client appointed fresh solicitors :—*Held*, that this was a discharge by the solicitor, and that he might be called upon to deliver to the new solicitors the papers relating to the

(1) 35 W. R. 232 (1886).

(2) 6 Q. B. D. 622 (1881).

(3) L. R. 18 Eq. 440; 20 W. R. 277 (1872).

matters in question in the suit, on their undertaking to hold them without prejudice to his lien and to return them undefaced within twelve days after the conclusion of the suit, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs."

Therefore, when the learned Judge made an order, as he did in the present case, the attorney consenting that the attorney should be entitled to retain the papers and that the client should only have a limited access and they should be produced upon paying to the attorney the costs of production, I think it was an order which ought not to have been made.

I quite appreciate the difficulty in which Mr. Justice Chaudhuri was placed by the fact that the Defendant appeared in person, and in all probability he had not the real position between the parties present to his mind when he made this order. We have not had any detailed judgment, and it may be that we are not in possession of what was passing in the learned Judge's mind. On the contrary, here, we have had the advantage of hearing learned Counsel on both sides and had the matter fully argued and the material points prominently brought to our notice—an advantage which Mr. Justice Chaudhuri had not—in considering this point.

Therefore, I think this appeal must be allowed, and the proper order will be in accordance with the judgment in the case of *Robins* v. *Goldingham* (3) so far as it is material.

The Respondent will pay the costs of this appeal. The Defendant in the Court below appeared in person, we make no order as to the costs in that Court.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—I agree that the order made by Mr. Justice Chaudhuri, which is of an exceptional character, cannot possibly be supported. It cannot be disputed that in the event of a change of solicitors in the course of an action the former solicitor's lien is not taken away, but his rights in respect of his lien are modified according as his discharge is by himself or by his client. *Re Rapid Road Transit Co.* (4). If he is discharged by the client otherwise than for misconduct, he cannot, so long as his costs are unpaid, be compelled to produce or hand over the papers: if, on the other hand, he discharges himself, he may be ordered to hand over the papers to the new solicitor, on the latter undertaking to hold them without prejudice to his lien, to return them intact after the action is over and to allow the former solicitor access to them in the meantime. *Re Faithfull* (5) and *Robins* v. *Goldingham* (3). Consequently two questions require consideration, namely, *first*, did the client in this case discharge the attorney, and *secondly*, if he had not, and the attorney discharged himself, is the latter entitled to the order made in his favour.

As regards the first question reference has been made to the letter of the 19th November 1914 to support the view that the client had discharged the solicitor. There is plainly no force in this contention. The letter in effect did not discharge the solicitor; and the subsequent conduct of the attorney also shows that he did not treat himself as discharged. Besides, as was pointed out by Mr. Justice Harington in the case of *Atul Chandra Ghosh* v. *Lakshman Chandra Sen* (6), under the Indian Law [Or. 3, r. 4, C. P. C., read with sec. 2 (15)] a solicitor could not be treated as finally discharged till the leave of the Court had been obtained.

(3) L. R. 13 Eq. 440 ; 20 W. R. 277 (1872).

(4) [1909] 1 Ch. 96.

(5) L. R. 6 Eq. 325 (1868).

(6) I. L. R. 36 Cal. 609 (1909).

As regards the second question, we have to consider the letter of the 2nd July 1915 which, I am inclined to hold, operated as a discharge of the attorney by himself. I need not consider what the true position might have been, if foundation had been laid in the course of the proceedings for a possible theory that there was a special agreement between the solicitor and the client as to the mode of payment of the fees or the conduct of the proceedings; it is in any event clear that in the absence of proof of such agreement, the refusal of the attorney to carry on the proceedings till he was paid his expenses, operated as a discharge by himself. *Robins* v. *Goldingham* (3), *Clover* v. *Adams* (2), *Wilson* v. *Emmett* (7), *Heslop* v. *Metcalfe* (8), *In re a Solicitor* (9), *Basanta Kumar* v. *Kusum Kumar* (10), *Atul Chandra* v. *Sashi Bhusan* (11) and *Moheshpur Coal Co.* v. *Jatindra Nath Gupta* (12). But even if the letter of the 2nd July 1915 be not treated as a discharge of the attorney by himself, I think the attorney could not justly obtain the order made in his favour, as is clear from the decision in *Bluck* v. *Lovering & Co.* (1). He is entitled, at best, to his lien, and if this is secured to him, he cannot claim to embarrass the proceedings by retention of the papers [see also *Griffiths* v. *Griffiths* (13) and *Hutchinson* v. *Norwood* (14)]. I consequently hold that this appeal must be allowed, the order of Mr. Justice Chaudhuri discharged, and an order made in the terms proposed by the learned Chief Justice.

Messrs. S. D. Dutt and *Ghosh*, Solicitors for the Appellant.

Babu K. K. Dutt in person.

Appeal allowed.

(1) 35 W. R 232 (1886).
(2) 6 Q. B. D. 622 (1881).
(3) L. R. 13 Eq. 440; 20 W. R. 277 (1872).
(7) 19 Beav. 233 (1854).
(8) 3 Myl. and Cr. 183 (1837).
(9) 4 B. L. R (P. C.) 29 (1870).
(10) 4 C. W. N. 767 (1900).
(11) I. L. R. 29 Cal. 63: s. c. 6 C. W. N 215 (1901).
(12) I. L. R. 40 Cal. 886: s. c. 17 C. W. N. 278 (1912).
(13) 2 Hare 587 (1843).
(14) 54 L T. 812.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 64 OF 1915.

SANDERSON, C. J. WOODROFFE, J. MOOKERJEE, J. 1916, 3, January.	PRABHU LAL and anr., Appellants, v. KUMAR KRISHNA DUTT, Respondent.

Attorney, application by, for discharge—Notice to client, sufficiency of.

If an attorney wishes to withdraw from a case even for good grounds, he must give his client reasonable notice of his intention so that the client may have a reasonable opportunity of getting other advice and making arrangements before the hearing of the application of the attorney for obtaining his discharge.

When an attorney gave notice to the client on the day previous to his making application before Court for obtaining his discharge and obtained the order,

Held, *on appeal, that the order must be set aside for insufficiency of notice.*

The facts of the case were as follows:—

Babu Kumar Krishna Dutt, attorney, had been employed by Prabhu Lal and Nunnumull, father and son, to act for them in suit No. 119 of 1914 on the Original Side of the High Court at Calcutta. He was also employed by the same clients to act for them in suit No. 1171 of 1913 on the same Side of the High Court. Nunnumull had in the latter suit applied to Court

on the 22nd of July 1915 and obtained an order for his discharge as appears from the report of Appeal No. 65 of 1915 hereinbefore reported (p. 437) Nunnumull in his petition and his affidavit in this connection had made some allegations against the said Babu Kumar Krishna Dutt which the latter stated to be untrue and unfounded and having regard to such conduct of the said Nunnumull, Babu Kumar Krishna made this application on the Original Side of the High Court, for his discharge from acting further for Nunnumull and his father Prabhu Lal in the above stated suit No. 119 of 1914 without prejudice to his lien on the papers until payment. The petition and affidavit in support of this application were served by the attorney on his clients above-named on the 27th of July 1915 and the application was heard on the 28th July following, when the Court made an order of discharge giving liberty to the attorney to withhold the cause papers until payment of costs of the attorney by the clients. Thereupon the clients appealed against this order.

Mr. B. N. Bose for the Appellants.

Mr. N. Sirkar for the Respondents.

The Judgment of the Court was as follows :—

Sanderson, C. J.—I think this case raises a question of some importance with regard to the relationship of the client and attorney.

What happened in this case was this: On the 28th of July 1915, there was filed an affidavit which had been sworn by the attorney, Mr. Dutt, on the 26th of July, two days previously. Mr. Sirkar told us that the notice of the application and a copy of the affidavit at the same time were served upon the clients on the 27th. The application was that the attorney should be discharged from his position of attorney and that he should not be called upon any longer to act on behalf of the clients whose names were Prabhu Lal and Nunnumull, and the ground of his application was that the client Nunnumull had made certain charges against the attorney which were quite inconsistent with the attorney continuing to act as such attorney.

I think the matter is of importance for this reason: I assume in favour of the attorney that those charges were in fact made; I assume further in his favour that there was no ground for them in any shape or form, still I am bound to come to the conclusion that what took place in this case was not right. I think the attorney was bound to give his client reasonable notice of the course he intended to take.

It is quite clear that the action which the attorney did take amounted to a discharge by himself, because it was he who initiated the proceedings: he gave notice to the client that he would apply to be discharged from his position as attorney in the case, and he made an application to obtain the discharge; and, therefore he must be taken to have discharged himself. But Mr. Sirkar submitted as follows. He said in effect—yes, it is quite true that technically the attorney discharged himself, but he could not go on acting as an attorney on account of the absolutely unfounded charges the client had made against him. But even in these circumstances, I think, it was the duty of the attorney to give reasonable notice of his intention to withdraw. Notice was given to the client on the 27th of July, the application was made on the 28th of July, and the parties were before the learned Judge on the 28th, the attorney appeared himself but the client was unrepresented by any attorney and appeared in person. I think it is safe to assume that in that

short time he had no opportunity for making any other arrangement or obtaining the assistance of another attorney, or perhaps raising funds which would be necessary before he could engage the services of another attorney. I find it stated in the 26th Vol. of Lord Halsbury's Laws of England, at page 739 as follows: "The solicitor is entitled to recover such remuneration where he is discharged by the client, or where he discharges himself for good cause." I am assuming that the attorney in this case discharged himself for good cause—still—the passage goes on to say "He must, however, give reasonable notice of his withdrawal from the case to his client." In my opinion, in this case no such reasonable notice was given. I do not think that giving notice that the attorney would apply to be discharged from the case, which application came on for disposal the next day, is giving reasonable notice of his withdrawal from the case to his client. It is for that reason I think this case is of importance not only to the profession but also to the client, and it must be clearly understood that if an attorney is going to withdraw from a case even if the ground for his withdrawal is good—it is incumbent upon him to give reasonable notice to his client of his intention, so that his client may have a reasonable opportunity of getting other advice and making other arrangements before the hearing of the application comes before the learned Judge.

On this ground, I think, the appeal must be allowed with costs.

As a matter of course the order for arrest goes.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—I agree that the order of Chaudhuri, J., under appeal must be set aside on the ground that the Appellants had not reasonable notice of the application. It is well settled that a solicitor retained to conduct an action may withdraw from it on good grounds. Such good grounds include misconduct of an offensive character or such misbehaviour on the part of his client as makes it impossible for a self-respecting solicitor to continue to act for him [*Steele* v. *Scott* (1) and *Bryan* v. *Twigg* (2)]. I express no opinion upon the question whether what is attributed to the client in this case did or did not amount to a conduct of this character. But if it is assumed in favour of the Respondent that the conduct of his client was such as made it impossible for him to continue to act, the client was entitled to reasonable notice of his application for withdrawal [*Hoby* v. *Built* (3), *Whitehead* v. *Lord* (4), *Nicholls* v. *Wilson* (5) and *Harris* v. *Osbourn* (6). The notice which was given in this case was obviously unreasonably short; the interval between the receipt of the notice and affidavit and the order by the Court was so short that it was impossible for the client to have himself represented by another attorney. The order must consequently be discharged with costs.

Messrs. S. D. Dutt and *Ghosh*, Solicitors, for the Appellants.

Babu Kumar Krishna Dutt, Solicitor, in person.

Appeal allowed.

(1) 2 Hogan 141.
(2) 3 L. J. Ch. N. S. 114 (1834).
(3) 3 B. & Ad. 350 (1832).
(4) 7 Exch. 691 (1852).
(5) 11 M. & W. 103 (1843).
(6) 2 Cr. & M. 629 (1834).

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 1 OF 1914.

JENKINS, C. J.
MOOKERJEE, J.
HOLMWOOD, J.

1915,
Heard, 5, 6 and 7, July.
Judgment, 26, August.

HEMENDRA NATH RAY, Defendant, Appellant,
v.
UPENDRA NARAIN RAY, Plaintiff, Respondent.

Digwar of Ghaut Bharra in Bankura—Office remunerated by land—Appointment and dismissal at Government's pleasure—Office, if hereditary—Suit for declaration of title to office and recovery of land if entertainable—Power of Court to grant declaratory decree—Specific Relief Act (I of 1877), sec. 42—Civil Procedure Code (Act V of 1908), Or. 7, r. 7—Prayer for general relief—Specific relief other than that prayed for when may be given.

The question being as to the right to succeed to Ghatwali land in Ghaut Bharra in District Bankura :

Held (*with reference to the evidence*)—*That* JOGENDRA NATH SINGH *v.* KALI CHARAN ROY (1) *had no application to the case as a precedent.*

That the present was a case of an office remunerated by the possession of land and not of land burdened with the service of an office.

Per JENKINS, C. J.—*The office was hereditary subject to the qualification that the heir's claim and tenure of office were dependent on the approval of the Government.*

Per MOOKERJEE, J.—*That the office itself was not hereditary, the Digwar being liable to removal for failure to discharge his duties satisfactorily and the Executive Government being free to appoint a qualified stranger as successor.*

K, a former Digwar having been dismissed 60 years ago, a stranger to the family M was appointed and on his death his son U, the Plaintiff, was appointed by the Magistrate but this appointment was set aside by the Commissioner in the view that the office was hereditary and the appointment was given to H, son of K, and Government to whom U appealed referred him to the Civil Court. U sued H for declaration of title and possession of the land,

Held, *per* JENKINS, C. J.—*That the Commissioner's view of H's title was wrong, as K after his dismissal 60 years ago could not with reason be regarded as a stock of descent.*

Held, *per* CURIAM.—*That the Civil Court had no jurisdiction to reinstate a dismissed Ghatwal, but regard being had to the orders of the Commissioner and the Government, the Civil Court could properly make a declaration in favour of U.*

That though the suit was not framed as one under sec. 42 of the Specific Relief Act, the Court had power under Or. 7, r. 7, to pass a declaratory decree.

COCKRELL *v.* DICKINS (3), DURGA PROSAD SUREKA *v.* BHAJAN LALL (4) *and* GOPI NARAIN KHANNA *v.* BABU BANSIDHAR (5) *relied on.*

WALLIHAN *v.* JOGGESWAR (2) *referred to.*

This was an appeal preferred on 24th April 1914, under sec. 15 of the Letters Patent, against the decree of the Hon'ble N. R. Chatterjea, one of the Judges of this Court, dated the 27th March 1914, differing in opinion from the Hon'ble E. E. Fletcher, one of the Judges of this Court, dated the 27th March 1914, in Appeal from Original Decree No. 298 of 1911. The dissentient judgments were reported in 18 C. W. N. at p. 1036 from which will appear the facts of the case.

Sir Rash Behary Ghosh, Babus Jogesh

(1) 9 C. W. N. 668 (1905).

(2) L. R. 35 I. A. 38 : s. c. 12 C. W. N. 227 (1907).

(3) 2 M. I. A. 389 (1840).

(4) L. R. 31 I. A. 122 : s. c. 7 C. W. N. 489 (1904).

(5) L. R. 32 I. A. 123 : s. c. 9 C. W. N. 577 (1905).

Chandra De, Jyotish Chandra Sarkar and *Srish Chandra De* for the Appellant.

Babus Dwarka Nath Chakravarty, Karunamay Bose, Lalit Mohan Ghosh, Jyotish Chandra Hazra and *Sarat Chandra De* for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

JENKINS, C. J.—The Plaintiff, Upendra Narain Ray, has brought this suit to establish his claim to lands in Ghaut Bharra in the District of Bankura as held in Digwari Chakran right. The Defendants are his rival claimants, Hemendra Nath Ray, the Secretary of State for India in Council, and the Raja of Panchakote, the Zemindar. There are also certain *pro forma* Defendants of whom some are the Plaintiff's brothers and one is Darpanarain Roy who is admittedly one of the two Digwars of Ghaut Bharra.

The Subordinate Judge has passed a decree in the Plaintiff's favour and has directed that the Plaintiff do recover possession of the land in suit, and effect has been given to this direction. From this decree an appeal to the High Court was preferred; it was heard by Fletcher and N. R. Chatterjea, JJ. They were divided in opinion and so the view of Chatterjea, J., who was for confirming the decree of the Subordinate Judge, prevailed.

From this judgment the present appeal has been preferred under cl. 15 of the Letters Patent by Hemendra Nath Ray, who has been supported by the Raja of Panchakote, a Respondent in this appeal. No one else has appeared except the Plaintiff who has supported the decree in his favour.

There are two Digwars in Ghaut Bharra. The Defendant Darpanarain is one and his position is not contested. The whole dispute is as to the other Digwar. It is common ground that the office of Digwar and enjoyment of the land go together, and this combination may be due either to a grant of land burdened with the services of the office or a grant of the office remunerated by the enjoyment of the land.

Whichever of these two it may be, we know that the office was held and the property enjoyed by Kartic Ray, the Defendant Hemendra's father, and seven generations of ancestors before him and it is common ground that it was so enjoyed in a regular course of succession. Kartic, however, was dismissed in 1855 and Rasik Lal Upadhaya, a stranger to the family, was appointed in his place. But he in turn was dismissed on the 14th April 1856 and Rajaram Rai was appointed to the office. In 1861 Rajaram Rai became incapable of performing the duties of the post and his nephew and heir presumptive, Mohendra, the Plaintiff's father, was appointed.

In the meantime the dismissed Kartic had rendered good service and so on the 18th of August 1869 a promise was made that when any Sardari or Sadiali post became vacant it should be offered to him in the first instance. In 1870 Mohendra was dismissed. In 1871 Kartic was confirmed in the vacancy caused by this dismissal and it was directed that possession would be given him of the Ghatwali lands.

This dismissal however was cancelled by order of the Lieutenant-Governor who reinstated Mohendra in the service and on the 19th June 1872 an order was made on the Sub-Inspector of Gangajal Ghati directing him to continue as before to get the work done by Mohendra and give him possession of the lands. From a report, dated the 14th August 1872 it appears this was done.

On the 19th July 1904 the Magistrate made an order dismissing a number of Ghatwals, including Mohendra. The

following month this dismissal was cancelled and Mohendra was reinstated.

In August 1907 Mohendra preferred a petition to the Magistrate praying for six months' leave on the score of ill-health and asking that his son Upendra, the Plaintiff, should be appointed in his place in an acting capacity for six months. This was approved.

On the 9th October 1907, Mohendra died and his son Upendra asked to be appointed. The order was "Upendra Ray will continue to act in place of his dead father Mohendra Narain Ray, Sardar of Bharra, until further orders."

I may here state that though Upendra has brothers, they do not dispute the superiority of his sole claim to the office.

In the meantime Kartic had died in 1908 leaving him surviving his widow Karunamayi, and his son, the Defendant Hemendra. Karunamayi on Mohendra's death applied for the appointment of her minor son Hemendra as Sardar Ghatwal of Pergana Mahissara. The Deputy Collector reported that in his opinion the application should be rejected and "that the present acting man Upendra Nath Ray (be) appointed in place of his deceased father specially when he appears to have been doing good work all along."

On the 16th of June 1908, the Magistrate Collector made an order in which he said he thought Upendra should be confirmed. On the 14th August 1908, Mr. Maddox, the Officiating Commissioner, set aside the Magistrate's order, and directed that Hemendra, the minor son of Kartic, be appointed as Sardar Ghatwal and until he came of age a Deputy must be appointed in his place. This opinion was based principally on Mr. Maddox's reading of a decision in *Jogendra Nath Singh* v. *Kali Charan Roy* (1).

(1) 9 C. W. N. 663 (1905).

Upendra appealed to the Board of Revenue on the 21st September 1908, but the Board resolved that it had no jurisdiction. Thereupon Upendra appealed to the Lieutenant-Governor and in reply he was informed that the remedy for any grievance which he might have, lay in the Civil Court. So this suit was instituted by Upendra in accordance with the reply given him by the Government.

Whether we have here to deal with an office remunerated by the possession of land or land burdened with the service of an office is practically immaterial in the view I take.

But such materials as there are on the record in my opinion support the conclusion that we have here an office remunerated by the possession of land. Most of the information we possess relates to the period subsequent to Kartic's appointment, but it does appear that one of his predecessors was dismissed. Since that time there have been repeated instances of appointment and dismissal which I have already mentioned, and what has given them the greater significance is that the corresponding possession of the land has apparently followed as a matter of course.

The oral evidence on this point is interesting. Thus Upendra says "From 1856 up to the time of my dismissal we have held the post of Sardar Digwar and held possession of the properties appertaining to the office. No person was appointed in my father's place and our possession did not cease."

Later he deposes "when a new Sardar is appointed, he has to take possession through the police. When I was appointed acting Sardar, I did not apply to be put in possession. The possession was then with us." And according to him, it is the Magistrate who appoints and dismisses. Darpanarain declares that he took

possession through the police on his appointment, and that when a Sardar is appointed permanently or in an officiating post, he has to take possession through the Police.

Beni Madhab, the Police Sub-Inspector at Gangajal Ghati, says that the Magistrates dismiss for misconduct or default in the performance of their duties and that the Police give possession to the person who is appointed. Rakhal Chandra Chattopadhya deposes to this power of dismissal.

Prasanna Kumar Rai, who looks after Hemendra's affairs declares that the Magistrate appoints and dismisses and that he had never seen any Digwar or Sardar hold possession of the lands of his office after dismissal.

This view is borne out by the documentary evidence. The earliest document is the report submitted in 1799 by Kanji Tahsildar of Chakla Pachet, but his covering letter shows that his sources of information were limited. The report throws no appreciable light on the question now under discussion, and it is probable that the distinction it involves was not present to his mind. But for what it may be worth, we find him stating that the Digwars enjoy their Jagir villages without payment of rent in lieu of their wages.

The order of the 23rd May 1847 is much more explicit, and the *parwana* there reproduced states that Ghatwali lands are held merely for remuneration for labours of their services and that they are not entitled to make a permanent settlement of the lands to anyone by giving up their rights thereto, that they can grant only a *patta* of *jote* right for the period of their incumbency.

Another document to which reference may usefully be made is Exh. D, and attested copy of Isamnabisi or list of Ghatwals, dated in the year 1849. It is expressed to be an Isamnabisi of Ghatwals who got their allowance in cash or got Jaigiri lands therefor. It refers to the subject-matter of the present litigation and one of the columns is headed "whether the Sardar gets pay in cash or holds Chakran lands." In another column we find the following statement: "In the year 1221 Aditya Rai was appointed in place of Madan Rai who was dismissed. Gour Mohan Rai was appointed on the 25th Bhadra 1238 in place of his deceased father Anand Rai. Jagat Sankar was appointed in place of his deceased brother Ananda Sankar on the 26th Bhadra 1235."

The conclusion then to which I come is that the Digwari position was that of an office remunerated by the enjoyment of land. So the next point for determination is, whether this office was hereditary or not. No Sannud is forthcoming, but the history of this office establishes a general usage on the death of a Digwar holding office to appoint his heir in his place as the successor to his office. Whether the office thus became hereditary in the strict sense of the term, may be open to discussion, for even in the case of life grants, it is a common practice that they should be renewed to the heir of the grantee, or that there may be by usage an appearance of descent and it must always be a matter of some doubt at what point the principle and practice of identification can be properly regarded as establishing heritability. Here the usage of the heir taking his predecessor's place can be traced back to the 17th century and so long a usage cannot be disregarded as an exponent of the Digwari right. On the contrary I think we may safely ascribe to it the force of law subject to the qualification that the heir's claim and tenure of office is dependent on the approval of the Government. Mr. Maddox' determination recognises this, for he clearly thought that he was passing

judgment on conflicting legal claims, and it is difficult to reconcile the Government's reply with any other view. In fact when analysed the contest would seem to be whether Mr. Maddox' legal pronouncement was correct or not, for if Mr. Maddox had not decided as he did, Upendra would not have been disturbed.

The Magistrate did approve Upendra's succession on his father's death, but this as I have shown was cancelled by the Commissioner with the result that the Board of Revenue resolved it had no jurisdiction and Government referred to the Civil Court. When the facts of the case are grasped this attitude of the Government is free from difficulty, for the Commissioner's determination was not limited to Upendra's conduct or fitness for office, but proceeded on that officer's view of the rival legal claims. The Commissioner's decision is based on *Jogendra Nath Singh* v. *Kali Charan Roy* (1), but that case has absolutely no application to the circumstances of this case: it dealt with a proposition that has no relevance here and determined no point that arises here. Apart from a personal promise, in favour of Kartic, Hemendra Nath's only claim would be as the heir of Kartic, but after his dismissal 60 years ago, he can no longer be regarded with reason as a stock of descent. The last incumbent was Mohendra and Upendra Nath is his heir. Still it does not appear to me that we can uphold the unconditional decree that has been passed, for that disregards the qualification that the Government's approval is necessary, and we can do no more than express our conclusion that Mohendra was the incumbent of the office at his death, having been appointed thereto in succession to Rajaram Rai whose heir he was, that Upendra was the heir of Mohendra, that Upendra's claim to succeed is subject to the approval of the Government, and that the ground on which the Commissioner cancelled the Magistrate's sanction was erroneous in law.

We cannot therefore affirm the decree as it stands, so that we have to see, whether it is open to us to pass a decree which will embody what is essential in this conclusion. The plaint is not happily framed, but in view of all the circumstances of the case, I think we can make a declaratory decree, defining the Plaintiff's position, though it may be it is not really necessary, for having regard to the Government's reply referring the Plaintiff to the Civil Courts, they would probably be prepared to give or withhold its approval in accordance with the view we have expressed, seeing that it invited recourse to the Civil Court. For the Appellant, it is objected that we cannot make a declaratory decree on a plaint framed as the present is, and we have been referred to the decision in *Wallihan* v. *Joggeswar* (2). But that decision does not appear to me to govern the present case which is peculiar in its circumstances. The prayers in the plaint are not limited to a claim for possession but seek declaration, and though the form in which these declarations are sought do not comply strictly with the provisions of sec. 42 of the Specific Relief Act, the prayers, more especially in view of Or. VII, r. 7 are, I think, sufficiently comprehensive to permit the decree I think should be passed.

In dealing with this matter on broad lines we shall be acting in accordance with what has been done by their Lordships of the Privy Council in more than one case, when, to use an expression employed on one occasion, it was necessary out of a wreckage of procedure to construct the material for a just decision.

(1) 9 C. W. N. 668 (1905).

(2) L. R. 35 I A. 38: s c 12 C. W. N 227 (1907).

HEMENDRA NATH RAY v. UPENDRA NARAIN RAY.

The principle adopted by their Lorsdhips in *Cockrell* v. *Dickens* (3) is this, "The rule is that if the Bill contains charges putting facts in issue that are material, the Plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert specific relief prayed, and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the Bill will consistently with the rules of the Court maintain that relief." And the same position was maintained in *Durga Prosad Surcka* v. *Bhajaw Lall* (4) and *Gopi Narain Khanna* v. *Babu Bansidhar* (5).

We must therefore modify the decree of the lower Court by substituting for the same a declaration that according to usage on the death of a Digwar of Ghaut Bharra holding office, his heir may be appointed in his place, if the Government approve; that Mohendra Narain Ray held the office of Digwar at his death and that the Plaintiff is the heir of Mohendra Narain Ray. This Court cannot give relief either by appointing him to the office he seeks or delivering him possession of the land appertaining thereto. That relief must be sought elsewhere and possibly for this purpose the declaration may be of service.

In the circumstances of this case, each party should bear his own costs throughout.

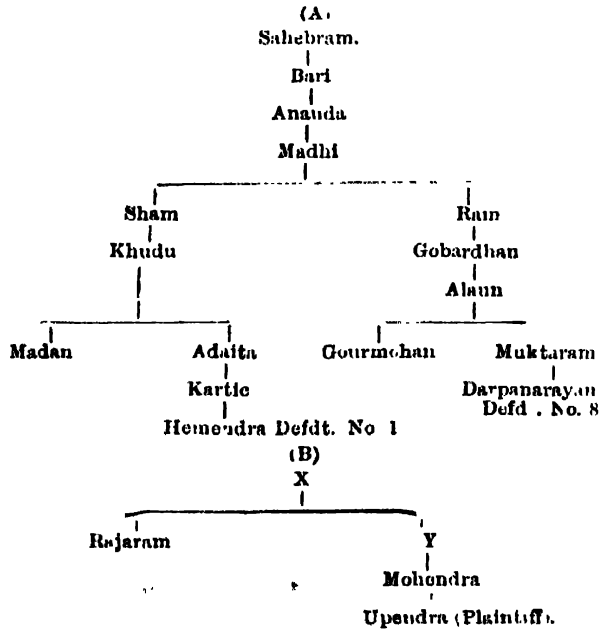
MOOKERJEE, J.—This is an appeal by the first Defendant in a suit commenced by the Plaintiff-Respondent for recovery of possession of land on declaration of title thereto as Digwar of Ghaut Bharra in the District of Bankura. The suit was decreed by the Trial Court. Upon appeal to this Court, the Judges of the Division Bench were equally divided in opinion. Fletcher, J., was of opinion that the decree of the Subordinate Judge should be reversed and the suit dismissed. N. R. Chatterjea, J., was of opinion, on the other hand, that the decree should be confirmed. Consequently the decree of the Subordinate Judge stood confirmed under sub-sec. 2 of sec. 98 of the Code of Civil Procedure, 1908. On the present appeal under cl. 15 of the Letters Patent, the decision of the Subordinate Judge has been assailed principally on the ground that the Plaintiff cannot claim as of right to succeed to the office of Digwar and that as the Executive Government have refused to appoint him as Digwar, the Civil Court has no jurisdiction to review the order of the Executive.

It is desirable at the outset to state that no useful purpose is likely to be served by a reference to the provisions of Reg. XXIX of 1814, which are applicable to Birbhum Ghatwals; nor can any analogy be safely drawn from the decisions in *Nilmoney Singh* v. *Bakranath Singh* (6) and *Jogendra Nath Singh* v. *Kali Charan Roy* (1) which are mentioned in the judgments of the Division Bench. As was observed by their Lordships of the Judicial Committee in the case of *Ram Chunder Dutta* v. *Jugesh Chunder Dutt* (7) the argument from analogy may arise where a principle of law is involved, but where Courts are dealing with the positive enactment of a statute reasons founded upon analogy are scarcely applicable. This observation is peculiarly weighty where the rights of the parties litigant depend in a great measure upon the nature of the particular tenure or the terms of the particular grant. The problem for investigation, consequently is, what is the nature of the tenure, what are the terms of the grant in this case as

(3) 2 M. I. A 339 (1840)
(4) L. R. 31 I. A. 122: s. c. 7 C. W. N. 489 (1904).
(5) L. R. 32 I. A. 128: s. c. 9 C. W. N. 577 (1905).
(1) 9 C. W. N. 663 (1905).
(6) I. L. R. 9 Cal. 187 (1882).
(7) 12 B. L. R. 396; 19 W. R. 353 (1873).

indicated by its antecedent history. In the determination of this question, we must bear in mind the clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands. This fundamental distinction was emphasized by Jackson, J., in *Kooldip Narayan Singh* v. *Mahadeo Narayan Singh* (8) and has since then been recognised and approved by the Judicial Committee in *Forbes* v. *Mir Muhammad* (9), *Leelanand Singh* v. *Munorunjan Singh* (10) and *Venkata Narasimha* v. *Sobhanadri* (11).

In the investigation of the nature of the title, under which the lands in dispute have been held by successive occupants thereof, reference to the following genealogical tables will be found convenient.



It is undisputed that the lands in suit were held by successive Digwars of Ghaut Bharra, who were up to the middle of the Nineteenth Century, members of the family whereof Sahebram was the founder. The evidence indicates that Sham and Ram were Digwars in 1782. Since then, the lands have been enjoyed in equal halves by the two Digwars, one of whom came from the branch of Sham and the other from the branch of Ram. We are not concerned in this litigation with the lands enjoyed by the Digwars who belong to the latter branch, but the evidence indicates that Gour Mohan was appointed Digwar in 1831 and that Darpanarain succeeded him in 1865. When we turn to the history of the other branch, we find that Madan who was Digwar in 1808, was dismissed in 1814 and was succeeded by Adwaita who in his turn was dismissed in 1850. Kartic was appointed Digwar on the 28th March 1851 after the dismissal of his father and was himself dismissed on the 10th May 1855, as the authorities were not satisfied with the manner in which he discharged the police duties. On the dismissal of Kartic, a stranger to the family, named Rasik Lal Upadhaya, was appointed Ghatwal, but his tenure of office was very brief, as he himself was dismissed on the 14th February 1856. On the dismissal of Rasik, Rajaram the grand uncle of the Plaintiff who belonged to a different family, was appointed Digwar on 14th April 1856. He was succeeded in 1861 by Mohendra, the father of the Plaintiff. During the incumbency of Mohendra, Kartic, in 1869 made a successful attempt to get back the office when Mohendra was suspended. On the 13th October 1870, Mohendra and Darpanarain were both dismissed, as their conduct was deemed unsatisfactory and the opinion was expressed that it was improper to keep such men in Government service. Kartic was re-appointed Digwar in place of Mohendra on the 11th January 1861 and, one Khetra Nath was, at the same time, appointed in

(8) 6 W R 199 at p 209 (1866).
(9) 13 M. I. A 438 at p. 464 (870).
(10) 13 B L R. 124 at p 131 (1873).
(11) L. R. 33 I. A. 46 at p. 52 : s. c. 10 C. W N. 161 (1905).

place of Darpanarain. But on the 30th May 1872, Mohendra and Darpanarain were both reinstated by the Lieutenant-Governor in supersession of the order of the Commissioner who had confirmed the order of dismissal made by the Magistrate. This terminated the brief restoration of Kartic to the office which had been held by his ancestors for seven generations but he obtained, what may be described as a promise of re-appointment on a future vacancy. Kartic however, died in 1900 leaving an infant son Hemendra the first Defendant in this litigation. On the 19th July 1904, Mohendra was dismissed again by the Magistrate along with a number of other persons similarly situated. On the 6th August 1904, this order was revoked and Mohendra and Darpanarain were conditionally restored. The evidence points to the conclusion that they were allowed to continue in office and enjoy the lands, though the condition imposed does not appear to have been fulfilled. On the 20th August 1907, Mohendra obtained leave of absence on the ground of illness and his son Upendra was appointed to act for him; but Mohendra never returned to his work, as he died on the 9th October 1907. Upendra was thereupon directed to act until further orders. At this stage, an attempt was made by the guardian of Hemendra to secure the office and the lands for him if possible. The Magistrate, however, on the 16th June 1908 appointed Upendra as Digwar on the strength of a report, dated 27th April 1908 submitted by the Deputy Magistrate. But on appeal to the Commissioner, the order of the Magistrate was reversed on the 11th August 1908 and Hemendra, the infant son of Kartic, was appointed Digwar, Upendra preferred an appeal to the Board of Revenue, which was dismissed on 21st September 1908. He then appealed to the Lieutenant-Governor; but on the 29th March 1909, he was informed that the remedy for any grievance which he might have, lay in the Civil Court. The result was the institution of this suit by him on the 16th August 1909.

From the fact thus briefly narrated, two points emerge as perfectly clear, namely, *first*, that the disputed lands have always been enjoyed by the Digwar of Ghaut Bharrah and *secondly*, that when a person has been dismissed from the office of Digwar he has been forthwith deprived of the lands: there is indeed no trace in the evidence that there ever was an assertion by a dismissed Digwar that he was not liable to be deprived of the lands. As regards the dismissal itself the Digwar was at liberty to appeal from the decision of the Magistrate to the superior authorities, but no one has ever suggested that if the Executive Government ultimately confirmed the order of dismissal, the Digwar had still a right to continue in possession of the lands. These circumstances in my opinion, justify the inference that we have here, not a grant of lands burdened with a certain service, but the grant of an office the performance of whose duties is remunerated by the use of lands. The land and the office went together, but the office was the primary concern, the occupation of the land was subsidiary thereto. I think the inference is also legitimate that we have here a case, not of property held by a man to himself and to his heirs, but of property held by a man to himself as holder of an office and his successors in that office. The office itself was not hereditary in the sense that the heir of the last holder was entitled as a matter of right to discharge the duties of the office and to remunerate himself from the usufruct of the lands attached thereto. The theory that the office was hereditary in character is inconsistent with incontrovertible facts disclosed in the

evidence. Successive Digwars were dismissed by the Executive Government on the ground that they were not fitted to hold the office without any question or demur. In 1855 the office was granted to a stranger to the family of Kartic and when the new Digwar was in his turn removed a few months later, another person Rajarām, who was stranger to both the families, was appointed, it was then expressly stated as a point in his favour that he was not connected with Kartic. The view that the Digwar was liable to be removed for failure to discharge his duties satisfactorily and that on his removal the Executive Government was free to appoint a qualified stranger as successor is borne out by the documentary and oral evidence on the record.

The earliest document, namely, the report of Kanji Tahsildar, dated the 9th July 1799, though based on meagre material, makes it reasonably clear that the Digwars enjoyed the villages without payment of rent in lieu of their wages. Evidence of a more recent date is consistent with this position, for instance the order on Adaitya and Gour Mohan, dated the 23rd May 1847, states explicitly that the Digwars held lands merely for remuneration for the labours of their services and are consequently competent to create only such subordinate rights as do not continue beyond the period of their incumbency. The list of Ghatwals framed in 1849 makes it equally clear that the Digwars when they did not get their allowance in cash held the lands only in lieu of such allowance, and this was applicable to the Digwari now in suit. The same view is supported by subsequent reports and orders made on the occasion of dismissal of successive Digwars and the appointment of their successor, and this is confirmed by the statement of the Plaintiff himself as to the nature of the tenure of the Digwari office made in an agreement between himself and his brother on the 1st April 1908. The position, consequently is that the disputed lands appertain to the office of Digwar of Ghaut Bharra, that the office itself is not hereditary as a matter of right, that the holder of the office is liable to be removed for failure to discharge his duties to the satisfaction of the Executive Government, that on the removal of a Digwar his successor acquires a valid title to the office only if appointed thereto by the Executive Government, and that although on two occasions, strangers have been appointed to this office, during many generations, the heir to the last holder has taken the office and the lands with the approval of the Executive Government.

Tested in the light of these conclusions what is the position of the Plaintiff? He has not been appointed Digwar by the Executive Government and he had not consequently a valid and enforceable title to that office at the time of the institution of the suit. He is plainly not entitled to decree for possession of the lands annexed to that office and the decree of the Subordinate Judge cannot, to this extent, be possibly confirmed. But it does not follow that the Plaintiff is not entitled to any relief in the suit as framed and here we must take into account the very special circumstances which have preceded its institution. The Plaintiff, on the death of his father, was appointed Digwar by the Magistrate. But the order of the Magistrate was reversed on appeal by the Commissioner. The decision of the Commissioner was largely based on a misapplication of the judgment of this Court in the case of *Jogendra Nath Singh* v. *Kali Charan Roy* (1). That decision, it has not been seriously disputed before us by either party, has no possible application to this case. There the Court

(1) 9 C. W. N. 663 (1905).

found that the particular tenure was not merely heritable but was also permanent, and that a tenure of this description could not be determined or resumed by the zemindar or the Government on the ground that the services were no longer necessary or had been dispensed with. It was further held that in the case of a tenure of this description where, during the life-time of the Ghatwal, his son who was appointed his Deputy, was dismissed, the dismissal of the son did not amount to a dismissal of the father, and that after the father's death, the son was entitled to succeed, although during his father's life-time he had been dismissed while acting as a Deputy of his father. It is obvious that these principles have no application to a case where, as here, the tenure is not heritable as of right and the lands are annexed to an office which also has not a hereditary character impressed upon it. The position then is, that the Commissioner refused to approve the appointment of the Plaintiff as Digwar, not because the Commissioner considered him unsuitable for the office, but because the Commissioner took an erroneous view of the relative rights of the Plaintiff and his opponent, the determination of the Commissioner was in essence based upon an erroneous adjudication of a question of title. This explains why the Board of Revenue stated that the Board had no jurisdiction and why the Executive Government held that the remedy for any grievance which the Plaintiff might have, lay in the Civil Court. It need not be denied that as was recognised in *Debee Narain* v. *Sree Kishen* (12) and *Secretary of State* v. *Poran Singh* (13), the Civil Court has no jurisdiction to reinstate a Ghatwal who has been dismissed by the Executive Government as unfit for the discharge of his duties. But the position is obviously different, where the Commissioner decides against a claimant, not in the exercise of his discretion but upon an erroneous view of the relative title of his contestant. *Lall Dharee Roy* v. *Brojolal Singh* (14). I am of opinion, accordingly, that it is competent to this Court to grant to the Plaintiff relief by way of a declaratory decree under sec. 42 of the Specific Relief Act, so that the Plaintiff may approach the Executive Government and seek their decision on the question of the appointment of a successor to the office of Digwar of Ghaut Bharra. A similar view has been taken in Bombay in connection with what are known as Vatans, and it has been ruled that if the Plaintiff has the right and if the Court has jurisdiction to give him relief by declaring it, he is entitled to a decree; the Court is not concerned with the object or motive of the party who comes into Court in assertion of his alleged right, and he should not be refused declaration merely because he seeks it with a view to influence the opinion of the Revenue authorities, *Ram Chandra* v. *Ananta* (15), *Govind* v. *Bapuji* (16), *Khando* v. *Apaji* (17), *Rahim Khan* v. *Dadamiya* (18); but the position is different when the declaration sought can be based only on the investigation of a question which is by statute or otherwise expressly excluded from the cognizance of the Civil Court, *Khandona* v. *Apaji* (19), *Chinto* v. *Lakshmi Bai* (20), *Bal Krishna* v. *Balaji* (21), *Raoji* v. *Genu* (22) and

(12) 1 W. R. 321 (1864).
(13) I. L. R. 5 Cal. 740 (1878).
(14) 10 W. R. 40 (1868).
(15) I. L. R. 8 Bom. 25 (1883).
(16) I. L. R. 18 Bom. 516 (1893).
(17) 11 Bom. L. R. 1342n (1904).
(18) 11 Bom. L. R. 1335; I. L. R. 34 Bom. 101 (1909).
(19) I. L. R. 2 Bom. 370 (1877).
(20) I. L. R. 2 Bom. 375 (1878).
(21) I. L. R. 9 Bom. 25 (1884).
(22) I. L. R. 23 Bom. 344 (1898).

Jivaji v. *Fakir* (23). The view I take is supported by the decision of the Judicial Committee in *Sadat Ali* v. *Khaja Abdul Gunney* (24) which recognised the principle that before the Court grants relief in a declaratory suit the Court must see that the declaration of right may be the foundation of relief to be got somewhere. This condition, it appears to me, is sufficiently answered in the present case. I arrive at this conclusion without hesitation or embarrassment in view of the letter of the Government of Bengal, dated 29th March 1909.

The only other question for consideration is, whether a declaration should be granted in the suit as framed. Here I think the Court should be guided by well settled principles now embodied in r. 7 of Or. 7 of the Code of 1908. The principle is best stated in the words of Lord Erskine in *Heirn* v. *Mill* (25). The rule is that if the Bill contains charges putting facts in issue that are material, the Plaintiff is entitled to relief which those facts will sustain under the general prayer but he cannot desert specific relief prayed and under the general prayer, ask specific relief of another description, unless the facts and circumstances charged by the Bill will consistently with the rules of the Court maintain that relief. This formulation of the rule, it may be parenthetically observed, is atrributed *per incuriam* to Lord Eldon by Baron Parke in *Cockerell* v. *Dickens* (3). In the application of this salutary rule, the test is whether the Defendant will be taken by surprise—*Stevens* v. *Guppy* (26), and there can be no surprise if the deficient relief not specifically claimed, but supplied as the Courts think just, is consistent with the relief specifically claimed as well as with the case raised by the pleadings. [*Cargyll* v. *Bower* (27). This rule has been repeatedly recognised and approved by the Judicial Committee [*Cockrell* v. *Dickens* (3), *Durga Prosad* v. *Bhajan Lall* (1) and *Gopi Narain* v. *Bansidhar* (5)]. The decision in *Wallihan* v. *Joggeswar* (2) is not really opposed to this view and only illustrates the position that to entitle a Plaintiff to judgment under the claim for general relief, different from that specifically claimed, the allegations relied upon must not only be such as to afford a ground for relief claimed but they must have been introduced for the purpose of showing a right to relief and not for the mere purpose of corroborating the Plaintiff's right to the specific relief claimed. In the case before us, the nature of the title under which the disputed property is held has been investigated after a protracted trial and there is no room for suggestion that the Defendant will be taken by surprise if a declaratory decree is made in favour of the Plaintiff. I hold accordingly that this is a case where a declaratory decree may properly be made and I agree with the Chief Justice that this appeal should be allowed and the decree of the lower Court modified by the substitution of a declaration in the terms framed by him.

HOLMWOOD, J.—I have nothing to add to the judgments which have just been delivered and with which I agree.

Decree modified.

(2) L. R 35 I A. 38: s. c. 12 C. W. N. 227 (1907).
(3) 2 M. I. A. 389 (1840).
(4) L. R. 31 I. A. 122: s. c. 7 C. W. N. 499 (1904).
(5) L. R. 32 I. A. 12 : s. c. 9 C. W. N. 577 (1905).
(23) 14 Bom. L. R. 895 (1912).
(24) 11 B. L. R. 203 (1873).
(25) 18 Ves. 119 (1806).
(26) 3 Russo 171 at p. 185 (1828).
(27) 10 Ch. D. 508 (1878).

THE

Calcutta Weekly Notes.

Vol. XX.] MONDAY, MARCH 6, 1916. [No. 15.

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NOTES.

EDITORIAL NOTES—

REPORTS (*See* Index).

Retirement of Mr. Justice Imam.

Mr. Justice Hossein Imam has resigned his seat on the Bench of the Calcutta High Court with effect from the 1st March. We notice with regret that he has had to retire so soon owing to ill-health and we hope he will soon be restored to his former health and strength. During the short time that he has been on the bench Mr. Justice Imam gave ample evidence of ability, judicial independence and strong common sense which always make a successful judge.

Mr. Justice Greaves and Mr. Justice Newbould.

In consequence of the retirement of Mr. Justice Imam, Mr. Justice Greaves has been made a permanent Judge. His Lordship was an Additional Judge all this time and we are glad to notice that he has been appointed to a permanent vacancy at the earliest possible opportunity. In place of Mr. Justice Greaves, Mr. Justice Newbould has been appointed an Additional Judge.

Shares in family property under Hindu Law of the adopted son and naturally born son respectively of two brothers.

On 26th November last, their Lordships of the Judicial Committee of the Privy Council delivered a very important judgment on a much disputed question of Hindu Law. The parties to the litigation were *Gujrati* Hindus and the question arose in a suit for partition of family property formerly held in joint ownership by two brothers Bhagwandas Nagardas and Hurkissendas Nagardas. Hurkissendas died on 14th September 1900, leaving him surviving his wife who on the 18th December 1900 was delivered of a *posthumous* child the Respondent Bachoo Hurkissendas. Bhugwandas Nagardas died childless on 17th December 1900, leaving him surviving a widow who, under an authority to adopt given to her on 17th February 1901, adopted the Appellant as a son to her deceased husband. The parties, it need hardly be stated, were governed by the Mitakshara as altered or interpreted by the Vyavahara Mayukha. The Appellant who was the Plaintiff in the suit claimed a moiety of the property, whilst the Respondent contended on the authority of paras. 24 and 25 of sec. 5 of the Dattaka Chandrika, as construed and applied by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (I. L. R. 4 Cal. 425) that the Appellant being an adopted son was entitled to a reduced share. Macleod, J., at the original trial upheld the Appellant's claim, but his decision was reversed on appeal by the Appellate Bench which accepted the interpretation of Markby and Prinsep, JJ.

Before the Appellate Court were placed two translations of the two paragraphs from Dattaka Chandrika, one Sutherland's (which was the one upon which Markby and Prinsep, JJ., proceeded) and another by Sir Ramkrishna Bhandarkar. Their Lordships of the Judicial Committee expressed themselves unable to say which translation was the more literal, each being obscure; but they had no doubt that neither translation warranted the construction placed by Markby and Prinsep, JJ., and by the Appellate Court in Bombay on the views somewhat obscurely expressed by the author of the Dattaka Chandrika himself in the paragraphs referred to.

In their Lordships' opinion what the author of the Dattaka Chandrika meant was that in cases of the distribution of family property by partition an adopted son stood exactly in the

same position as he would stand if he were a naturally born son of his adoptive father, subject to the qualification that if there was a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son would take a less share than he would take if he had been a naturally born legitimate son. This construction was not in their Lordships' opinion in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha and was moreover consistent with the reference to the text of Vasistha in paragraph 1 of sec. 10 of the Dattaka Mimansa; according to which "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part." It was to their Lordships obvious that Vasistha and Nanda Pundit were both referring to cases in which the competition would be between an adopted son and a naturally born subsequent son of the same father.

As regards the decision of Markby and Prinsep, JJ., referred to above their Lordships point out that it was in conflict with the previous decision of Loch and Hobhouse, JJ., in *Tara Mohun* v. *Kripa Moyee* in 9 W. R., p. 423, which was followed in 1881 by McDonnell and Field, JJ., in *Dinonath* v. *Gopal Charn*, 8 C. L. R. 57; and also that in *Raja* v. *Subbaraya*, I. L. R. 7 Mad. 253, doubt was cast on its correctness by Muthuswami Ayyar, J.

An attempt was made before their Lordships to establish the position that a son by adoption did not become a coparcener in the joint family property by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. Upon this argument, their Lordships observe that Hindu law and custom have not stood still and what we were now concerned with was the position at the present time of an adopted son in a Hindu family. As to this the authorities, *e.g.*, *Sumbhoochunder* v. *Narain*, 3 Knapp. 55 and *Pudma Coomari* v. *The Court of Wards*, 8 I. A. 229. *Kalikomul* v. *Uma Shunkar*, 10 I. A. 138 established that an adopted son (except in certain matters relating to marriage and except in so far as there might be a competition between an adopted son and a subsequently born legitimate son to the same father) becomes for all purposes the son of the father by adoption. This, in substance, is also the view which has been taken by their Lordships the Chief Justice and Woodroffe and Mookerjee, JJ., in the appeal of *Gungadhar Bogla* v. *Hira Lal Bogla* which as well as the Privy Council decision will be shortly reported.

PATNA HIGH COURT NOTES

Opening of the Patna High Court.

The Patna High Court was opened on Wednesday the 1st of March last. The opening ceremony was an imposing one. The Hon'ble Judges wore full Court dress. They were robed in red gown, wigs, black knee breeches, black silk stockings and buckled patent leather shoes. The Judges first assembled in the Government House where the Chief Justice was residing. Then they proceeded in procession in motor cars, the Chief Justice and Mr. Justice Sharfuddin, the seniormost puisne Judge, heading the procession. The Judges on arrival entered through the main entrance and first proceeded to their private chambers. The admission of barristers and vakils and visitors was by invitation cards. These gentlemen had taken their seats in the Chief Justice's Court room before the arrival of the Judges. There were a number of European ladies and two Bengalee ladies present who were provided with seats below the *dais* to the left-hand side of the Judges. Exactly at 10-35 the Judges entered the Court room and took their seats on red morocco stuffed armless chairs on the *dais*. The Registrar of the Court, the Commissioner of the Division, the Commissioner of Excise and Registration and some local high officials took their seat on the *dais* behind the Judges. The Hon'ble the Chief Justice then announced that His Majesty the King-Emperor has been pleased, by Letters Patent published on date, to establish a High Court of Judicature for the Province of Bihar and Orissa to be called the High Court of Judicature at Patna and that from date the jurisdiction hitherto exercised in this Province by the High Court of Judicature at Fort William in Bengal has been transferred to this Court.

Mr. Mazahrul Huq then, in according welcome to the Judges on behalf of the Bar, alluded to the high traditions of the Calcutta High Court and the eminent Chief Justices of that Hon'ble Court who had contributed to the building up of the traditions and maintaining them. He expressed a hope that the Hon'ble Judges of the Patna High Court would

keep fast to the moorings and administer even-handed justice between the strong and the weak and the rich and the poor. He offered on behalf of the Bar their whole-hearted co-operation to the Hon'ble Judges in their responsible and arduous task. Rai Saheb Narayan Prasad, the President of the Vakils' Association, then read a speech in which he echoed the very sentiments to which such eloquent expression had been given by Mr. Muzahrul Huq. The Hon'ble the Chief Justice then in a short resume of the Letters Patent and the Rules explained the scope of the more important provisions and in what respects they varied the practice prevailing in the Calcutta High Court. The changes related mostly to arrangements of business to enable the Hon'ble Judges and Registrar to cope with the work with a limited staff.

After the opening of the Court, advocates and vakils who had gone from Calcutta were conducted by the brother members of the profession to the different Court rooms and the intended Bar Library and Vakils' Library. The Court rooms are spacious and the dais, railings and furniture are elegant. The High Court buildings with their wings containing barristers' and vakils' chambers though not exactly imposing have a pleasing appearance. The entrance hall has been very artistically finished in marble and the dome above together with marble facing on the walls and the massive marble parapets of the landing lend an air of grandeur to the structure. But the tiled roof and brick and plaster of which the building is constructed somewhat take away from the effect of the dome and entrance hall. We also apprehend that the corridor running between the Court rooms may make them noisy. The resonance in the Court rooms, of which the Chief Justice complained, was not much in evidence on the opening day. Every word of the Chief Justice's speech was heard from every corner. But this might have been due to the hall being quite full on that day. We expect that when litigants and lawyers attend the Court in large numbers the resonance will to a great extent subside.

The Patna High Court Letters Patent.

The Letters Patent constituting the High Court of Judicature at Patna which is published in the *Gazette of India* of February 26th, 1916, and bears date the 9th February 1916, follow in their main features the Letters Patent of the Calcutta and Allahabad High Courts, though the fact that the new High Court inherits most of the jurisdictions hitherto exercised by the High Court at Calcutta has enabled the clauses describing the nature and extent of its various jurisdictions to be expressed more simply than was possible in framing the Letters Patent of the Allahabad High Court, *viz.*, by reference simply to the jurisdiction hitherto exercised by the High Court at Calcutta. Also the Province of Bihar and Orissa having, unlike the North-Western Provinces, a seaboard, the High Court at Patna is endowed with an admiralty jurisdiction which the Allahabad High Court does not and could not usefully possess. The Civil and Criminal powers conferred on the new High Court in its Admiralty Jurisdiction are those exerciseable "immediately before the publication of these presents" in the Province of Bihar and Orissa by the Calcutta High Court (cls. 21 and 25).

The points of difference between the Letters Patent of the Patna High Court and those of the Allahabad High Court (and necessarily also of the Calcutta High Court) are not very many, but the most noteworthy amongst them are the following :—

(1) The power of the Chief Justice of the Patna High Court to appoint clerks and ministerial officers is made subject to "any rules and restrictions which may be prescribed from time to time by the *Lieutenant-Governor in Council*," whereas in the Letters Patent of the Allahabad and Calcutta High Courts, the power to frame these "rules and restrictions" rests with the Governor-General in Council.

(2) It is specifically provided in cl. 10, that no appeal shall lie to the High Court from the judgment of a single Judge passed in the exercise of its Revisional Jurisdiction thus continuing for the provinces of Bihar and Orissa the practice obtaining in the High Court at Calcutta of not allowing appeals under the Letters Patent from orders of single Judges passed in revision.

(3) The special provisions made for the holding of a Circuit Court in Orissa.

(4) Delegation of duties (judicial, quasi-judicial and non-judicial) to subordinate officials.

With regard to the establishment of a Circuit Court in Orissa it is provided—

35. And We do further ordain that, unless the

Governor-General in Council otherwise directs, one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa, by way of circuit, whenever the Chief Justice from time to time appoints, in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the said High Court: Provided always that such visits shall be made not less than four times: every year, unless the Chief Justice, with the approval of the Lieutenant-Governor in Council otherwise directs: Provided also that the said High Court shall have power from time to time to make rules with the previous sanction of the Lieutenant-Governor in Council, for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justice may, in his discretion, order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division.

36. And We do further ordain that whenever it appears to the Lieutenant-Governor in Council, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

37. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Patna visit any place under the 35th or the 36th clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

It should be noted that cl. 36, is not new, for it corresponds with cl. 24 of the Allahabad Letters Patent and cl. 31 of the Calcutta Letters Patent.

The delegation of authority to subordinate officers is in these terms.

38. The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

It was in view of this clause, that many *lowazima* matters recently brought up before the Court and arising from cases from what until lately were the V and VI Groups of the Calcutta High Court were referred to the Registrar of the High Court of Patna at Patna and Cuttack.

Besides the clauses noticed above the only other clauses which need special mention are those providing for the "cessation of jurisdiction of the High Court of Judicature at Fort William in Bengal." They have already appeared in a previous issue of this journal, but in order to make these notes on the provisions of the Patna High Court Letters Patent complete we reproduce them here.

39. And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents, and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court:

Provided, first, that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

(*a*) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order, other than an order of an interlocutory nature, has been passed or made by that Court, or in which the validity of any such decree or order is directly in question; and

(*b*) in all proceedings [not being proceedings referred to in paragraph (*a*) of this clause] pending in that Court, on the date of the publication of these presents, under the 13th, 15th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th or 35th clause of the Letters Patent bearing date at Westminster the Twenty-eighth day of December, in the Year of Our Lord One thousand eight hundred and sixty-five, relating to that Court; and

(*c*) in all proceedings instituted in that Court, on or after the date of the publication of these presents, with reference to any decree or order passed or made by that Court:

Provided, secondly, that, if any question arises as to whether any case is covered by the first proviso to this clause, the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final.

PRIVY COUNCIL.

[APPEAL FROM SUPREME COURT OF CANADA.]

THE LORD CHANCELLOR. LORD ATKINSON. LORD PARMOOR. SIR GEORGE FARWELL. SIR ARTHUR CHANNELL.	THE EASTERN TRUST COMPANY, Appellants, *v.* MCKENZIE MANN & Co., Ld, Respondents.	1915, 27, April.

Temporary injunction, subsequently dissolved—Order to be obeyed when it lasts—Order binding on party though it prohibits receiving payment from Government and Government authorised to pay by statute—Order operates in personam—Government's duty to ascertain and obey law—Question of construction, question for Courts.

Where in a suit for dissolution of partnership and accounts, a Receiver of the partnership assets was appointed and a temporary injunction was granted restraining the Defendants inter alia *from receiving certain payments from Government and the Government which was no party to the suit made payments to one of the Defendants in alleged exercise of power reserved to it by statute, and subsequently the injunction was dissolved, the Plaintiff's case having failed:*

Held—*That an injunction although subsequently discharged because the Plaintiff's case failed, must be obeyed while it lasts.*

That although the injunction could not bind the Government not to pay or make the Government responsible for that obedience to the law which the Court was entitled to expect, the man who received in breach of the order was guilty of a contempt in no way cured by the payment by Government.

The non-existence of any right to bring the Crown into Court such as exists in England by petition of right, and in many of the Colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General.

DYSON *v.* ATTORNEY-GENERAL (1) AND BURGHES *v.* ATTORNEY-GENERAL (2) *referred to.*

It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue and it is the duty of the Executive in cases of doubt to ascertain the law in order to obey it, not to disregard it.

The Government in this case having made the payment with notice of the Court's order:

Held—*That although with regard to the payments made under statutory powers, the action of the Executive might be justifiable, the question whether any particular sum mentioned in the contract in suit was payable as for "labour and supply" (so as to be within the Government's power to pay under the statute) was a question of construction and therefore of law for the Courts.*

That the proper course in the present case for the Executive would have been either to apply to the Court to determine the question of construction of the contract and to pay accordingly or to pay the whole amount over to the Receiver and to obtain an order from the Court on the Receiver to pay the sums properly payable according to the true construction of the contract.

This was an appeal from the Supreme Court of Canada.

The material facts are set out in the judgment.

(1) [1911] 1 K. B. 410 [1910].
(2) [1912] 1 Ch. 173 [1911].

THE EASTERN TRUST COMPANY *v.* MCKENZIE MANN & CO., LD.

Their LORDSHIPS' JUDGMENT was delivered by

SIR GEORGE FARWELL.—This is an appeal from a judgment of the Supreme Court of Canada (Duff, J., dissenting), which reversed the unanimous judgment of the Supreme Court of Nova Scotia, dated the 5th July 1913, varying the report dated 15th January 1912, of the referee appointed by the Court in this action. The action is a partnership action between James Irvine, since deceased, as Plaintiff, and Robert G. Hervey and others as Defendants, and a decree was made therein by Graham, J., on March 13th, 1905, whereby the partnership was dissolved and certain accounts and inquiries were directed to be taken by a referee appointed by the Court. The Respondents, Mackenzie and Mann, were made parties to the action under the following circumstances. In June 1903 the Harvey Trust and Guarantee Company, as agent for the partners Irvine and R. G. Hervey, controlled all the capital, stock, and bonds of the Nova Scotia Southern Railway Company, which had been formed by the partners, who were unable to complete its construction, and arrangements had been made whereby the railway was to be completed by the Halifax and South-Western Railway Company, and Government subsidies were to be paid to that company in respect of the Nova Scotia line, which would form part of the said Halifax and South-Western Railway when completed; and on the 13th June 1903 an agreement was entered into between the trust company, as agents for the two partners of the one part, and the Respondents Mackenzie and Mann (therein and hereinafter called the contractors) of the other part, whereby the partners agreed to sell and the contractors agreed to buy all the stock and bonds of the said Nova Scotia Railway Company for 275,000 dollars, of which 75,000 dollars was to be paid in fully paid capital stock of the said Halifax Company at par on an event which has happened and the balance, 200,000 dollars, as follows:—5,000 dollars on execution and the balance, 195,000 dollars, from time to time to the extent of 50 per cent. of the amounts paid by Government on account of loans or subsidies in respect of the said Nova Scotia line as and when such amounts are paid until the whole 195,000 dollars is paid.

"Provided that if the 50 per cent. be not sufficient to pay the 195,000 dollars in full, the balance shall be paid when the said loans and subsidies have been all received by the said company."

There is a further proviso which will be more conveniently dealt with later.

The sum payable by the contractors would form part of the assets of the partnership of which the Court had undertaken the administration, and would be primarily applicable in discharging the debts of the firm, including their indebtedness to the Nova Scotia Company, and inasmuch as the contractors owned all the stock and shares of that company, the discharge of the company's debts would enure for their benefit by increasing the value of the company's assets, and consequently of its stocks, shares, and securities. The substantial question in the case is the amount payable under the contract by the contractors.

On 29th January 1901 a Receiver was appointed of such assets, and an injunction was granted restraining the Defendants Hervey and the Hervey Trust Company from receiving from the contractors or the provincial treasurer of the Province all or any part of the 195,000 dollars.

When this appeal was opened before their Lordships it was treated as common ground that (as appears from the report of the referee at page 126 of the Record)

by September 27th, 1907, the total subsidy then paid by the Government was 397,080,90 dollars :—

"One half of this 198,540.45, a sum sufficient to pay more than the amount called for under the contract of June 13th, 1902."

This subsidy was paid on mileage. The inquiry with regard to this matter is given in the order of 24th November 1908 (page 66 of Record) :—

"What balance remains due and owing in respect of the consideration moneys payable under the said contract dated June 13th, 1902, to the parties entitled under the said agreement, or the persons, if any, who succeeded to their rights thereunder."

The case has throughout proceeded on the footing of ascertaining the exact amount due, but towards the end of his reply before their Lordships, counsel for the Respondents took the point that nothing was due, because, according to his argument, the 195,000 dollars fell short by about 30,000 dollars, and that the inquiry should be answered accordingly. It may be questioned whether such an argument is now open to the Respondents, but whether it is so or not, their Lordships are of opinion that it is untenable; the 5,000 dollars was undoubtedly payable and paid on the execution of the contract, and the balance from time to time to the extent of 50 per cent. of the amounts was payable and paid by Government on account of loans or subsidies. There is nothing to lend colour to the suggestion that the contractors are not bound to pay until the whole accounts have been settled up, and show no balance, even of a dollar, owing. The proviso points to the payment of the balance out of subsidies paid in respect of the residue over and above the 50 per cent., not to the payment of the entirety of the 50 per cent. of the subsidies, as a condition precedent to a demand for payment of so much as has been paid, and an account of the amount of such payments.

Another objection was also taken by the Respondent's counsel, which may possibly have been taken in the Supreme Court of Canada, although the only reference to anything of the sort occurs in Duff, J.'s dissenting judgment, where he says :—

"If it had been shown that the Plaintiff in the action or the Receiver was aware that such payments were being made to Hervey, then it is conceivable that a case of estoppel might have been made out. But there is no suggestion of anything of the kind."

The argument offered to their Lordships is that Hervey, in contempt of Court, got payment of some of the subsidy money to himself, and that a motion to commit him was made, which failed by reason of his disappearance from the colony. It appears to their Lordships that it is sufficient to state the point to show its want of substance.

The real point, however, argued and dealt with in the Courts below is as follows. The contract of 13th June 1902 contained the following proviso referred to above :—

"It is part of this contract that the Government of Nova Scotia have the right to be satisfied that all claims for moneys due and owing by the said Nova Scotia Southern Railway Company, Ltd., and its contractors in the province of Nova Scotia for labour and supplies furnished in connection with the construction of the said Nova Scotia Southern Railway Company's road, heretofore constructed, have been paid or satisfied, and the amounts of such claims may be paid out of the consideration moneys hereinbefore mentioned, and all sums paid in liquidation of such claims shall be considered payments on account of the said sum of 195,000 dollars."

The object of this proviso is to enable the Government of Nova Scotia, in whose jurisdiction labour had been done by work-

ing men, and materials supplied and used, on that portion of the railway that had been made in the province, to compel payment therefor by the Nova Scotia Railway and its contractors: the persons to be paid are the labourers for their labour and the tradesmen for their goods: the persons who were bound to pay, and whose default was to be cured by Government intervention, were the railway company and the contractors. There is no such provision with regard to any other work or material.

The contract is framed in accordance with the subsidy contract between the Nova Scotia Government and the Halifax and S.-W. R. Co., in whom the undertaking of the Nova Scotia Company was vested (Act 1, 3 of 1903, Acts of Nova Scotia), confirmed by C. 1 of the Acts of Nova Scotia, 1902, set out at p. 237 of the record, which makes special provision for payment of all labour in the construction of the work or materials therefor, and in case of default in paying the men or in paying for materials on or before the 20th day of the month for all works performed or materials delivered before the first of that month, the Governor in Council has power to retain all money due to the company and to apply it in paying the men their wages, or in paying for materials, and charge it as if paid to the company on account of the subsidy. The Government undertook no personal liability for such payment, but took power to ascertain the sums due and the persons to whom they were due.

In June 1903 the Government, under the statutory powers given under C. 26, 1903, Nova Scotia, appointed a Commissioner—

"to inquire into and report to the Governor in Council what claims for wages of the workmen employed in and for materials supplied for the construction or unfinished construction of the Nova Scotia Southern Railway are due and unpaid by any person, firm, or corporation, and the particulars and amounts of such claims respectively, and also all other claims against the company, construction company, or contractors engaged in the building of the said railway, the nature and particulars of the said claims, and the respective amounts thereof."

The Commissioner duly made his report, and the Government acted thereon, and made large payments to persons reported as entitled to payments out of the subsidy. The greater part of these payments reached the persons entitled thereto, and no objection is now raised in respect thereof. But before all the payments on account of the subsidy had been made, *viz.*, on 13th July 1903, this action was commenced, and a Receiver was appointed by the Court of the assets of the Plaintiff's business, and an injunction was granted until the final determination of the action restraining the Defendants, R. G. Hervey, and the Hervey Trust from receiving from the Canadian Bank, or the contractors, or the Provincial Treasurer of Nova Scotia or otherwise, and the said Bank and the contractors were restrained from paying to the said Defendants or to any persons other than the Receiver (*inter alia*), all or any part of the said 195,000 dollars. The Provincial Treasurer was dismissed from the action on the ground that the Court had no jurisdiction over him, and the Government, with full notice of the order, proceeded to distribute the subsidy without any regard to it. With regard to payents actually made by the Government under the statutory powers above referred to, the action of the Executive may be justifiable; but even so, the question whether any particular sums mentioned in the contract were or were not properly described as for labour and supplies is a question of construction, and therefore of

law for the Courts. Their Lordships are unable to agree with the view of the Supreme Court as to the powers of the Government and to the presumption that ought to be drawn as to the nature of the payments made.

It was further held, on the admission of the parties, that no injunction could be granted against the Crown, and further that no other party to the action was bound by the injunction or the appointment of a Receiver.

This decision raises a question of great importance. Duff, J., in his dissenting judgment, puts the first point very clearly:

"The parties were declaring that certain payments made by the Government were to be deducted from the consideration moneys. These were such payments as the Government should be satisfied were due and owing in respect of claims for 'labour and supplies. The deduction could only be made if two conditions were satisfied: (1) that the claim was for labour and supplies; and (2) that the Government was satisfied that it was due and owing.'"

In the present case the Government have not only made payments which by no latitude of construction can come within the words "labour and supplies," but have also paid a large sum to R. G. Hervey, who was directly restrained by the Court from receiving it. If it was the case of a private individual, he would be clearly liable to make good the wrongful payment and to purge his contempt. In the case of the Crown there is no ground for Idington, J.'s proposition that the Government may fairly say that they were given such power by the Legislature over the subject-matter and that the Courts have no ground for interfering, at all, directly or indirectly, with the exercise of such a discretion. There is nothing on which to found the existence of the alleged discretion or to support a decision which pronounces the Executive Government free to dispose of money the right to which is *sub judice inter partes* and held *in medio* by the order of the Court.

The second point taken by Idington, J., is equally untenable and even more important. The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the Colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Dyson* v. *Attorney-General* (1) and in *Burghes* v. *Attorney-General* (2). It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the Receiver and to obtain from the Court an order on the Receiver to pay the sums properly payable for labour and supplies, as to the construction of which their Lordships agree with the Supreme Court of Nova Scotia.

The duty of the Crown in such a case is

(1) [1911] 1 K. B. 410 (18 C).
(2) [1912] 1 Ch. 173 (1921).

well stated by Lord Abinger in *Deare* v. *Attorney-General* (3). After pointing out that the Crown always appears (in England) by the Attorney-General in a Court of Justice—especially in a Court of Equity—where the interest of the Crown is concerned, even perhaps in a bill for discovery, he goes on to say :

"It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice where any real point of difficulty that requires judicial decision has occurred."

Further, their Lordships are unable to agree with the Supreme Court of Canada in their opinion of the injunction. Apart from the Crown, the Court had clear jurisdiction over all the parties to the action to restrain them from doing any of the acts complained of: its order and injunction operates *in personam*, and compels the party forbidden to do any act, whether the receipt of money or the like, to refrain from doing it, whoever the other party may be, and whatever his rights may ultimately prove to be. The existence of such a jurisdiction has been part of the equitable jurisdiction of our Courts for centuries, and is necessary in a case like the present for the safe preservation of the subject-matter of the action until the rights of the parties can be finally determined. It is a misconception to speak of the order and injunction of the Court in such a case as this as only permissive: it was, of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged, and although it could not bind the Government not to pay or make the Government responsible for that obedience to the law which the Court was entitled to expect, the man who received in breach of the order was guilty of a contempt in no way cured by the payment by the Government. Their Lordships are unable to agree with the decision of the Supreme Court which gives the Executive power to override the judgment of the Court.

Their Lordships, with all respect, differ entirely from the statements in Idington, J.'s, judgment, that an injunction under which the hand giving may be innocent, and the hand receiving guilty, would be an anomaly not in accord with the policy of the law which developed the power of injunction. Such an injunction is, on the contrary, in accordance with ordinary practice and well-settled principles, and their Lordships are of opinion that the order to attach Hervey for contempt was rightly and properly made. An injunction, although subsequently discharged because the Plaintiff's case failed, must be obeyed while it lasts; it is clear that if a claimant to an inalienable Government pension succeeded in persuading the Court in this country that he had a *primâ facie* claim to it, and obtained an interim injunction, the true owner of the pension could be committed for contempt if he received his money in defiance of the order, although the Crown was no party to the litigation, and paid in disregard or ignorance of the order.

Their Lordships agree with the decision of the Supreme Court of Nova Scotia, and will humbly advise His Majesty to allow this appeal, discharge the order of the Supreme Court of Canada, and restore that of the Supreme Court of Nova Scotia, of the 5th July 1913.

But in remitting the report as directed by the last-mentioned order there should be a direction to the referee that in taking the accounts all amounts paid by the Government of Nova Scotia to the creditors of the Nova Scotia Southern Railway Com-

(3) Y. & C. Exch. 197 at p. 208 (1835).

pany ought to be set off against the amount payable by the Respondents.

The Respondents must pay all the costs in the Courts below and of this appeal.

Appeal allowed.

B. D.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 191 OF 1913.

MOOKERJEE, J. ROE, J. 1915, Heard, 9 and 10, June. Judgment, 30, August.	SURES CHANDRA PALIT and anr., Plaintiffs, Appellants, *v.* LALIT MOHAN DUTTA CHOUDHURI and ors., Defendants, Respondents.

Will—Absolute gift—Rules of construction approved by Courts—Effect of subsequent clauses in Will restricting absolute gift created in previous clauses—Will of a Hindu, matters which Court may consider in construing*—Malik—Nirbyudha malik, *meaning of.

A Hindu testator left a Will the material portions of which were as follows. The second and third clauses of the Will appointed the testator's widow as executrix and authorised her to meet the expenses and pay the debts by sale, if necessary, of a portion of the estate. The fourth clause provided that the widow shall obtain as nirbyudha malik *whatever moveable and immovable properties shall be left by the testator and she shall be the absolute owner with the rights of gift, sale and all other kinds of transfer. In the next three clauses the testator authorised the widow to adopt a son and prescribed the devolution of the estate in the event of such adoption and in the last clause he provided that if at the time of the death of his widow there be no adopted son or if no son or wife of the adopted son be alive then the testator's heir according to the Hindu* shastras *who shall be alive at the time shall get the properties which shall remain after disposal by the widow by way of gift or sale of the same.*

Held—*That under the fourth clause of the Will the widow took an absolute interest in the estate devised and the gift over contained in the last clause of what might remain undisposed of by her was void and inoperative in law.*

That the provisions of the Will relating to adoption and the devolution of the estate in the event of adoption could not qualify the effect of the fourth clause even though they contained provisions repugnant thereto.

That where an absolute interest is given the Court will not cut it down by subsequent words in the Will unless they clearly have an effect to restrict it.

That where a devisee takes an absolute interest a gift over on his failure to dispose of the property or whatever part of the property he does not dispose of is void.

That the rule of construction applicable to cases of this description is that not only ought the Court to look to the words of a Will alone to determine the operation and effect of the devise but the Court ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate when such estate is once collected from the words of the Will itself. SCARBOROUGH *v.* SAVILE (68). *The instrument must receive a construction according to the plain meaning of the words and sentences therein contained, that is, the words are to be first read in their grammatical and ordinary sense unless the context shows otherwise.*

That in construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, namely,

that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family and also that a Hindu knows that as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate but where the terms are perfectly clear the Court cannot assume contrary to the plain meaning thereof that the testator intended to create estates of a particular description and then bend and twist the language in favour of the assumption so made.

That the use of the term malik *may not by itself necessarily create an absolute interest but the expression* nirbyudha malik *is the strongest and most unequivocal phrase employed in the vernacular to indicate absolute ownership.*

This was an appeal preferred on the 5th June 1913, against the decree of Babu Kailas Chandra Sen, Subordinate Judge, 2nd Court of Zillah Sylhet, dated the 17th February 1913.

The facts of the case fully appear from the judgment.

Babu Rishindranath Sarkar for the Appellants.

Babus Tarakisor Chaudhuri and *Gobinda Chandra De Ray* for the Respondents.

The Judgment of the Court was as follows :—

The subject-matter of the litigation, which has culminated in this appeal, originally formed the estate of one Sarat Chandra Dutta Chaudhuri, who made a testamentary disposition on the 2nd April 1899, and died on the 7th November 1901. He left a childless widow, Girija Sundari Chaudhuri, who died on the 21st November 1908. After the death of the widow, a dispute arose as to the devolution of the estate of her husband which had vested in her. The sons of the sister of the widow contended that the estate had vested in her absolutely and on her death had devolved upon them as her heirs. The son of the sister of the testator contended, on the other hand, that the widow took nothing beyond a life-interest and that upon her death, the estate had devolved upon him as the reversionary heir to the estate of her husband. The result was that on the 11th September 1911, the sons of the sister of the widow instituted this suit against the son of the sister of the testator, for construction of his Will and for recovery of possession of his estate on declaration of title thereto. Three other persons with whom we are not now concerned, were also joined as Defendants. The Subordinate Judge dismissed the suit on the ground that the widow took only a life-interest and that upon her death the estate vested in the first Defendant as reversionary heir. The Plaintiffs have now appealed to this Court and have contended, *first*, that the widow took an absolute estate under the Will of her husband and, *secondly*, that the gift over of what might remain undisposed of by her was repugnant and void.

The rights of the litigants depend upon a true construction of the Will of the testator and the determination of the legal effect of the disposition made by him. The material clauses of the Will, after the usual prefatory words, are as follows :—

2. "If, at the time of my death, no son is born of my loins or no son exists and I die childless, then in respect of my aforesaid moveable and immoveable properties which shall be rightfully owned by me, at the time of my death, by virtue of purchase, gift inheritance or by any other right, I appoint my wife Srimati Girija Sundari Chaudhuri to be the *achhi* or Executrix after my death.

(68) 3 A and E. 897, 962 (1836).

3. Immediately after my death, my Executrix, *i.e.*, *achhi*, shall defray the expenses, etc., of my cremation ceremony with the income of my property and shall pay my just debts, etc., if there be any, and shall meet other necessary expenses. If the expenses cannot be met with the income of the aforesaid properties, the said *achhi*, *i.e.*, Executrix, if necessary, shall be competent to sell some portion of my aforesaid properties.

4. After the performance of what should be done, according to the purport of the foregoing paragraph my widow Srimati Girija Sundari Chaudhuri shall obtain whatever moveable and immoveable properties shall be left by me and she shall be the absolute owner with the rights of gift, sale and all other kinds of transfer.

5. If no son is born of my loins, or there be no son, my widow Srimati Girija Sundari Chaudhuri if she wishes shall be competent to adopt son; if she wishes, she shall be competent to adopt three sons in succession but she shall not be competent to adopt another son, during the life-time of one, or if such son does not forsake his adoptive mother, or if any of them dies leaving a male child, then during the life-time of such male child.

6. If I adopt a son during my life-time or after my death my widow adopts a son, in that case after her, *i.e.*, my widow's death, the said adopted son shall get such properties as shall remain after sale or gift by my widow; and he shall be the absolute owner, with the rights of gift, sale and all other kind of transfer; but the said adopted son shall not be competent to go away to the house of his natural father and mother, that is, he shall dwell in my own house or in a separate house erected by him in our own village. If he does not do so, he shall be fully deprived of the said properties. During the life-time of my widow, the said adopted son shall not have any right over the aforesaid properties.

7. If the said adopted son shall have no son or if he dies before a son is born to him, his widow shall be in enjoyment and possession of the said properties provided my widow or her husband has not conferred on her any special right in respect of the said properties. But if she does not live in my own house, or in the house erected by her husband or that erected by her, in my own village, she shall be deprived of the right of enjoyment and possession of the said properties.

8. If, at the time of death of my widow, there be no adopted son or if no son or wife of the adopted son be alive, then, my heir according to the Hindu *shastras* who shall be alive at the time shall get the properties which shall remain after disposal by my wife by way of gift or sale of the same."

The second clause appoints the widow as Executrix. The third clause authorises her to meet the expenses and pay the debts by sale, if necessary, of a portion of the estate. The fourth clause vests in her whatever might remain after payment of debts and expenses, absolutely and with complete power of alienation. It cannot be disputed that the effect of this clause taken by itself is to constitute the widow the absolute proprietor of the estate. Her status is described not merely as that of *malik*, but as that of *nirbuyadha malik*. The use of the term *malik*, may not by itself, necessarily create an absoulte interest, as explained in the cases of *Surajmani* v. *Rabinath* (1), *Punchoomoney* v. *Trailokhya Mohiny* (2), *Shib Lakshan* v.

(1) L. R. 35 I. A. 17 : s. c. 12 C. W. N. 281 ; I. L. R. 30 All. 84 ; 7 C. L. J. 131 (1907).
(2) I. L. R. 10 Cal. 842 (1884).

Tarangini (3) *and Padamlal* v. *Tek Singh* (4). But in the case before us, the term *malik* is qualified by the word *nirbuyadha* which, as is clear from the Sanskrit lexicons of Wlison, Bohtlingk arid Roth and Monier Williams, signifies "completed" or "finished." In fact, the well-known expression *nirbuyadha malik* is the strongest and most unequivocal phrase employed in the vernacular to indicate absolute ownership. In addition to this we have two important facts, *first*, that as pointed out in *Kollany Koer* v. *Lachmee Persad* (5), *Lalitmohan* v. *Chukkunlal Roy* (6), *Rajnarain* v. *Katyayani* (7), affirming *Rajnarain* v. *Asutosh* (8), the effect of the word *malik* is to confer on the donee a heritable and alienable estate, and *secondly*, that the fourth clause itself expressly confers on the widow full power of alienation of all kinds. As explained in *Tulsidas* v. *Madan Gopal* (9), *Amarendranath* v. *Suradhani* (10), *Seth Mulchand* v. *Mancha* (11), *Jogeswar Narayan* v. *Ramchandra* (12), when a power of absolute disposition is conferred on the donee, the provision indicates that the testator intended to create an absolute interest in favour of the donee. No doubt, there may be cases, where, as in *Harakumari* v. *Mohim Chandra* (13), and possibly in *Saroda Sundari* v. *Kristo Jiban* (14), all the provisions of a Will taken together may indicate that the widow took only a life-interest coupled with a power of appointment to alienate by gift or sale the property passing by the Will, but this doctrine cannot be applied if there is, in so many words, a clear and absolute gift to the widow, as in the case before us. We thus start, with the fundamental position that by the fourth clause the widow took an absolute interest in the estate devised. Is there, then, any provision in the Will which restricts the clear and unambiguous effect of this clause? The Subordinate Judge, in support of his view, relied upon the clauses which authorise the widow to adopt and prescribe the devolution of the estate in the event of such adoption. In our opinion these provisions do not qualify the effect of the fourth clause. In fact, even the later clauses explicitly provide that the widow would have absolute interest, notwithstanding the adoption, that the adopted son would not have any right over the estate during her life-time, and that after her death he should get only such properties as might remain after sale or gift by the widow; so that it is conceivable that the widow might alienate the entire estate and leave nothing for the adopted son to take. The case is thus very different from that before the House of Lords in *Comiskey* v. *Bowring Hanbury* (15), where, although an absolute gift was made to the widow, there was clear indication that the estate was to be kept intact by her for transmission to the nieces of the testator, in whose favour there was an executory gift to take effect on her death. The Subordinate Judge also relied upon the decision of the Judicial Com-

(3) 8 C. L. J. 20 (1908).
(4) I. L. R. 29 All. 217 (1906).
(5) 24 W. R. 395 (1875).
(6) L. R. 24 I. A. 76 : s. c. I. L. R. 24 Cal. 884 ; 1 C. W. N. 387 (1897).
(7) I. L. R. 27 Cal. 649 : s. c. 4 C. W. N. 387 (1900).
(8) I. L. R. 27 Cal. 44 (1899).
(9) I. L. R. 28 Cal. 499 (1901).
(10) 14 C. W. N. 458 (1909).
(11) I. L. R. 7 Bom. 491 (1883).
(12) L. R. 23 I. A. 87 : s. c. I. L. R. 23 Cal. 670 (1896).
(13) 12 C. W. N. 412 (1908).
(14) 5 C. W. N. 300 (1900).
(15) [1905] A. C. 84.

mittee in *Shamsul Huda* v. *Sebak Ram* (16), in support of the view that in construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, namely that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and also that a Hindu knows that as a general rule, at all events, women do not take absolute estates of inheritance, which they are enabled to alienate. This is indisputable and has been reaffirmed by the Judicial Committee in *Radha Prosad* v. *Ranimoni* (17), but where, as here, the terms are perfectly clear, we cannot assume, contrary to the plain meaning thereof, that the testator intended to create estates of a particular description and then bend and twist the language in favour of the assumption so made. In our opinion, there is nothing in any of the later clauses of the Will which cuts down the absolute estate created in favour of the widow in the fourth clause in the most unequivocal terms conceivable. It is possible that the testator has, in the later clauses of the Will, made provisions repugnant to what is contained in the fourth clause, but that cannot affect the meaning of what is contained therein. As was observed by the Judicial Committee in *Tripurari* v. *Jagat Tarini* (18), where an absolute interest is given the Court will not cut it down by subsequent words, unless they clearly have an effect to restrict it. To the same effect is the principle repeatedly recognised by the House of Lords as a settled rule of construction, namely that if there is a clear gift it is not to be cut down by anything subsequent in the Will, which does not with reasonable certainty indicate the intention of the testator to cut it down. *Thornhill* v. *Hall* (19), *Featherston* v. *Featherston* (20), *Abbott* v. *Middleton* (21), *Randfield* v. *Randfield* (22), *Hope* v. *Freemen* (23). Thus, if an estate is given in terms which confer an absolute estate to a named donee, and, then further interests are given merely after or on the termination of that donee's interest, and not in defeasance of it, his absolute interest is not cut down, and the further interests fail. *Hoare* v. *Byng* (24), *Hyndman* v. *Hyndman* (25), .

The question next arises: is the gift over contained in the eighth clause valid and operative in law? The Appellants have contended that as an absolute interest was conferred on the widow, the gift over was void for repugnancy. This argument is supported by the well-settled rule of English Law that a gift over, if a devisee or legatee to whom an absolute interest is given does not dispose of his interest or dies intestate or dies before selling his interest, is void both as regards reality and personality. This is clear from a long line of authorities: *Leightburne* v. *Gill* (26), *Ross* v. *Ross* (27), *Green* v. *Harvey* (28), *Re Yalden* (29), *Re Mortlock's Trust* (30), *Bower* v.

(16) L. R. 2 I. A. 7: s. c. 14 B. L. R. 226; 22 W. R. 409 (1874).
(17) L. R. 35 I. A. 118: s. c. I. L. R. 35 Cal. 896; 12 C. W. N. 729; 8 C. L. J. 48 (1908).
(18) L. R. 40 I. A. 37: s. c. I. L. R. 40 Cal. 274; 17 C. W. N. 145 (1912).
(19) 2 Cl. and F. 22, 36 (1834).
(20) 3 Cl. and F. 67, 73 (1835).
(21) 7 H. L. C. 68, 84 (1858).
(22) 8 H. L. C. 225, 235 (1860).
(23) [1910] 1 Ch. 681.
(24) 10 Cl. and F. 508 (1844).
(25) [1895] 1 I. R. 179.
(26) 3 Brown P. C. 250 (1764).
(27) 1 J. and W. 154 (1819).
(28) 1 Hare 428 (1842).
(29) 1 DeG. M. & G. 58 (1851).
(30) 3 K. & J. 456 (1857).

Goslett (31), *Henderson* v. *Cross* (32), *Gulliver* v. *Vaux* (33), *Holmes* v. *Godson* (34), *Barton* v. *Barton* (35), *Perry* v. *Merritt* (36), *Re Wilcock's Settlement* (37), *Re Percy* (38), *Re Dixon* (39), *Re Jones* (40), *Comiskey* v. *Bowring Henbury* (15), *Bull* v. *Kingston* (41), *Cuthbert* v. *Purrier* (42), *Brown* v. *Gibbs* (43), *Phillip* v. *Eastwood* (44), *Watkins* v. *Williams* (45), *Weale* v. *Ollive* (46), *Shaw* v. *Ford* (47), *Re Jenkins's Trusts* (48), *Stretton* v. *Fitz Gerald* (49), *Parnell* v. *Boyd* (50), and *Re Walker Lloyd* v. *Tweedy* (51).

The decisions in *Upwell* v. *Halsey* (52), and *Doed Stevenson* v. *Glover* (53) to the contrary effect cannot be treated as good law; the first of these cases was treated as overruled by Loughbrough, L. C., in *Malin* v. *Keighley* (54) and by Sugden, L. C., in *Phillips* v. *Eastwood* (44); the second case was decided in ignorance of the decision in *Gulliver* v. *Vaux* (33), which, though decided in the Common Pleas in 1746 was brought to light in 1856 after a century's repose; it was with reference to this case that Holmes, J., observed in *Parnell* v. *Boyd* (50): "It will be recorded for a precedent, and many an error, by the same example, will rush into the State." The rule thus steadily applied in England and Ireland, is, however different from that recognised by the Law of Scotland, for as pointed out by the House of Lords in *Barstow* v. *Black* (55), the position of an absolute unlimited owner subject to a conditional gift over, though unknown to the Law of England is well-known to the Scotch Law.

The rule of English Law has been adopted almost universally in the Courts of the United States, and is thus formulated by Chancellor Kent in his commentaries (Vol. IV 270): "if there be an absolute power of disposition given by the Will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over or remainder over the property, which he, dying without heirs, should leave, or without selling or devising the same; in all such cases, the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the Will" [*Jackson* v. *Bull* (56), *Jackson* v. *Robins* (57), *Ide* v. *Ide* (58) and *Attorney-General* v. *Hall* (59)]. The rule formulated by Kent has been twice approved by the Supreme

(31) 27 L. J. Ch 249 (1857).
(32) 29 Peav. 216 (1861).
(33) 8 DeG. M. & G. 167n (1746).
(34) 8 DeG. M. & G. 152 (1856).
(35) 3 K. & J. 512 (1857).
(36) L. R. 18 Eq. 152 (1874).
(37) 1 Ch D. 229 (1876).
(38) 24 Ch. D. 616 (1883).
(39) [1903] 2 Ch. 458.
(40) [1898] 1 Ch. 438, 441.
(15) [1905] A. C. 84.
(41) 1 Mer. 314 (1816).
(42) Jac. 415; 23 R. R. 104 (1822).
(43) 1 Rus. & Myl. 614 (1831).
(44) Ll. and Goo. Temp. Sugden 270, 297.
(45) 3 Mac. and G. 622, 629; 87 R. R. 228 (1851).
(46) 32 Beav. 421 1863).
(47) 7 Ch. D. 669, 674 (1877).
(48) 23 L. R. Ir. 162 (1889).
(49) 23 L R. Ir 310 (1889).
(50) [1896] 2 I. R 571.
(51) [1898] 1 I. R. 5.
(52) 1 P. Wms. 651.
(53) 1 C. P. 448 (1845).
(54) 2 Ves. 529, 532; 2 R. R. 229 (1795).
(50) [1896] 2 I. R. 571.
(55) L. R. 1 Sc. and Div. 302 (1868).
(56) 10 Johnson 19 (1813).
(57) 16 Johnson 537 (1819).
(58) 5 Mass. 500.
(59) Fitz. 314; W. Kee. 13: 2 Eq. Cas. Abr. Pl. 21.

Court of the United States : *Smith* v. *Bell* (60) and *Howard* v. *Carusi* (61).

The rule enunciated above has been recently adopted by the Judicial Committee of the Privy Council without discussion in *Tripurari Pal* v. *Jagattarini* (18). There the testator directed with regard to *debutter* estate, which he had dedicated and religious ceremonies which he had established during his life-time, that his son Mukunda Murari would be the *shebait*. He appointed the mother of the boy to be *shebait* as guardian during his minority. He next proceeded to provide that, if during his life-time, or after his death the said Mukunda Murari died, his widow would be *shebait*, and after her death her two daughters would be *shebaits*. After the death of the testator the widow, during the minority of the boy, acted as *shebait* and conducted the worship. Mukunda, on attainment of his majority, took possession and acted as *shebait*; he died in 1900, leaving a minor son and widow. His mother then resumed possession under the gift over in her favour. The infant son of Mukunda, through his mother, sued the widow and daughters of the testator for a declaration that he had the sole right to the *debutter* estate of his grandfather as the heir of his father in whom it had previously vested absolutely on his attaining majority. The Subordinate Judge decreed the suit. This Court on appeal reversed that decision and held that the *shebaitship* devolved upon the death of Mukunda, upon his mother, and that upon the death of the latter, it devolved on her daughters. The Plaintiffs appealed to the Privy Council and contended before the Judicial Committee that his father Murari took an absolute estate in the *shebaitship*, which on his death devolved on the Plaintiff by right of inheritance; the contention was that the gift over was contrary to law and reference was made to sec. 111 of the Indian Succession Act and the decision of the Judical Committee in *Narendranath* v. *Kamalbasini* (62). The Judicial Committee accepted this contention and held that as there was an absolute gift to Mukunda on his attaining his majority, the Plaintiff was entitled to succeed.

This fits in exactly with the rule enunciated by Sir Arthur Hobhouse in *Mussoorie Bank* v. *Raynor* (63), namely, that where an absolute interest has been given to the first taker, followed by a gift over of what may not be required by him, the gift over though couched in the most direct and precise words is void for uncertainty according to a very well-known and well-established class of cases.

Much stress has been laid in this Court on the decision of the Judicial Committee in *Bhubanmohini* v. *Harishchandra* (64). That case is, in our opinion, clearly distinguishable and its precise effect was stated by Lord Hobhouse in *Krishnaramani* v. *Narendra Krishna* (65) : "there was no gift over in that case; *Bhubanmohini* v. *Harishchandra* (64). The donor made a gift to his sister Kasiswari in vernacular terms, which, though peculiar and referring only to lineal heirs, this Committee held to be identical in effect with other terms well-known, and often used by Hindu donors, who intend to pass the whole inheritance, though they men-

(18) L. R. 40 I. A. 37 : s. c. I. L. R. 40 Cal. 274 ; 17 C. W. N 145 (1912).
(60) 6 Peter 68.
(61) 103 U. S. 725.
(62) I. R. 23 I. A. 18 : s. c. I. L. R. 23 Cal. 563 (1896).
(63) L. R. 9 I. A. 70 (80) : s. c. 7 App. Cas. 321 ; I. L. R. 4 All. 500 (1882).
(64) L. R. 5 I. A. 138 : s. c. I. L. R. 4 Cal. 23 (1878).
(65) L. R. 16 I. A. 29 : s. c. I. L. R. 16 Cal. 383 (888).

tion only children or issue. Then he said, 'no other heir shall be entitled.' This was held to mean that if Kasiswari died leaving no issue then living, her interest was to cease. In effect the construction was that if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life-interest. In the latter case, nothing had passed from the donor but the life-interest, and when that was spent, he or his heir would lawfully re-enter." This principle clearly does not avail the Respondents nor can they derive any assistance from the rule laid down in *Soorjeemoney* v. *Denobundoo* (66), as to the defeasance of a prior absolute interest by a subsequent event. That rule has no application where, as here, there is an absolute gift of property to a person, followed by a gift over in the event of his dying intestate or not disposing of it. There is, in our opinion, no substantial answer to the contention that where a devisee takes an absolute interest, a gift over on his failure to dispose of the property or of whatever part of the property he does not dispose of, is void.

An ingenious attempt has been made to criticise the rule enunciated and recognised in the Law of England, and we are not unmindful that the rule has been the subject of unfavourable comment by text writers (see, for instance, Gray on Restraints on the Alienation of Property, secs. 57—74 g). For all practical purposes, however, it is fruitless to seek the logical justification of a principle, which has been recognised or approved, twice by the House of Lords [*Lightbourne* v. *Gill* (26) and *Comiskey* v. *Bowring Hanbury* (15)] twice by the Judicial Committee [*Tripurari* v. *Jagattarini* (18) and *Mussoorie Bank* v. *Raynor* (63)] and twice by the Supreme Court of the United States [*Smith* v. *Bell* (60) and *Howard* v. *Carusi* (61)]. Reference may be made, however, to the judgments of Grant, M. R., in *Bull* v. *Kingston* (41), of Truro, L. C., in *Watkins* v. *Williams* (45), of Burnett, J., in *Gulliver* v. *Vaux* (33), of Turner, L. J., in *Holmes* v. *Godson* (34) of Fry, J., in *Shaw* v. *Ford* (47) and of Kent, C., in *Jackson* v. *Robins* (57), where the rule is defended on the grounds of uncertainty, repugnancy to the prior gift, and of public policy. As Turner, L. J., said in *Holmes* v. *Godson* (34), the law has said that if a man dies intestate, the real estate shall go to the heir and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of law and therefore void. Lord Macnaghten emphasised this when he said in *Attorney-General* v. *Ailesbury* (67): "real estate must descend according to the ordinary rules of real property; you cannot give real estate in fee and say that on the death of the owner intestate it shall go to his next of kin."

We may add that in cases of this description, the rule of construction formulated by Tindal, C. J., in *Scarborough* v.

(15) [1901] A. C. 81.
(18) L. R. 40 I. A. 87: s. c. I. L. R. 40 274; 17 C. W. N. 145 (1912).
(26) 3 Brown. P. C. 250 (1784).
(33) 8 DeG. M. & G. 167n (1746).
(34) 8 DeG. M. and G. 152 (1856).
(41) 1 Mer. 314 (1816).
(45) 3 Mac & G. 622, 629; 87 R R 228 (1851).
(47) 7 Ch D. 669, 674 (1877).
(57) 16 Johnson 537 (1819).
(60) 6 Peter. 68.
(61) 109 U. S. 725.
(63) L. R 9 I. A. 70 (80): s. c 7 App Cas. 321; I. L. R. 4 All. 500 (1882).
(66) 6 M. I. A. 526 (1857); 9 M. I. A. 123 (1861).
(67) L. R. 12 A. C. 672, 694 (1897).

Savile (68) applies : " not only ought we to look to the words of a Will alone to determine the operation and effect of the devise, but we ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate, when such estate is once collected from the words of the Will itself." The instrument must receive a construction according to the plain meaning of the words and sentences therein contained; that is, the words are to be first read in their grammatical and ordinary sense, unless the context shows otherwise ; *Hamilton* v. *Ritchey* (69), *Gordon* v. *Gordon* (70) and *Seale Hayne* v. *Jodrell* (71) ; as Knight Bruce, L. J., pointed out in *Lowe* v. *Thomas* (72), this rule comes from the Digest (lib. 32, tit. 1, s. 69) where Marcellus says : " *Non aliter a significatione verborum recedi oportet quam cum manifestum est aliud sensisse testatorem* "—a departure from the literal meaning of the words used is not justifiable, unless it be clear that the testator himself intended something different therefrom. But as Halsbury, L. C., said in *Leader* v. *Duffey* (73) we shall be arguing in a vicious circle if apart from the language of the instrument, we start with the assumption that the testator intended to create such estates only as the law allows, and then read into his words a meaning they will not legitimately bear. To the same effect are the observations of Cairns, L. C., in *Coldsmann* v. *Coldsmann* (74). As Buller, J., said in *Hodgson* v. *Ambrose* (75) the question whether the intention is consistent with the rules of law or not, can never arise till it is settled what the intention was. Where there is no obscurity or ambiguity, there is no room for application of the doctrine that it is better to effectuate than to destroy the intention, for as Lord Coke quaintly puts it, " whensoever the words of a deed or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken " [1 Co. Lit. 42 a, b ; *Christie* v. *Gosling* (76)]. Where, however, the language is clear and unequivocal, the construction cannot be altered or wrested to something different from the plain meaning, for the purpose of escaping from what may seem to be the harsh consequences of rules of law. *Dungannon* v. *Smith* (77), *Peaks* v. *Mosley* (78), *De Beauvoir* v. *De Beauvoir* (79), *Abbott* v. *Middleton* (21), *Bathurst* v. *Errington* (80) and *Martin* v. *Holgate* (81). We are of opinion that upon a true construction of the Will before us, the following positions are incontestable, namely, *first*, that the testator gave an absolute interest in his estate to his widow with full powers of alienation ; and, *secondly*, that the gift over of what might remain undisposed of by her, was void and inoperative in law. There is thus no escape from the position that after the death of the widow the estate has devolved upon the Plaintiffs as her heirs and not upon the first Defendant as the reversionary heir to the testator.

The result is that this appeal is allowed and the decree of the Subordinate Judge

(68) 3 A. and E. 897, 962 (1836).
(69) [1894] A. C. 310, 313.
(70) L. R. 5 H. L. 254, 271 (1871).
(71) [1891] A. C. 304, 306.
(72) 5 DeG. M. and G. 315, 317 (1854).
(73) 18 A. C. 294, 301 (1888).
(74) L. R. 3 H. L. 121, 130 (1868).
(75) 1 Douglas, 337, 342 (1780).
(21) 7 H. L. C. 68, 84 (1858).
(76) L. R. 1 H. L. 279, 290 (1866).
(77) 12 Cl. and Fin. 546, 599 (1846).
(78) L. R. 5 A. C. 714, 719, 733 (1880).
(79) 3 H. L. C. 524, 545 (1852).
(80) 2 A. C. 698, 709 (1877).
(81) L. R. 1 H. L. 175, 180 (1866).

set aside. The Plaintiffs will have a decree for possession of the properties in suit, exclusive of the properties mentioned in the two Schedules attached to the written statement of the third Defendant, dated the 20th February 1912, but inclusive of one-half of property 14 of the Second Schedule of that written statement. The Plaintiff will also be entitled to costs in both the Courts and to mesne profits from the first Defendant.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 110 OF 1915
AND
RULE No. 438 OF 1915.

MOOKERJEE, J.
NEWBOULD, J.
1915,
Heard, 4 and 5, August.
Judgment, 10, August.

SWARNAMOYEE DEBI, Appellant,
v.
SECRETARY OF STATE FOR INDIA IN COUNCIL, Respondent.

Court Fees Act (VII of 1870), sec. 19-C—Double probate, duty if payable on—Fees chargeable raised by Statute in the interval between the two grants—Second applicant if should pay the difference.

By sec. 19C of the Court Fees Act, the Legislature meant that where the full fee chargeable under the Court Fees Act on a probate at the time it is granted has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate.

Where during the minority of the testator's son, G to whom on 29th April 1909 probate durante minore aetate *was granted died and thereupon on 7th November 1914, a second grant of probate was applied for by S,*

Held—*That the Court was wrong in directing S to pay the difference between the fees calculated at the rate of 2 per cent. which was paid, in accordance with the Court Fees Act then in force, by G and fees calculated at 3 per cent. as required by the Amending Act VII of 1910 which was enacted in the interval between the two grants.*

This was an appeal from an Order of J. D. Cargill, Esq., District Judge, Mymensingh, dated the 18th January 1915.

The facts of the case will appear from the judgment.

Babus Dwarkanath Chuckerbutty and *Kali Kinkar Chuckerbutty* for the Appellant.

Babu Ram Charan Mitra for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal is directed against an order, whereby the District Judge has in substance refused to issue a probate to the Appellant till a sum of Rs. 769-3-0 had been paid as succession duty. The facts are not in controversy, and may be briefly recited. One Prasunna Kumar Bhattacharyya died on the 28th October 1908. He had previously made a testamentary disposition of his properties on the 24th March 1907. The Will provided that during the minority of his son Amulya Kumar Bhattacharyya his estate would be administered, first by his eldest sister, Gobindasundari Debi, and, next, upon her death, by his widow Swarnamoyee Debi; the ladies were thus constituted the two successive executrices. On the 29th April 1909, probate was granted to Gobindasundari Debi under sec. 31 of the Probate and Administration Act, 1881, though it was not explicitly stated that the grant was made *durante minore aetate*. The executrix died on the 17th July 1914. As the

sole residuary legatee had not yet attained his majority, the second executrix named in the Will applied for probate on the 9th September 1914. An order was recorded on that date that no probate duty appeared necessary as it had been paid already, and the case was fixed for disposal on the 7th November 1914. On that date the Court directed that the original probate produced by the Applicant be cancelled and that a fresh probate with a copy of the Will annexed be granted to the petitioner. On the 21st December 1914, the Court reconsidered the matter and held that as the scale of probate duty on estates valued at above Rs. 50,000 had been raised from 2 to 3 per cent. by Act VII of 1910 and as duty had been paid at the rate of 2 per cent. on the first probate the petitioner should be called upon to pay the difference between the duties calculated at 2 per cent. and 3 per cent. respectively. The petitioner was heard on the 18th January 1915, and contended that under section 19-C of the Court Fees Act, 1870, as amended by Act XIII of 1875, no further duty was payable. This contention was overruled and she was called upon to pay the additional sum named before the probate could be issued to her. The petitioner has appealed to this Court and has also obtained a Rule in the alternative, should a question be raised as to the competency of the appeal. It is plain that the order in effect refuses the application for probate and is appealable under sec. 86 of the Probate and Administration Act.

Section 19C of the Court Fees Act, 1780, which was inserted therein by sec. 6 of Act XIII of 1875, is in these terms: "Whenever a grant of probate or letters of administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate." It is plain that as the fee chargeable upon a probate is required by sec. 19I to be paid before the order for grant of probate is made, what constitutes "the full fee chargeable under this Act" must be determined by reference to the point of time when the grant of probate is made. We are unable to accept the contention that "the full fee chargeable under this Act" must be determined, with reference to the point of time, when the second grant is sought. We are further unable to accept the contention that the expressions "under this Act" and "under the same Act" refer to, not the Court Fees Act but the subsequent Acts amending the Court Fees Act; what the Legislature appears to have intended is that where the full fee chargeable under the Court Fees Act on a probate at the time it is granted has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate. If this interpretation were not accepted, and if the contention of the Government Pleader were to prevail, the anomalous result would follow that sec. 19C would have no application where, as in the case before us, the scale of probate duty has been raised in the interval between the grant of the first and the second probates, and consequently, the entire probate duty on the enhanced scale would be payable without deduction of the duty previously paid. This could hardly have been the intention of the Legislature. The second paragraph of sec. 19C would be of no avail, as it is restricted to grants in respect of property forming part of an estate. In our opinion, the interpretation put upon the first paragraph of sec. 19C by

the Appellant is reasonable and is undoubtedly consistent with the language used. We hold accordingly that as the full fee chargeable under the Court Fees Act on the first probate granted in this case on the 29th April 1909 was paid thereon, no fee is now chargeable under the Court Fees Act on the second grant. This view does not militate against the decision of COUCH, C. J., in *In the goods of Chalmers* (1) and of Garth, C. J., in *In the goods of Gasper* (2). In the former case, the first grant had been made and a fixed duty paid thereon under the Indian Succession Act, 1865, while the second grant was made after the Court Fees Act, 1870, had come into force. In the latter case the circumstances were similar, with this difference that sec. 19C had meanwhile been inserted in the Court Fees Act, but that section could not avail, as it refers expressly to cases where both the first and the second grants had been made after the Court Fees Act had come into force. Nor is any assistance derived from the decision of Norman, C. J., in *In the goods of Innes* (3), which merely recognises the principle subsequently embodied in the second paragraph of sec. 19C. We may add that the view adopted by us places the law in this country in a line with what has long been the law in England. There, all second and subsequent grants of probate and administration, in respect of property on which the full duty has been already paid upon a previous grant, are exempted from further stamp duty by sec. 3 of 41 Geo. III, c. 86; sec. 36 of 5 and 6 Vict. Ch. 82 contains a corresponding provision for Ireland. It may further be observed that if the question be considered as one of principle, the rule as formulated in England and as interpreted by us is evidently just. When an executor to whom probate has been granted dies, leaving a part of the testator's estate unadministered and a new representative is appointed for the purpose of completing the administration, there is no new succession, no new devolution of the estate and it is difficult to appreciate why a fresh succession duty should be levied. A good illustration is afforded by the case of *In the goods of Balthazar* (4); there, letters of administration had previously been issued in respect of the whole property, and the full fee chargeable on the property at the value then placed upon it had been levied. It was ruled that when a new grant had to be made under sec. 229 of the Indian Succession Act, on the death of the first administrator, no further Court-fee was leviable although the value of the property had increased in the meantime. This is consistent with the decision of Norman, C. J., in *In the goods of Ameerun* (5), that no duty is payable on a double probate which recites and in fact proceeds upon the first. Reference may in this connection be made to the following passage from Williams on Executors, 10th Ed., Vol. 1, p. 295; "Probate granted to one of several executors enures to the benefit of all. *Webster* v. *Spencer* (6) and *Cummins* v. *Cummins* (7). Where there are several executors, upon the grant of probate to one of them, it is usual to reserve power of making a like grant to the others. But this appears to be unnecessary, both because the probate already granted enures to their benefit, and because they have a right to the grant, whether the power be reserved or not. The practice is to take out what is called a double pro-

(1) 6 B. L. R. App 137; 21 W. R. 246 (1870)
(2) I. L. R. 3 Cal. 788 (1878).
(3) 16 W R. 253; 8 B. L. R. App. 48 (1871).
(4) 4 L. B. R. 255 (1908).
(5) 15 W. R. 476 (1871).
(6) 3 B. and Ald. 362 (1820).
(7) 3 Jo. and Lat. 64 (1845).

SWARNAMOYEE DEBI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

bate which is in this manner. The first executor that comes in takes probate in the usual form, with reservation to the rest. Afterwards if another comes in, he also is to be sworn in in the usual manner and an engrossment of the original Will is to be annexed to such probate in the same manner as the first, and in the second grant such first grant is to be recited; and so on, if there are more that come in afterwards. 4 Burn Ec. Law 310; *In the goods of Bell* (8). If there be several executors appointed with distinct powers, as one for one part of the estate, and another for another, yet there being but one Will to be proved, one proving of it suffices. Bacons Abr. Ti Exec. (c) 4. So, if B is made executor for ten years and afterwards C is to be executor, and B proves the Will and the ten years expire, C may administer without any further probate. *Anon* (9), *Anon* (10) and *Watkins* v. *Brent* (11). In our opinion, we cannot reasonably hold that the Appellant is bound to pay additional probate duty.

The result is that this appeal is allowed, and the order of the District Judge dated the 18th January 1915 set aside. Probate will be granted to the Appellant without payment of fresh probate duty.

The rule will stand discharged.

Rule discharged.

(8) L. R. 2 P. and D. 247 (1871).
(9) 1 Freeman 318 (1675).
(10) 1 Ch. Cas. 265 (1675).
(11) 1 My'. and Cr. 104 (1835).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES

No. 147 OF 1911

AND

Nos. 208 AND 216 OF 1913.

FLETCHER, J.
TEUNON, J.
1915,
Heard, 7 and 8, April.
Judgment, 8, April.

JANARDAN KISHORE LAL SINGH DAO and ors., Plaintiffs, Appellants,
v.
SIB PROSAD RAM and others, Defendants, Respondents.

Civil Procedure Code (Act V of 1908), Or. 2, r. 2, sub-r. (3)—Suit for royalty—Accidental omission of portion of claim already due—Court's power to reserve portion of cause of action—Amendment of plaint which would deprive Defendant of plea of limitation, if should be allowed—Consolidation of suits pending appeal.

Where it appeared from certain leases that the causes of action as regards minimum royalty and excess royalty were the same, but the lessor sued only for the minimum royalty which had fallen due at the date of the suit:

Held—*That he was precluded by Or. II, r. 2, of the Civil Procedure Code from suing again for the excess royalty, even though in decreeing the previous suit, the Court expressly reserved the Plaintiff's cause of action in respect of excess royalty.*

Or. II, r. 2, sub-sec. (3), of the Civil Procedure Code does not authorise the Court to split up the Plaintiff's cause of action but only to allow the Plaintiff to pursue the reliefs in respect of the same cause of action at different times.

Where the Plaintiff sued for royalties due on a mining lease during a specified period, excluding from his claim certain previous arrears which were also due, on the ground that certain amounts paid by

the Defendants during the period in suit had been appropriated in discharge of these previous arrears, but the Court held that the payments should have been appropriated in discharge of a portion of the arrears sued for,

Held—*That a subsequent suit for the recovery of the arrears excluded from the claim in the previous suit was barred by Or. II, r. 2, of the Civil Procedure Code.*

Even an accidental or involuntary omission by a Plaintiff of a portion of his claim is covered by the rule.

BUZLOOR RUHEEM *v.* SHAMSOONNISSA BEGUM (1) *followed.*

RADHAKISHOREE DEVIA *v.* RAM COOMAR CHOUDHURY (2) *referred to.*

The Court would proceed to consolidate suits, if at all, only where the consolidation is asked for before the trial of the suits begins, and the evidence to be given is common to both.

The High Court declined to consolidate two suits already decided in the first instance by the lower Courts, in which appeals were pending before it, the suits having been tried in the lower Courts by different Judges and on evidence recorded separately in each suit.

The High Court also refused leave to amend a plaint when the amendment, if permitted, would deprive the Defendants of the right that the law had given them, viz., *to state or allege that the claim was legally barred.*

These appeals were preferred on the 19th of April 1911, against the decree of Babu Bankim Chandra Mitra, Subordinate Judge, Burdwan, dated the 27th June 1910.

(1) 11 Moo. I. A at p. 551 (1867).
(2) 12 W. R. 79 (1869).

The appeals arose out of two suits instituted by the Plaintiffs-Appellants for recovery of moneys alleged to be due on the basis of two mining leases. One of the suits was instituted on the 18th March 1909 (suit No. 119 of 1909) and the claim was for Rs. 10,437-3-6 pies and included claim for minimum royalty and rent for three years, namely, the Bengali years 1313 and 1314 and portions of 1312 and 1315. In making up the claim, the sums paid by the Defendants during the years 1313, 1314 and 1315 for the royalty of those years were, the Plaintiffs averred, appropriated by the Plaintiffs towards the previous arrears due for the years 1310, 1311 and 1312.

In this suit the learned Subordinate Judge by his decision, dated the 27th June 1910 held that the sums paid during the years in suit should have been appropriated for those years and the result was that a sum of about Rs. 1,100 only was decreed to the Plaintiffs. Appeal No. 147 of 1911 was preferred, on the 19th April 1911 against this decree.

Previous to the institution of this appeal the Plaintiffs had filed suit No. 535 of 1910 on the 14th November 1910 claiming royalty due for six years before suit excepting the period for which the previous suit No. 119 of 1909 had been filed. This suit was valued at Rs. 16,379-11-0 and was partially decreed on the 31st January 1913, for Rs. 8,178-5-11 pies and the Plaintiffs preferred Appeal No. 216 of 1913 claiming an additional sum of Rs. 8,201-5-1 pie.

At the hearing of the appeals, the Plaintiffs made an application for amendment of the plaint in the later suit or in the alternative for consolidating the two appeals, alleging as follows :—

"That as the object of both the suits is to claim the royalties due for six years

before the suit filed on 14th November 1910 your Petitioners pray that your Lordships will be pleased either to allow them to withdraw the suit No. 119 of 1909 and to amend the plaint in suit No. 595 of 1910, so that your Petitioners may get what is due to them for royalties in respect of the six years before the 14th November 1910 or to order that the suits and appeals be consolidated and decree made upon adjustment of accounts for six years before suit.

"That if amendment be made in the plaint of suit No. 595 to the following effect, the object of your Petitioners will be attained—

"(*a*) In para. 8 of the plaint to insert after the words 'of the years 1311 and 1312 B. S.' the following :—The Plaintiffs beg to withdraw the suit No. 119 of 1909 and appeal No. 117 of 1911 and pray that on adjustment of the accounts of receipts of royalty the Plaintiffs may be awarded such sum as is due to them in respect of the years 1311 Kartick to 1317 Kartick.

"(*b*) Paras. 9 and 10 be omitted.

"(*c*) In prayer (*ka*), the following words may be added—'or such other sum may be found to be due to them.'

"(*d*) That the last para. and the account of minimum royalty that follows it be omitted."

Upon this application Fletcher and Teunon, JJ., on 8th April 1915 passed the following judgment :—

FLETCHER, J. (TEUNON, J., agreeing).—This application for amendment of the plaint is, in my opinion, too late. No application was made to the Court of first instance nor has it been made until after the opening of the appeals before us. I think we ought not to assent to the amendment prayed for when the learned senior Government pleader tells us quite frankly that, if the amendment is now permitted, it will, in fact deprive the Defendants of the right that the law has given them, namely, to state or allege that the claim is now barred by limitation. By the proposed amendment we would take away from the Defendants, if we grant it, a right that they would have if the Plaintiffs proceed against them by way of original suit.

Then the other part of the application is that we should consolidate the two appeals. The cases were not consolidated in the Court of first instance. The evidence has been taken separately and different witnesses have been called and cross-examined. The Code contains no provisions for consolidating proceedings in India. Whether or not the Court has jurisdiction to consolidate the proceedings, I imagine that it would only do so where the consolidation is asked for before the trial of the suits begins and where the evidence given in the two cases is common in both of them. I do not know any instance where the appeals have been consolidated so as to treat the evidence in one case as evidence in the other when the trial proceeded separately in the Court of first instance. In many cases in India it happens that the evidence is given before different Judges in the Court of first instance. As a matter of fact, in the present case, the Judge who decided the suit which forms the subject-matter of Appeal No. 117 of 1911 is a different Judge from the Judge who decided the suit which forms the subject-matter of Appeal No. 208 of 1913. To consolidate the two cases that have been tried by different Judges in that manner is a proceeding which I have never heard of before. It will also be noticed in this case that the second suit now under appeal, that is, the suit which forms the subject-matter of Appeal No. 208 of 1913, was not

instituted until after the former suit had been finally determined by the Court of first instance. If the Plaintiffs intended to proceed by way of amendment or otherwise, they ought to have made the application to the Court of first instance before the institution of the second suit. I see no reason which would lead us to assent to the present application. The application seems to me to be altogether a novel one. I think, therefore, that the present application should be dismissed with costs one gold mohur.

Babus Ram Charan Mitter and *Srish Chandra Choudhury* for the Appellants in Nos. 147 and 216 and for Respondent in No. 208.

Dr. Dwarkanath Mitter and *Babu Mohini Nath Bose* for the Respondent in Nos. 147 and 216 and for the Appellant in No. 208.

The following judgment was delivered in the appeals and a cross-appeal preferred by the Defendants :—

No. 147.

FLETCHER, J.—This is an appeal preferred by the Plaintiffs against a judgment of the learned Subordinate Judge of Burdwan. The suit was brought to recover the arrears of what is called the minimum royalty in respect of certain mining leases that were held by the Defendants as transferees from the original lessee. The amounts sued for were a portion of the royalty payable for 1312, the whole of the royaly payable for 1313 and 1314 and the royalty up to the Pous *kist* of 1315 B. S. The only quetsion that was really in dispute between the parties as to the amounts payable was as to whether the Plaintiffs had appropriated certain specific payments that had been made by the Defendants towards the payment of certain other rents that were then in arrears. The learned Subordinate Judge found that point in favour of the Defendants. The payments or the directions as to the mode in which the money should be applied were all in writing. There does not seem to be any doubt that the learned Judge arrived at a correct conclusion. When he took the view that the payments that had been made by the Defendants ought to be given credit to them as against the amount sued for in the present suit. That is the only point in dispute between the parties in this appeal and I think that the view adopted by the learned Judge of the Court below is correct. The present appeal, therefore, fails and ought to be dismissed. We make no order as to costs.

No. 216.

FLETCHER, J.—This is an appeal by the Plaintiffs from a decision of the learned Subordinate Judge of Burdwan. The Plaintiffs brought the suit to recover the rent payable to them under two leases, the leases being mining leases and the amounts sued for were not only the minimum royalty but also the excess royalty. In the present appeal, only one question arises and that is this :—The learned Judge has disallowed a certain portion of the Plaintiffs' claim on the ground that subsequent to the date on which the amount disallowed became due the present Plaintiffs instituted in the Court of the learned Subordinate Judge another suit which came to trial and did not include this portion of their claim. Shortly it may be stated that in the former suit certain instalments of the minimum royalty were sued for. But the Plaintiffs omitted from their claim a portion of the minimum royalty which became due in the Bengali years 1311 and 1312 on the ground that those amounts had been satisfied by the appropriations of certain payments that had been made to the Plaintiffs by the Defendants. In the former suit, the Subordinate Judge

found that the payments that had been made by the Defendants should be applied towards the payment of certain instalments subsequent to the year 1312. The Plaintiffs in that suit made no application to the learned Subordinate Judge to amend their plaint nor did they attempt in any way to get payments of these sums that became due earlier than the amounts sued for in the earlier suit. The Plaintiffs, therefore, in the present suit claimed not only the amounts that were due subsequent to the date of the decree in the former suit but those earlier amounts which were not sued for in the earlier suit. The only question we have to decide is "Are the Plaintiffs entitled to recover these portions of the minimum royalty payable for parts of the year 1311 and 1312?" Or. II, r. 2, C. P. C., provides that "every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court." Sub-r. (2) of the same rule provides that "where the Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." It is said that that rule does not apply to an accidental or involuntary omission to sue. But the authorities are all the other way. The authorities seem to me to be clear and conclusive that the omission of a Plaintiff to sue is covered by the rule that I have referred to whether the omission be accidential or involuntary or otherwise. That is quite clear from the judgment of the Judicial Committee in the case of *Buzloor Ruheem* v. *Shamsoonnissa Begum* (1). The words of the Code of Civil Procedure that was then in force are not substantially different from the words that now appear in Or. II, r. 2. In so far as there is any variation, the variation is not in favour of the Appellants but rather against them. That case has also been recognised and followed in this Court in the case of *Radhakishoree Devia* v. *Ram Coomer Choudhury* (2), and also in a later decision of Mr. Justice Mookerjee sitting alone in the case of *Syed Abdullah* v. *Hurkishen Singh* (3). Those decisions have not in any way been departed from and although, as the learned senior Government pleader says, there may be some hardship in a case of an accidental omission, it is quite obvious that the Court cannot cut down the clear and distinct words of the statute, even if the Court thinks that it is a case of great hardship to the Plaintiff. It seems to me that, on the point raised in the present appeal, the learned Subordinate Judge came to a correct conclusion. I would, therefore, dismiss the present appeal. In this case also, we make no order as to costs.

No. 208.

FLETCHER, J.—This is a cross-appeal to Appeal No. 216 of 1913 preferred by the Defendants against the judgment of the learned Subordinate Judge in so far as it relates to what he has called in his judgment the excess royalty. The first point to determine in this appeal is "Are the Plaintiffs entitled to sue in this suit for what is known as the excess royalty for the years 1312 to 1316?" The leases under which the property is held do not make any distinction between the minimum royalty and the excess royalty excepting that the minimum royalty is payable by monthly instalments in any event. But the whole royalty is

(1) 11 Moo. I. A. at p. 551 (1867).

(2) 12 W R 76 (1869).

(3) 2 C L J [illegible].

payable under one and the same bundle of facts. It is quite clear on these mining leases that the causes of action as regards the minimum royalty and the excess royalty are, in fact, the same. If that is so, then the Plaintiffs are in this difficulty. They brought the former suit in which they claimed only the minimum royalty. In the present suit, they have claimed for royalty for the years 1312 to 1316. In the former suit they could have sued for the excess royalty for the years 1312, 1313 and 1314; and, that not having been done, it seems to me that Or. II, r. 2, C. C. P., prohibits them from suing for those amounts in the present suit. Those clearly ought to have been included in the former suit.

Then it is said that the learned Subordinate Judge in the former suit gave the Plaintiffs leave to reserve their cause of action as regards the excess royalty. Petitions seem to have been presented to the learned Judge in that view and the learned Judge, so far as the order-sheet shows, seems to have assented to that mode of the Plaintiffs' suing. But Or. II, r. 2 (3), does not provide for the learned Judge authorising the Plaintiffs to split up their causes of action but only authorises the Court to allow the Plaintiffs to pursue the reliefs in respect of the same cause of action at different times. I do not think that the order of the learned Judge giving leave to the Plaintiffs to reserve their cause of action as regards the excess royalty was authorised by the law, and I think, therefore, that they are brought back to what was raised in the last Appeal (No. 216) that these sums formed a portion of the same cause of action, as the minimum royalty. These sums for the year 1312 to 1314 ought to have been sued for in the former suit and, they not having been sued for, under the provisions of Or. II, r. 2, C. C. P., the Plaintiffs cannot sue for them in the present suit. On that footing, the amount due to the Plaintiffs for excess royalty would be Rs. 2,598-10-9 instead of the amount found due by the learned Subordinate Judge.

A further point was raised by the learned vakil for the Defendants in this cross-appeal and that is that, under the provisions of the second mining lease, the two holdings under the two separate leases became amalgamated and the Defendants are only liable to be charged for the excess royalty when the excess is over the total quantity, namely, 235,960 maunds which is the aggregate amount mentioned in the second lease. That seems to me clearly not to be so. There is nothing in the second lease that purports to put an end to the provisions of the former lease. In fact, the former lease has over and over again been recognised as valid and subsisting in the second lease. Cl. 12 of the second lease that has been relied upon clearly does not, in my opinion, put an end to the provisions contained in the first lease.

The result, therefore, is that in this case the decree of the learned Judge of the Court below must be varied by declaring that the Defendants are liable to pay the sum of Rs. 2,598-10-9 as excess royalty in lieu of the sum found due by the learned Judge. The provisions in the learned Judge's judgment as to the calculation of interest will, of course, remain unaffected by the present judgment. We make no order as to costs.

TEUNON, J.—I agree.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES NOS. 1748 AND 2023 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1915,
Heard, 21 and 22, July.
Judgment, 30, July.

BROJENDRA KISHORE ROY CHOUDHURY, Plaintiff, Appellant,
v.
SAROJINI RAY and others, Defendants, Respondents.

Limitation Act (IX of 1908), sec. 23, Arts. 120, 142—"Dispossession" and "discontinuance of possession," meaning of—Suit to determine rights of parties to order under sec. 146, Cr. P. C., period of limitation for—Suit, if lies against Magistrate—Magistrate a stake-holder—Declaratory suit against rival claimant—Continuing wrong.

The Defendants attempted to interfere with the Plaintiff's possession of the disputed property and a breach of the peace becoming imminent proceedings under sec. 145, Cr. P. C., were instituted and resulted in an order of attachment under sec. 146, Cr. P. C. The Plaintiff sued for declaration of his title and for recovery of possession.

Held—*That though deprived of possession, the Plaintiff was not dispossessed or had discontinued possession within the meaning of Art. 142 of the Limitation Act.*

Meaning of "dispossession" and "discontinuance of possession" explained.

That as there was no cause of action against the Magistrate, the suit could be brought only against the Defendants.

GOSWAMI *v.* GIRIDHARJI (9) *dissented from.*

RAJA OF VENKATAGIRI *v.* ISAKAPALI (1) *followed on this point.*

KHAGENDRA NARAIN *v.* MATANGINI (2) *and* RAMA SWAMY *v.* MUTHU SWAMY (3) *referred to.*

That Plaintiff having proved his title, the suit must be treated as a suit for declaration of title under sec. 42 of the Specific Relief Act.

That it was a case of continuing wrong independent of contract, and consequently, under sec. 23 of the Limitation Act, a fresh period of limitation under Art. 120 began to run at every moment of the time the wrong continued.

"*Continuing wrong*" *defined.*

RAJA OF VENKATAGIRI *v.* ISAKAPALI (1) *dissented from.*

MAHABHARAT *v.* ABDUL HAMID (17), BINDA *v.* KAUNSILA (18), ANANDA *v.* VEYYANNA (19) *and* JUGAL KISHORE *v.* LAKSHMAN DAS (20) *referred to.*

These appeals were preferred on the 4th July 1912 against the decree of S. E. Stinton, Esq., District Judge of Zillah Sylhet, dated the 19th of April 1912, reversing the decree of Babu Aswini Kumar Bose, Subordinate Judge, 1st Court of that District, dated the 27th of June 1911.

The material facts of the case will appear from the judgment.

Babus Dwarka Nath Chakerverty and *Ramani Mohun Chatterjee* for the Appellant in No. 1748.

Babus Tara Kishore Choudhury and *Brojolal Chakervarty* for the Appellant in No. 2023.

Babu Gopal Chandra Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The events antecedent to the litigations, which have culminated in the present appeals, are no longer in controversy and may be briefly recited. The Plaintiffs claimed title to the disputed property by

(1) I. L. R. 26 Mad. 410 (1902).
(2) I. L. R. 17 Cal. 814 (819) (1890).
(3) I. L. R. 30 Mad. 12 (1906).
(9) I. L. R. 20 All. 120 (1897).
(17) 1 C. L. J. 73 (1904).
(18) I. L. R. 13 All. 126 (1890).
(19) I. L. R. 15 Mad. [illegible]
(20) I. L. R. 28 Bom. [illegible]

purchase at a sale in execution of a mortgage decree. They took possession but were resisted by the Defendants and a breach of the peace became imminent. Proceedings were consequently instituted under sec. 145 of the Criminal Procedure Code; but as the Magistrate was unable to satisfy himself as to which of the parties was in possession of the subject of dispute, he attached it under sec. 146 of the Criminal Procedure Code, until a competent Court should determine the rights of the parties thereto or the persons entitled to possession thereof. This order was made on the 25th April 1902. On the 3rd July and 11th October 1909, the suits were instituted by the two sets of Plaintiffs, who claim respectively an eight annas, and a five annas share of the property, for declaration of their title and for recovery of possession. The Courts below have concurrently found that the Plaintiffs have fully proved their title, and that the Defendants have no case on the merits. The Courts below have also found that the Plaintiffs were in possession when on the 25th April 1902, the property was attached by order of the Magistrate. But while the Trial Court held that the claims were not barred by limitation, as the Plaintiffs were in possession within twelve years of the suit, the lower Appellate Court has concluded on the authority of the decision in *Raja of Venkatagiri* v. *Isakapàli* (1), that the suits are barred by limitation, as they have been instituted more than six years after the order of the Magistrate. The result of this divergence of opinion has been that the District Judge has reversed the decrees of the Subordinate Judge and has dismissed the suits, although he has found that the Plaintiffs have established their title. The Plaintiffs have now appealed to this Court and have impugned the correctness of the view adopted by the District Judge. The question, consequently, arises, what is the period of limitation, if any, applicable to a suit for determination of the rights of the parties to an order under sec. 146 of the Criminal Procedure Code, where it is found that the party who is the rightful owner was in possession when the property was attached by the Magistrate. Three alternative views have been placed before us for consideration, *viz.*, *first*, that the suit is in essence for recovery of possession of immoveable property, and must under Art. 142 of the schedule to the Indian Limitation Act be instituted within twelve years from the date of the order of the Magistrate; *secondly*, that the suit is in substance for declaration of title to immovable property, and must, under Art. 120, be instituted within six years from the date of the order of the Magistrate when the right to sue accrues; and *thirdly*, that the suit is for declaration of title to land, but that there is no bar of limitation applicable, as under sec. 23 a fresh period of limitation begins to run at every moment of the time during which the attachment continues. If the first or the third view is adopted, these suits are not barred by limitation, while the suits must be deemed barred if the second alternative is accepted.

As regards the first possible point of view, it is clear that no action can be brought against the Magistrate for recovery of possession. In the words of Lord Morris in *Khagendra Narain* v. *Matangini* (2), the Magistrate is in the position of a stake-holder, or as was said in *Rama Swamy* v. *Muthu Swamy* (3), when the property is attached it passes into legal custody and during the conti-

(1) I. L. R. 26 Mad. 410 (1902).

(2) I. L. R. 17 Cal. 814 819, (1890).
(3) I. L. R. 30 Mad. 12 (1906).

nuance of the attachment such custody must be held to be for the benefit of the true owner. [*Beni Prosad* v. *Shahzada* (4) and *Rao Karan* v. *Raja Bakar Ali* (5)]. It is further plain that there is no cause of action against the Magistrate, as he has acted in the exercise of his statutory powers. The suit must, consequently, be brought against the rival claimant, but obviously the suit cannot be framed as one for recovery of possession of the disputed land from him, as he is admittedly not in possession. The Plaintiff may have been deprived of possession, but he cannot aptly be said to have been dispossessed, or, to have discontinued possession within the meaning of Art. 142 of the Indian Limitation Act. Dispossession implies the coming in of a person and the driving out of another from possession. Discontinuance implies the going out of the person in possession and his being followed into possession by another. These elementary principles are deducible from the decisions of the Judicial Committee in *Agency Company* v. *Short* (6) and *Secretary of State* v. *Kristomani* (7). To the same effect is the observation of Baron Parke, in *Smith* v. *Lloyd* (8), that to make the statute of limitation applicable, there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected. It follows, that if the seisin or legal possession is, during the attachment, in the true owner, the attachment cannot be deemed to amount to either dispossession of the owner or the discontinuance of his possession. We must accordingly hold, as was done in *Raja of Venkatagiri* v. *Isakapali* (1), that Art. 142 has no application to a suit of this description, and we are unable to accept the contrary opinion on this point as formulated in *Goswami* v. *Giridharji* (9). We are not unmindful that in *Khagendra Narain* v. *Matangini* (2), the suit was framed as one for recovery of possession and that the Judicial Committee ordered that each of the parties "be decreed to be put into possession" of an equal moiety of the disputed property. It is clear, however, that the question now under consideration was not raised before the Judicial Committee, for the obvious reason that the suit there was in time, whether the six years' or the twelve years' rule was applied; the record shows that the order of attachment was made on the 10th December 1877 and the suit was commenced on the 14th December 1880. It may also be observed that the language of the order by the Judicial Committee is consistent with the view that the parties were to be put into possession by the Magistrate. It may be added that the decision in *Nissar Ali* v. *Adebuddi* (10), to which reference was made in the course of argument, is clearly distinguishable. There the Magistrate had, after the attachment, placed a stranger in possession, contrary to the provisions of sec. 146, Cr. P. C., a suit against such stranger for recovery of possession is clearly governed by Art. 142 or Art. 144. We need not refer in detail to the cases of *Chuj Mull* v. *Khyratee* (11), *Goswami* v. *Giridharji* (9), *Akilananda Amal* v. *Pariasami* (12), *Raja of Venkatagiri* v. *Isakapali* (1) and *Deo Narain*

(4) I. L. R. 32 Cal. 856 (1905).
(5) L. R. 9 I. A. 99 (1882).
(6) 13 App. Cas. 793 (1888).
(7) L. R. 29 I. A. 104: s. c. 6 C. W. N. 617 (1902).
(8) 9 Exch. 562 (1854).
(1) I. L. R. 26 Mad. 410 (1902).
(2) I. L. R. 17 Cal. 814 (819) (1890).
(9) I. L. R. 20 All. 120 (1897).
(10) 16 C. W. N. 1078 (1912).
(11) 3 Agra H. C. R. 65 (1868).
(12) I. L. R. 1 Mad. 309 (1877).

v. *Webb* (13), in so far as they merely recognise the doctrine that Art. 47 of the Indian Limitation Act is restricted to cases where an order for possession has been made in favour of one of the parties and has no application where the land has been attached under sec. 146. We hold accordingly that the suits before us, though framed as suits for possession, cannot be treated as such, and are not governed by Art. 142 of the Indian Limitation Act.

As regards the second and third possible points of view it is clear, from what has already been stated, that the suits must be treated as suits for declaration of title under sec. 42 of the Specific Relief Act. What then is the period of limitation, if any, applicable to these suits? We have been pressed, on the one hand, to adopt the view propounded in *Raja of Venkatagiri* v. *Isakapali* (1) that Art. 120 is applicable and that the suit is required to be instituted within six years from the date of the order of attachment when the right to sue accrues. We have been pressed, on the other hand, to hold that this is a case of continuing wrong under sec. 23 and that the right to sue accrues from moment to moment. The first alternative, though adopted by the Madras High Court, leads to an obvious anomaly. If the suit is not instituted within six years from the date of the order of attachment, neither of the claimants can obtain a declaration of title; yet the title continues unaffected in the true owner, for under sec. 28 his right is extinguished only at the determination of the period limited for the institution of a suit for possession. The Magistrate thus continues as a stake-holder for an indefinite period, as there is no statutory provision for forfeiture after the lapse of a prescribed term. According to the Madras High Court, however, the true owner, although not in a position to seek a declaration of title for purposes of recovery of the property, can obtain a declaration of title to the profits in the hands of the Magistrate; in other words, the Magistrate is constituted his Manager in perpetuity. The Madras High Court further seems to hold that, although a declaration of title cannot be embodied in the decree, because the prayer for declaration is barred by lapse of time, yet the finding in the judgment on the issue of title will have the force of *res judicata* and will practically operate as a determination of the question of right for purposes of sec. 146, Cr. P. C. With all respect, this bears the appearance of a distinction without a difference. To adopt the language of Lord Ellenborough in *Luxmore* v. *Robson* (14) "the common sense, the practice and the general convenience of mankind require that a construction different from that should be adopted." In our opinion, the true view of the matter is that sec. 23 of the Indian Limitation Act governs the case. To maintain this position, it is not essential to accept the broad proposition formulated in *Chuckan Lal* v. *Lalit Mohan* (15) (which was reversed on appeal on another point by the Judicial Committee in *Lolit Mohun* v. *Chuckkan Lal* (16), that a suit for declaration of title to immoveable property cannot be held to be barred so long as the Plaintiff has a subsisting right to such property; nor is it necessary to depart in any way from the rule recognised in *Mahabharat* v. *Abdul Hamid* (17), that a

(1) I. L. R. 26 Mad. 410 (1902).
(13) I. L. R. 28 Cal. 86: s. c. 5 C. W. N. 160 (1900).
(14) 1 B. & Ald. 548 (1818).
(15) I. L. R. 20 Cal. 906, (925) (1893).
(16) L. R. 24 I. A. 76: s. c. I. L. R 24 Cal. 834; 1 C. W. N. 387 (1897).
(17) 1 C. L. J. 73 (1904).

suit for declaration of title to immoveable property is governed by Art. 120. On the other hand, as was explained in the case last mentioned, and as had been previously indicated in the cases of *Binda* v. *Kaunsila* (18), *Ananda* v. *Veyyanna* (19), *Jugal Kishore* v. *Lakshman Das* (20), Art. 120 and sec. 23 may have to be simultaneously applied to determine whether or not a suit is barred by limitation, for instance, in suits for partition of joint property. The answer to the question, when does the right to sue accrue, must depend on the circumstances of the particular case, and very refined distinctions have indeed been sometimes drawn, as may be seen from *Yamuna* v. *Solayya* (21) and *Pamu Sanyasi* v. *Zemindar of Jayapur* (22). In the case before us, the view may reasonably be maintained that there is a continuing wrong independent of contract and that consequently a fresh period of limitation under Art. 120 begins to run at every moment of the time the wrong continues. It is needless for our present purpose to attempt an exhaustive definition of the expression "continuing wrong." But it may generally be stated that if the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, then, in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*. To put the matter in another way, where the wrongful act produces a state of affairs, every moment's continuance of which is a new tort, a fresh action for the continuance lies, for there is a real distinction between continuance of a legal injury and continuance of the injurious effects of a legal injury. Tested from this point of view, what is the position here? The Defendants attempted to interfere with the possession of the Plaintiffs, and a breach of the peace became imminent. The Magistrate intervened, as it was incumbent upon him to do, and attached the property. The result was that the Plaintiffs were deprived of the enjoyment of their property. This state of things has continued, though it could have been terminated if the Defendants had intimated to the Magistrate that they abandoned all claim to the property and would not cause a breach of the peace by an endeavour to obtain possession by force. We think, in these circumstances, that the case may aptly be treated as one of continuing wrong within the meaning of sec. 23 of the Indian Limitation Act. From this point of view, no question of limitation arises.

The result is that these appeals are allowed, the decrees of the District Judge set aside, and the suits decreed with costs in all the Courts. The title of the Plaintiffs in each case to the share claimed will be declared, and it will be further declared that they are entitled to have the property released from attachment, and to be placed in possession by the Magistrate.

Appeals allowed.

(18) I. L. R. 18 All. 126 (1890).
(19) I. L. R. 15 Mad. 492 (1892).
(20) I. L. R. 23 Bom 659 (1899).
(21) I. L. R. 24 Mad. 339 (1901).
(22) I. L. R. 25 Mad 540 (1901).

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL DECREE No. 350 OF 1913.

FLETCHER, J.
RICHARDSON, J.
1915,
Heard, 25 and 26, May.
Judgment, 9, June.

RASH BEHARI LAL MUNDER, Defendant, Appellant,
v.
TILUCKDHARI LALL, Plaintiff, Respondent.

Mustagiri *lease relating to agricultural land*—

RASH BEHARI LAL MUNDER *v.* TILUCKDHARI LALL.

Bengal Tenancy Act, Art. 2, Sch. III—Limitation —Agricultural purpose if necessary for lease to come under the Tenancy Act—Transfer of Property Act (IV of 1882), sec. 117.

The Plaintiff sued to recover arrears of rent due under two kabuliats *given in respect of agricultural lands leased to the Defendant. The leases were* mustagiri *leases and contained the provision that "the* mustágir *shall enjoy the* parti *land which may be converted into culturable land in the* jamabandi *of the mauza which may be increased till the term of the settlement."*

Held *per* FLETCHER, J.—*That one of the purposes for which the leases were granted was to authorise the Defendant to bring under cultivation the waste land which is obviously an agricultural purpose and the period of limitation applicable to the suit was that provided under Art. 2 of Sch. III, Bengal Tenancy Act.*

That even if the leases were held not to be for agricultural purposes they were governed by the Bengal Tenancy Act for the purposes of limitation. BURNAMOYI DASSI *v.* BURNA MOYI CHOUDHRANI (3).

Per RICHARDSON, J.—*Whether the leases, which were temporary leases relating to agricultural lands granted to a rent farmer, were or were not leases for agricultural purposes, the Bengal Tenancy Act applied and the period of limitation applicable was that provided by that Act.*

That in view of the cases, DURGA PROSAD *v.* BRINDABAN (7), PEARY MOHUN *v.* SREERAM CHANDRA (8) *and* BURNAMOYI DASSI *v.* BURNA MOYI CHOUDHRANI (3) *and of the terms of sec. 117 of the Transfer of Property Act, it does not follow that because a lease (of agricultural land) is not a lease for agricultural purposes it is subject only to the Transfer of Property Act and is not governed in any respect by the Bengal Tenancy Act.*

Per FLETCHER, J.—*Although a* mustagiri *lease is sometimes and perhaps usually a lease to a middleman yet in Bihar the term is applied frequently to temporary leases instead of the word* thika.

This was an appeal preferred on the 2nd August 1913, against the decree of Babu Dinanath De, Officiating Subordinate Judge, 1st Court of Zillah Bhagalpore, dated the 28th April 1913.

The facts of the case will sufficiently appear from the judgment.

Dr. Dwarkanath Mitter and *Babu Noresh Chandra Sinha* for the Appellant.

Babu Chandra Sekhar Prosad Singh for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—The only question raised in this appeal is whether the period of limitation for a portion of the claim is governed by Art. 2 of Sch. III of the Bengal Tenancy Act or Art. 116 of the Indian Limitation Act. The suit was brought to recover arrears of rent due under two *kabuliyats*. The first *kabuliyat* was dated the 23rd of May 1902 and was given in respect of certain properties leased to the Defendant for a term of four years (1310 to 1314), at a rent of Rs. 1,200 per annum. The second *kabuliyat* was dated the 15th of January 1906 and was given in respect of certain other properties leased to the Defendant for a term of eight years (1313 to 1320) at a rent of Rs. 438 a year.

The rent that was in arrears and was sued for was for the year 1313 under the first *kabuliyat* and under the second *kabuliyat* for the years 1313 to 1318. The

(3) I. L. R. 23 Cal. 191 (1895).
(7) I. L. R. 19 Cal. 504 (1892).
(8) 6 C. W. N. 794 (1902).

Defendant's estate was taken charge of by the Court of Wards on the 11th of November 1908, and whilst his estate was under their charge the Collector gave an acknowledgment in writing on the 20th of September 1910 with respect to the rent now sued for.

The only question therefore that arises is with reference to the rent due for the year 1313, for if the period of limitation applicable to the present suit is that provided under Art. 2 of Sch. III of the Bengal Tenancy Act then when the Collector gave the acknowledgment in writing on the 20th of September 1910 the rent for the year 1313 was already barred by limitation. The leases in the present cases are expressed to be *mustagiri* leases. Although a *mustagiri* lease is sometimes and perhaps usually a lease to a middleman yet in Bihar the term is applied frequently to temporary leases instead of the word *thika* (see Land Laws of Bengal, S. C. Mitra, p. 207). The two clauses in the lease that are chiefly relied upon are first the words, "I, the Mustagir, shall enjoy the *parti* land which may be converted into culturable land in the *jamabandi* of the said mouza which may be increased till the term of this settlement." The translation is not a very happy one but the meaning seems to be that the tenant may either cultivate the waste land or let it out to tenants and enjoy the increased rental.

The words relied on by the Respondent to this appeal are, "Be it known that that in the said mouzas you the proprietors have no *kamat* lands," that is lands in the possession of the zemindars.

Now the Bengal Tenancy Act does not define the classes of leases to which the Act applies. The local extent of the Act is given in sec. 1 (3) of the Act. It has however always been held that the Act only applies to agricultural land. A class of cases however has grown up in the Courts to the effect that the Act does not apply to leases of agricultural land which are not for agricultural purposes [see *Umrao Bibi* v. *Mahomed Rojabi* (1)].

The case of *Promotho Nath Mitra* v. *Kali Prosunna Choudhury* (2) was much relied on in argument. The remarks of Maclean, C. J., in that case are only to the effect that a *putni* was not a lease for agricultural purposes, and therefore the provisions of the Transfer of Property Act applied as to the merger of the *putni* on its being purchased: That some of the provisions of the Bengal Tenancy Act, *viz.*, those as to the period of limitation provided by the Act for recovering arrears of rent from the *putnidar*, apply had already been decided in this Court in the case of *Burnamoyi Dassi* v. *Burna Moyi Choudhrani* (3). That case remains unaffected by any subsequent decision of this Court. If the period of limitation provided by the Bengal Tenancy Act applies to arrears of *putni* rent it must also apply to the leases in the present suit even if we accept the construction placed on those leases by the vakil for the Plaintiff. I think however that the leases in the present case, even apart from the decision in *Burna Moyi's* case (3), come under the Bengal Tenancy Act. One of the purposes for which the leases were granted was to authorise the Defendant to bring under cultivation the waste land which I think is obviously an "agricultural purpose."

That being so I think that the rent sued for the year 1313 is barred by limitation. The decree of the lower Court must be varied by deducting from the decretal

(1) I. L. R. 27 Cal. 205: s. c. 4 C. W. N. 76 (1899).
(2) I. L. R. 28 Cal. 744 (1901).
(3) I. L. R. 22 Cal. 101 (1895).

amount the amount of rent and interest thereon for that year. Subject to that modification the decree appealed against will be affirmed.

As the Appellant has only succeeded as regards the rent for 1313 there will be no order as to the costs of this appeal.

The order of the lower Court as to the costs in that Court will remain unaffected.

RICHARDSON, J.—I agree. It is not always easy to ascertain precisely what the purposes of a lease are and in the present case I doubt whether it is necessary to determine, whether the lease in question is or is not a lease for agricultural purposes within the meaning of sec. 117 of the Transfer of Property Act. Under cl. (3) of sec. 1 of the Bengal Tenancy Act, that Act extends to the whole of Bengal with the exception of certain specified areas, with which we are not now concerned. The lease covers land to which the Act *primâ facie* extends. It has been held however, that there are non-agricultural lands outside the excepted areas to which the provisions of the Act according to their true construction have no application. [*Raniganj Coal Association* v. *Jadoonath* (4), *Umrao Bibi* v. *Mahomed Rojabi* (5) and *Hedayet Ali* v. *Kamalanand Singh* (6)]. But the land here is admittedly agricultural land and these authorities therefore are not pertinent. On the other hand where a lease relates to agricultural land but is not a lease for agricultural purposes, it is clearly governed by the Transfer of Property Act which is an Imperial Act, in respect of matters within the scope of that Act (so far as its operation is not excluded by anything in its sec. 2). By way of illustration reference may be made to *Promotho* v. *Kali Prosunna* (2). Such a lease again can only be made under sec. 107 by a registered instrument. In these and other cases the Transfer of Property Act has been held to apply. In other respects however the relationship between the parties to such a lease may still be subject to the provisions of the Bengal Tenancy Act [*Durga Prosad* v. *Brindaban* (7), *Peary Mohun* v. *Sreeram Chandra* (8) and *Burnamoyi* v. *Burna Moyi* (3)]. The Government have not found it necessary to issue any notification in exercise of the power conferred by sec. 117 of the Transfer of Property Act and so far as I am aware the position gives rise to no practical difficulty, except the initial difficulty in some cases of determining whether a particular lease is or is not a lease for agricultural purposes, that is to say, where the question is whether some provision in the Transfer of Property Act is or is not applicable. That question does not really arise in the present case. The lease here appears to me to be in substance a temporary lease granted to a rent farmer or middleman. It relates, as I have said, to agricultural lands. There is no question of any conflict between the Tenancy Act and the Transfer of Property Act or of applying any provision of the latter Act. The point is whether the period of limitation applicable to a suit for arrears of rent due under the lease is that prescribed by the Limitation Act or that prescribed by the Tenancy Act. The argument for the Respondents is that the lease is not a lease for agricultural purposes, and is therefore subject only to the Transfer of Property Act and is not governed in any respect by the Tenancy Act. But in view of the cases cited and of the terms of sec. 117 itself that con-

(2) I. L. R. 28 Cal. 744 (1901).
(3) I. L. R. 23 Cal. 191 (1895).
(4) I. L. R. 19 Cal. 489 (1892).
(5) I. L. R. 27 Cal. 205 (1899).
(6) 17 C. L. J. 411 (1912).
(7) I. L. R. 19 Cal. 504 (1892).
(8) 6 C. W. N. 794 (1902).

THE

Calcutta Weekly Notes.

Vol. XX.] MONDAY, MARCH 13, 1916. [No. 16.

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Sir Herbert Holmwood's retirement.

In the retirement of Mr. Justice Holmwood, the Calcutta High Court will be deprived of a very able and popular Judge. Both on the bench of the High Court and as a District Judge the career of Mr. Justice Holmwood was marked with distinction. He was a man of strong common sense and of varied experience in the different branches of the public service. As a judge of fact he showed exceptional quickness and although arguments based on technicalities of law did not very often find favour with him he was always anxious to do substantial justice. His courteous and affable manners endeared him to the members of the profession and he leaves the Court with the reputation of an able and conscientious judge. For the last few years he was in charge of the English department and as such he was practically the Controller of the Subordinate Judicial Service in Bengal, and Munsifs and Subordinate Judges were always confident of a kind and sympathetic treatment in his hands.

Courts of law and the Executive.

The full text of the judgment of the Privy Council in *The Eastern Trust Company* v. *McKenzie Mann & Co., Ld.*, which had been widely noticed on account of the importance of the constitutional questions considered in it was published in our reports column last week at p. 457. The questions arose in connection with a temporary injunction which, it should be noted, was finally discharged because the suit itself failed. Their Lordships point out that this fact did not make the injunction any the less binding on the parties so long as the injunction subsisted and a party who disobeyed the injunction laid himself open to proceeding for contempt, whatever the issue of the suit.

It appears that the injunction in this case restrained and prohibited one Hervey from receiving certain payments from Government. The Government Treasurer had originally been made a party to the suit, but was subsequently, without objection, dismissed from it, so that the injunction did not in terms run against Government. But Government nevertheless had notice of the injunction, and, with such notice, made payments *inter alia* to Hervey. Their Lordships had no doubt that if the payment had been by a private individual in similar circumstances, he would have been guilty of Contempt of Court. But it was urged that the same consideration did not apply in this case to the payments made by Government as the Government was authorised by statute to make these payments.

Their Lordships of the Judicial Committee examined the statutory provisions in question and failed to find any warrant in them for the view that the statute gave Government such an absolute discretion in the matter of the payments that the Courts had no ground for interfering at all, directly or indirectly, with the exercise of such discretion. That being so, the Government, in this matter, must be taken to have stood in much the same position as any private individual. The question, therefore, squarely arose for decision whether the Government had acted properly or in accordance with law in making payments with notice of the injunction.

Their Lordships were clearly of opinion that Government had not, and they defined the position of the executive with reference to orders issued by the judiciary in terms which like

some other pronouncements of the Judicial Committee will become classical. "The non-existence of any right to bring the Crown into Court, such as exists in England by petition of rights, and in many Colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General and a declaratory order obtained. . . It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.

Their Lordships went further and pointed out that even assuming that the Executive had absolute authority to make payments in cases actually covered by the statute, when the question was mooted whether certain payments proposed to be made were in fact and law covered by the statute that was a matter for decision by the Court and the proper course for the executive in any event was to hold the money and await the directions of the Court in regard to its payment

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Active hostility on the part of the Executive towards the Judiciary may not, at the present day, be altogether a thing of the past, but it can hardly form a part of the normal working of the State in any part of, at least, the British Dominions. But even so, public officials, and more specially public officials who as in some of the Colonies and in most Dependencies are clothed with larger executive powers than officials in the United Kingdom, cannot be too often reminded of and impressed with, the necessity, in the interest of good government, of not merely complying with the injunctions of Courts directly issued upon them but of so acting as not to defeat such injunctions even when not directly addressed to them, by acting contrary to their spirit. No question of contempt of Court's authority by a public servant should be permitted to arise, for public servants are expected and required to forestall such questions by holding themselves unreservedly in readiness to respect and obey the Court's directions. The one outstanding feature which marks the constitution of the British Empire (and in this matter no distinction can be drawn between the English constitution and the constitution of the Colonies and the Dominions) is the supremacy or, as it is often expressed, the reign of law. The reign of law exists in theory in the constitution of every civilised State, but it is made real and effective in the British Empire only by the respect and unquestioned obedience normally paid by officials and non-officials alike to orders and injunctions of Courts of law. Courts of law are not merely the indispensable organs of administration of law, which they are in all civilised countries, but the sole effective guarantors of the supremacy of law.

Chait Sankranti Holiday in Bihar.

The following is a copy forwarded to us of a letter, dated the 4th March 1916, which appears to have been addressed to the District Judge of Purnea, by the Secretary, Bar Association, Araria, with a view to obtaining a modification of the Holiday list so that the 13th April may be declared a holiday on account of Chait Sankranti for Bihar and Orissa as well as for Bengal. We confess our incompetence to decide whether the holiday as declared in the list already published is a mistake or not. However, if it is, there is no doubt that it needs correction.

"I respectfully beg to bring to your notice that there seems to be a mistake in the list of holidays prepared by the Hon'ble High Court of Calcutta for this year.

"The 12th April has been declared to be a holiday on account of both Ramnavami and Chait Sankranti. But the Chait Sankranti really falls on the 13th April and not on the 12th

"We would not have brought this matter to your notice had it not involved serious inconvenience to the landlords intending to bring rent-suits for full four years together, which they will be precluded from doing if the 13th April be not declared to be a holiday.

"I therefore humbly beg to suggest that the Hon'ble High Court of Patna may be moved so that the 13th April may be declared to be a holiday on account of the Chait Sankranti, retaining at the same time 12th April as a holiday on account of the Ramnavami."

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before LORDS JUSTICES SWINFEN EADY, PICKFORD and BANKES. *The King* v. *Sir Frederick Loch Halliday*. 9th February 1916.

Can a British subject be interned without trial?

This was an appeal from an order of the King's Bench Division which decided that the Executive were empowered to intern the Appellant Arthur Zadig, a naturalized British subject, and which is shortly reported in Vol. 20 C. W. N., p. .

Mr. Leslie Scott, K. C. (with him *Mr. Patrick Hastings*) for the Appellant, submitted that the regulation which authorised internment was *ultra vires*. It was contrary to the whole practice of Parliament to deal with the liberty of the subject in that way. The usual practice was to pass an act suspending the *Habeas Corpus* Act, and a Suspension Act was always followed by an indemnifying Act.

The question to be considered here was whether Parliament had kept in its own hands or had delegated to the Executive the power to deal with the liberty of the subject. That power had always been retained by Parliament.

LORD JUSTICE SWINFEN EADY.—Do you contend that, however dangerous a person is and however necessary it may be in the interests of public safety to intern him, no regulation can be made by his Majesty in Council so to intern him, although the Act of Parliament provides that "His Majesty in Council has power . . . to issue regulations for securing the public safety and the defence of the realm"?

MR. LESLIE SCOTT.—It was not the question whether it was desirable to intern the person, but whether Parliament intended to give the Executive that power. In the next place, he submitted that the general words in the subsection ought not to be interpreted as taking away the fundamental rights of individuals as conferred by statute or the Common Law. The fact that under the Defence of the Realm (Consolidation) Act, 1914, sec. 1, a series of specific powers were given to the Crown was in itself a ground for limiting the general words at the beginning of sub-sec. 1. Maxwell on the Interpretation of Statutes (4th Edition), 131, 461; *Hawkins* v. *Gathercole* (6 De G. M. and G., 1), *Arthur* v. *Bokenam* (11 Mod., 150), and *Battersby* v. *Kirk* (2 Bing., N. C., 584). Nothing comparable with these regulations was to be found in any regulations made under any of the earlier Acts of Parliament.

LORD JUSTICE BANKES.—You never had comparable conditions.

MR. LESLIE SCOTT.—The words were so general that they must be regarded as being words capable of more than one meaning, and ought to be construed in favour of the subject. He submitted that the tendency during the war for the Courts to make concessions to the Executive was one which certainly should not go any further. It had always been the practice of Parliament to retain seisin of the liberty of the subject itself and to deal with it in express language. It was inconceivable that Parliament should have left that question of policy to a subordinate authority.

The Court dismissed the appeal without calling upon counsel (The Attorney-General *Sir F. E. Smith, K. C.*, and *Mr. Branson*) for the Crown.

LORD JUSTICE SWINFEN EADY said that this was an appeal from an order of the Divisional Court discharging a rule *nisi* for *habeas corpus*. The point raised on behalf of the Appellant was a short one. The Appellant was a person of hostile origin in the sense that he was of German origin, born of German parents, but had since obtained letters of naturalization under the Act of 1870, and was therefore a naturalized British subject. He was at present interned, and his complaint was that he had been wrongfully interned. The Appellant did not say that regulation 14 (*b*), which was the regulation in question, did not authorize the internment, or that there had been some irregularity in the proceedings, but that the regulation in itself was *ultra vires* and without binding force. Now that regulation had been made under and in pursuance of the powers conferred by sec. 1, sub-sec. 1, of the Defence of the Realm (Consolidation) Act, 1914.

Under the provisions of that enactment there was in force an Order in Council, which, as amended on June 10, 1915, contained the provisions which were put in force in connexion with the Appellant, and he was interned in the place specified by the Order.

The Order provided for the appointment of advisory committees to be presided over by a person who held or had held high judicial office, to whom any person interned under such an Order was entitled to make representations against the Order, and to have these represen-

tations duly considered by one of the advisory committees. That was the security which an interned person had that proper consideration would be given to the facts of his case. The Appellant here complained that regulation 14 (*b*) was inoperative as being beyond the powers conferred by Parliament, and constituted an interference with the liberty of the subject and was not justified by the terms of the statute. Now that statute had been passed on November 27, 1914, and was the third of a series of Acts of Parliament dealing with the defence of the realm, each Act conferring wider powers upon the Executive than its predecessor.

The earlier Acts which were passed respectively on August 8 and on August 28, 1911, and by sec. 1, sub-sec. 1 of the Act now under consideration, his Majesty in Council had power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm. The sub-section then proceeded to provide for punishment of persons committing offences by trial by Courts-martial or in the case of minor offences by Courts of Summary Jurisdiction. It could not be disputed that the regulation in question came within the scope of the words authorizing the making of regulations "for securing the public safety and the defence of the realm" and was within the very wide words of the sub-section.

In his Lordship's judgment the regulation was one which in terms was authorized by the express words of the statute, and he thought that Parliament had expressed its intention with irresistible clearness and that the power to issue the regulation was vested in his Majesty in Council. A limit was provided that the regulation should only be in force during the continuance of the present war and must be for the purpose of "securing the public safety and the defence of the realm."

It had been urged on behalf of the Appellant that by reason of the wide words at the beginning of the sub-section some limitation must be imposed upon them; that hitherto it had not been the practice of Parliament to limit the liberty of the subject, and that in so grave a matter as the liberty of the subject the limitation could only be effected by express language. Reference had also been made to regulations issued in critical times of the country's history, and it had been urged that it had then been the practice not to legalize expecrehand what was to be done, but to pass subsequently an Act of Indemnity in respect of what had been done. His Lordship thought that Parliament was entitled to change its ways, and in that connexion he would point out that in recent times it had often become the practice to pass an Act in a general form, leaving the details to be filled up afterwards either by by-laws or by Orders in Council under the Superintendence of a Government Department.

Looking at the words of the sub-section, in his judgment, the language was so precise and clear that no assistance was to be obtained from the rules of construction. Then it was said that subsequent Acts of Parliament showed that the words in question could not have the meaning contended for by the Crown. There was nothing in that point. In his opinion the regulation was *intra vires* and the appeal therefore failed.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA and RICHARDSON, JJ. S. A. No. 2525 OF 1913. CHAITYA DASSYA, Appellant *v.* MADAN CHANDRA DAS SARCAR AND ORS., Respondents. 25th February 1916.

Agreement between members of Hindu family not to partition, if binding.

The appeal arose out of a suit for partition brought by a Hindu widow against the sons and grandsons of her deceased husband's brother. There was a compromise decree between the parties in a previous suit and the Plaintiff agreed by that compromise that as long as she lived she would hold and enjoy *ijmali* possession of certain properties mentioned in the decree, jointly living with the Defendants in the same mess as before and also that she would not be competent to make a gift or sale of the properties or transfer the same.

Held, that an agreement between the members of a Hindu family not to come to a partition might be binding upon themselves.

Krishnendra Nath v. *Debendra Nath* (12 C. W. N. 793) followed.

Babu Girija Prosonno Sanyal for the Appellant.

Babu Chandra Kanta Sen for the Respondents.

A. T. M. *Appeal dismissed.*

clusion by no means follows from the premise. There is no dispute that if the Tenancy Act Applies for any purpose, the period of limitation is three years as provided in Art. 2 of the Sch. III of the Tenancy Act. Sec. 29 of the Limitation Act contains a saving clause in regard to special and local laws. In my opinion whether this lease is or is not a lease for agricultural purposes the Tenancy Act applies and the period of limitation applicable is that provided by that Act.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 18 OF 1915.

SANDERSON, C. J. WOODROFFE, J. MOOKERJEE, J. 1916, 19, January.	KUMAR GUNGADHUR BOGLA, Defendant, Appellant, *v.* KUMAR HIRA LAL BOGLA, Plaintiff, Respondent

Hindu Law—Mitakshara—Succession to* stridhan *property—Son adopted by husband in conjunction with another wife and after-born natural son by a third—Rival wife's son, if "son"—Adopted son and son of rival wife, co-heirs, as* sapindas *of husband—Shares—Construction of texts—*Atideca *upon* atideca, *fallacy of.

B, a Hindu governed by the Mitakshara, adopted, in conjunction with his then wife by whom he had no issue, a son H. By a second wife whom B subsequently married, B had a natural born son G. Another wife M whom B married having died leaving no issue of her own the question arose as to the respective rights of H and G in certain jewellery alleged to have been left by M:

Held—*That G was not entitled to succeed to M's estate as her "son" in accordance with the rules of inheritance of* stridhan *property laid down in Chap. II, sec. XI, paras. 9, etc., of the Mitakshara.*

That both H and G were entitled to succeed as sapindas *of her husband in accordance with para. 25 read with paras. 9 and 11 of Chap. II, sec. XI of the Mitakshara.*

That in the absence of express texts cutting down his share H was entitled to share equally with G in the inheritance.

JOYKISHORE *v.* PANCHOO BABOO (3) *and* PADMA COOMARI DABEE *v.* COURT OF WARDS (4).

NAGINDAS BHUGWANDAS *v.* BACHOO HURKISSENDAS (5) *referred to.*

That the text of Manu, IX, 183: "If among all the wives of one husband, one has a son, Manu declares them all to be mothers of male children through that son" cannot be applied so as to constitute G, a son of M.

The operation of the text examined.

ANNAPURNI NACHIAR *v.* FORBES (1) *and* ANANDI *v.* HARI SUBA (16) *referred to.*

ANANDI *v.* HARI SUBA (16) *approved by* MOOKERJEE, J.

Ch. II, sec. XI of the Mitakshara refers to the case of a woman dying "without issue" in the ordinary sense of the words.

Quære: *per* MOOKERJEE, J.—*Whether the term "son" includes a son taken by the woman in adoption in conjunction with or under an authority conferred by her husband.*

(1) L. R. 26 I. A. 246, 253: s. c. 3 C. W. N. 730 (1899).
(3) 4 C. L. R. 538 (1879).
(4) L. R. 8 I. A. 229, 246: s. c. I. L. R. 8 Cal. 302 (1881).
(5) Decided by the Privy Council on 26th November 1915. See 20 C. W. N. ccxxv.
(16) I. L. R. 33 Bom. 404 (1909).

KUMAR GUNGADHUR BOGLA *v.* KUMAR HIRA LAL BOGLA.

Per CURIAM.—*Unless curtailed by express texts the rights of an adopted son are similar in every respect to those of a natural son.*

MOOKERJEE, J.—*A special text or statute forming an exception to a general text or statute should be construed strictly and applied only to the cases falling clearly within it.*

The suit was decided by his Lordship Mr. Justice Chitty in the Original Side of the High Court in favour of the Plaintiff. The facts of the case will appear from the judgment delivered by his Lordship on the 1st day of December 1914 :—

CHITTY, J.—This is a suit filed by Hira Lal Bogla against his brother Gungadhur Bogla for a declaration that the brothers are entitled to share equally in the estate of Rani Mohori Bibee, widow of their father Rajah Sewbux Bogla ; for administration of the estate by the Courts, and for other relief. Mirza Mall and Rajah Sewbux Bogla were brothers, members of a joint Hindu family, governed by the Mitakshara School of Hindu Law. Mirza Mall died leaving a widow, Dhuni Bibee and a son Ballav Das. Bullav Das and his wife Bhugwandai both died shortly after Mirza Mall. The Plaintiff had been adopted by Rajah Sewbux Bogla and his first wife, Soli Bibee. Soli died and Rajah Sewbux married Moni Bibee, by whom he had a son, the Defendant Gungadhur. Mani died and Rajah Sewbux married Sundar Bibee, by whom he had a daughter Fulbai. Sundar died and he married a fourth wife, Mohori Bibee. Rajah Sewbux Bogla, his two sons, his wife Mohori Bibee, and Dhuni Bibee, widow of Mirza Mall, in 1907, submitted their family disputes to the arbitration of Hardatrai Praladka and Ramniranjan Das Murarka who made their award on 15th September 1907. That award was filed in and became a decree of this Court, inspite of the opposition of Mohori Bibee.

Rajah Sewbux Bogla died leaving a Will, by which he left his property to Mohori Bibee for her life and after her death to the Defendant Gungadhur.

Mohori Bibee died intestate on 5th June 1910 leaving property of considerable value consisting principally of jewellery. A box containing such jewellery is, I am told, now in the custody of the National Bank of India.

The following issues were raised :—

1. Were the ornaments claimed in the plaint the separate *stridhan* property of Mohori Bibee or did they belong to Rajah Sewbux Bogla?

2. Are the ornaments items 1-14 in the list to the award the *debuttar* property of Shatanarain Jew?

3. Is the Plaintiff estopped from claiming as an heir of Mohori Bibee?

4. Is the Plaintiff estopped from claiming the jewellery in suit as against the Defendant by reason of the award, dated 15th September 1907?

5. Is the Plaintiff an heir of Mohori Bibee?

6. If so, to what shares in her estate would the Plaintiff and Defendant be respectively entitled?

7. Whether, if Plaintiff is entitled to participate in the inheritance he is not bound to contribute to the expenses of the *sradh* of Mohori Bibee and the payment of her debts?

It is unnecessary to discuss the first two issues. They will be investigated in the enquiry as to the estate of Mohori Bibee. I may, however, mention that it was stated at the Bar that there is now no question as to which of the ornaments were *debuttar*. Such as were dedicated to the idol have already been handed over for that purpose.

The answer to issue 7 is obvious. In the administration of Mohori Bibee's estate her funeral and *sradh* expenses and debts will have to be taken into account. If the Defendant has properly expended money for those purposes he will be entitled to be recouped by the Plaintiff *pro rata* out of the share, if any, allotted to him.

As to issues 3 and 4, no question of estoppel really arises, and the point was not seriously pressed by counsel for the Defendant, though it was not expressly abandoned. The adoption of Hira Lal to Rajah Sewbux Bogla and his wife Soli Bibee is admitted. It was suggested that Hira Lal had been subsequently taken in adoption to Mirza Mall and that he could not be allowed now to claim as the son of Rajah Sewbux Bogla. It is clear from the submission to arbitration and from the recitals to the award that this was not the case. At that time, 1907, Hira Lal was regarded as a son of Rajah Sewbux Bogla and the arbitration and award proceeded on that footing. The fact of his adoption to Mirza Mall is expressly negatived by the recitals to the award, and the property was divided, on a partition between Rajah Sewbux Bogla and his two sons. The shares would have been different, had Hira Lal been regarded as Mirza Mall's son. Hira Lal certainly did not take up that position. I find these two issues in favour of the Plaintiff and against the Defendant. The substantial question in this suit is that raised by the 5th and 6th issues, whether the Plaintiff is an heir of Mohori Bibee and if so in what shares do he and the Defendant divide her estate. For the Defendant it was contended (1) that the Plaintiff being only the adopted son of one wife had no right of inheritance to a rival wife's *stridhan* as against a son subsequently born of a third wife and (2) that if he is an heir then he takes only ¼th of what the legitimate son takes, in other words, 1/5th of the step-mother's estate.

For the Plaintiff it was conceded that in succession to a father or to paternal relatives, by the Law of the Mitakshara, the adopted son would take a 1/5th share and the subsequently born legitimate son a 4/5th share of the estate. But it was contended that that is a special rule affecting that kind of succession, and that in the absence of any special rule applicable to the present case, the ordinary rule would apply and the adopted and legitimate sons would take in equal shares.

A number of texts, commentaries, and decided cases were referred to and the matter was fully argued on both sides. I have carefully considered the materials placed before me, but do not think that any useful purpose will be served by an elaborate discussion. The matter lies in a narrow compass and it will be sufficient if I briefly indicate the conclusion at which I have arrived.

The first contention raised on behalf of the Defendant is unsupported, so far as I can see, by any authority, and moreover appears to be diametrically opposed to those decisions which say that as regards inheritance an adopted son is in all respects on an equality with the legitimate son except where such rights are expressly denied to him. I hold therefore that the Plaintiff is entitled with Gungadhur to succeed to the estate of Mohori Bibee.

With regard to their shares in the inheritance, it is no doubt true that in succession to the estate of a father or a father's relatives the adopted son takes a lesser share than the legitimate son. But this is in consequence of express texts to that effect, and is one of the exceptions to

the general rule referred to in the decisions. There is no decision so far as I am aware which deals with the precise question of inheritance arising here, but there is a series of decisions laying down in general terms the equal rights of the adopted and legitimate son in all matters of inheritance, except where there is an express authority limiting those rights. It is not suggested that there is any text limiting the right of an adopted son to share equally with his legitimate brother in the succession to the *stridhan* of their step-mother. I need only refer to the cases of *Tincowri* v. *Dinanath* (29) and *Kalikamal* v. *Uma Sankar* (26), affirming the decision of a Full Bench of this Court *Umasankar* v. *Kalikamal* (27) and *Padma Coomari* v. *Court of Wards* (4).

Against these decisions, and the principle underlying them, the Defendant's counsel has not been able to cite a single case.

I accordingly hold that the Plaintiff and Defendant are entitled to succeed to the estate of Mohori Bibee in equal shares.

There will be the usual decree for administration of her estate with the necessary directions and enquiries. The Defendant must pay to the Plaintiff the costs of the second and third day's hearing before me, which have been occasioned by the Defendant, in which he has failed. Further consideration and other costs of the suit will be reserved. Liberty to apply.

Mr. B. Chakravarti (with him *Messrs. A. N. Chaudhuri* and *B. K. Lahiri*) for the Defendant-Appellant contended that the Respondent was no heir to his step-mother Mohori Bibee and relied mainly on a text of Yajnavalkya (Chap. II, verse 117) a proper interpretation of which depended on the meaning of two words "Apraja" (without issue) and "Anvaya" (issue). The parties were governed by the Mitakshara School and Mohori Bibee's marriage with Rajah Sewbux Bogla was performed according to one of the four approved forms. The devolution of her *stridhan* would therefore be regulated accordingly; *Musammat Thakoor Deyhee* v. *Rai Balukram* (33) and *Bai Kesserbai* v. *Honsraj Marorji* (11). According to the text of Manu (Chp. 9, verse 183): if one of several rival wives had a son born to her then the other wives became mothers as well. Mohori Bibee could not therefore be said to be a childless woman ("Apraja"). On the other hand a son adopted by a person in conjunction with a particular wife became a secondary son to his step-mother [*Annapurni Nachiar* v. *Forbes* (1) and *Kashushree Debi* v. *Greesh Chunder Lahoree* (34). The fiction resorted to by Manu in the case of a natural born son of a rival wife in order to establish filial relationship could not be extended to the adopted son as there was no authority for doing so. There could not be an analogy ("Atideca") upon an analogy according to Hindu Law (Bhattacharyya's Hindu Law, 3rd Ed., p. 344). As the natural born son of a co-wife of Mohori Bibee, Gungadhur was her son and as such was entitled to succeed to the exclusion of the adopted son as the heir in the absence of her natural issue. Referred to the commentators of Mitakshara—Subodhini (Setlur's Ed.,

(4) L. R. 8 I. A. 229, 246: s. c. I. L. R. 8 Cal. 302 (1881).
(10) L. R. 10 I. A. 138: s. c. I. L. R. 10 Cal. 282 (1883).
(27) I. L. R. 6 Cal. 256 (1880).
(29) 3 W. R. 49 (1865).
(1) L. R. 26 I. A. 246, 253; s. c 3 C. W. N. 730 (1899).
(11) L. R. 33 I. A. 176: s. c. 10 C. W. N. 802; I. L. R. 30 Bom. 421 (1906).
(33) 11 M. I. A. 139 (1866).
(34) [1864] W. R. 71.

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pp. 848-853) and Balambhatti (Setlur's Ed., p. 853, line 9) and authorities such as Mitramisra [Viromitrodaya, Ch. 5, pt. 2, sec. 14, *Giridhan Lall Roy* v. *The Bengal Government* (35)], Apararka (Anandasram Ed., Vol. 2, p. 754). Vivada Ratnakara (Chap. 10) and Kamalakara (Baroda Ed.) p. 462—*Dwarkanath Roy* v. *Sarat Chander Singh Roy* (13) in support of his contention that the term "sons" in para. 19 (Yajnavalkya II, p. 118) included the son of a rival wife. Submitted that if reliance could be placed on these authorities he would ask their Lordships to hold that his position was better than that of the adopted son and that he would come in even before the husband of the lady. On the other hand both the Appellant and the Respondent were *sapindas* of their father and if they succeeded by virtue of the *sapinda* relationship alone he submitted he was a nearer *sapinda* of the father than the adopted son. He further submitted that if their Lordships did not accept the above arguments he would rely on the well-known text of Vasistha "If after he has been adopted a legitimate son be born, then the Dattaka shall obtain a fourth share" which gave him a fourth share in the estate of Mohori Bibee; *Birbhadra Rath* v. *Kalpataru Panda* (22) and *Giriapa* v. *Ningapa* (36).

Reference was also made to Sarkar's Hindu Law, 4th Ed., p. 456. Mayne's Hindu Law, 8th Ed., pp. 218, 220, 226. Banerjee—Marriage and Stridhan, pp. 277-382, 3rd Ed. Colebrooke's translation of Mitakshara, Ch. IX, sec. 11, verses 19-23.

Mr. B. L. Mitter (with him *Mr. B. K. Ghosh*) for the Respondent argued that an adopted son could not renounce his status, *Mahadu Gana* v. *Bayaji Sidu* (10). By virtue of his status as adopted son he occupied exactly the same position in the family as any natural born son [*Padma Coomari Dabee* v. *The Court of Wards* (4), *Kalikamal Mazumdar* v. *Uma Shankar Moitra* (26), *Radha Prosad Mallick* v. *Rani Mani Dassee* (30), *Juggarnath Sahaee* v. *Makhan Koonwar* (28) and *Tincowri Chatterjee* v. *Dinanath Banerjee* (29)]. The adopted son of one of several wives should be deemed to be the son of the wife adopting and the step-son of the co-wives. *Annapurni Nachiar* v. *Collector of Tinnevelly* (32). The adopted son was his father's *sapinda* and as regards this *sapinda* relationship there was no difference between an adopted son and a son born. He further argued that both the adopted and the natural-born sons of a co-wife succeeded as *sapindas* of the husband and that if there was no text curtailing the right of the adopted son he succeeded equally with the natural-born son. [*Surjokant Nundi* v. *Mohes Chunder Dutt* (17) and *Joykishore Chowdhury* v. *Panchoo Baboo* (3)]. Referred to the following text books in the course of his argument:—Vyvastha Chandrika, Vol. 2, p. 521, para. 741. Banerjee's Marriage and Adoption, p. 183. Dattaka Chandrika sec. 3, para. 18. Dattaka Mimansa, sec. 6, para. 9.

Mr. Chakravarti in reply.—I do not contest that the adopted son becomes

(13) 15 C. W. N. 1036, 1044 (1911).
(22) 1 C. L. J. 388 (1905).
(35) 12 M. I. A. 448 (1868).
(36) I. L. R. 17 Bom. 103 (1892).
(3) 4 C. L. R. 533 (1879).
(4) L. R. 8 I. A. 229, 246: s. c. I. L. R. 8 Cal. 802 (1881).
(10) I. L. R. 19 Bom. 289 (1893).
(17) I. L. R. 9 Cal. 70 (1882).
(26) I. R. 10 I. A. 138: s. c. I. L. R. 10 Cal. 232 (1883).
(28) 3 W. R. 24 (1865).
(29) 3 W. R. 49 (1865).
(30) 10 C. W. N. 895: s. c. 3 C. L. J. 502; I. L. R. Cal. 917 (1906).
(32) I. L. R. 18 Mad. 277, 281 (1895).

affiliated into the adoptive family. I dispute the proposition that with regard to inheritance the adopted son is on the same footing as a natural-born son. So far as any original authority is concerned the status of the adopted son of a co-wife has not been at all dealt with by either Yajnavalkya or his commentator Vijnaneshwar or in any other commentary of approved authority.

Their Lordships delivered the following judgments :—

SANDERSON, C. J.—This is a suit by Hira Lal Bogla against his brother Gungadhur Bogla in which the Plaintiff asks for a declaration that he and the Defendant are entitled in equal shares to the property of Rani Mohori Bibee a widow who had been the fourth wife of Rajah Sewbux Bogla : for administration and partition of Mohori Bibee's estate and other incidental relief. The case raises the question whether the Plaintiff, who was the adopted son of Rajah Sewbux Bogla and his first wife, is entitled to any (and if so what) share of the *stridhan* property of Rajah Sewbux Bogla's fourth wife in competition with the Defendant who was the son of the Rajah and his second wife.

The details of the family tree are given in the judgment of Chitty, J., and I need not repeat them, the only point which I need emphasize being that the fourth wife, whose property is in question, died without issue. It appears that a box of jewellery, alleged to be valuable, which had been deposited in a Bank by Mohori Bibee, constituted the main part of her estate. It was, however, alleged by the Plaintiff, though denied by the Defendant, that there was other property belonging to Mohori Bibee besides the jewellery, *viz.*, certain Hundis.

The first of the issues raised, was as follows :—Were the ornaments claimed in the plaint the separate *stridhan* property of Mohori Bibee, or did they belong to Rajah Sewbux Bogla?

This issue has not yet been decided, and the result may be that if on the enquiry, which must be held hereafter, it turns out that the jewels in question were the property of the Rajah and were not the separate *stridhan* of Mohori Bibee, the above-mentioned question would not arise : for the jewels would pass under the Rajah's Will to the Defendant, and if there were no other property of Mohori Bibee besides the jewellery, then the discussion which we have had would become merely academical.

It was not until some considerable time had been occupied in argument that the true position became clear to the Court, otherwise, personally, I should have been in favour of postponing the decision of this case until the above-mentioned enquiry had been held.

But in view of the fact that considerable time had already been spent over the case, and that in one event the point will be material, we come to the conclusion that in the interests of the parties it would be best for us to give a decision at once.

It is agreed that the family were governed by the Mitakshara School of Hindu Law, but the learned Counsel for the Defendant urged that the Mitakshara was uncertain or doubtful on the point in question and relied upon a passage in Manu—on the other hand it was argued for the Plaintiff that the provisions of the Mitakshara were clear and admitted of no doubt. The Mitakshara in Chap. II, sec. XI, para. 9, provides as follows :—"If a woman dies "without issue," that is, leaving no progeny, in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son; the woman's

property, as above described, shall be taken by her kinsmen; namely, her husband and the rest, as will be (forthwith) explained." Para. 11 contains further provisions as to the succession of a woman dying without issue having regard to the different forms of marriage. This marriage, it was agreed, must be taken to be governed by one of the first named four modes in which event the whole property of a woman dying without issue as before stated belongs in the first place to her husband: on failure of him it goes to his nearest kinsmen (*sapindas*). This is confirmed by para. 25.

It was argued, however, on behalf of the Defendant that these paragraphs do not apply to this case, because it was said that Mohori Bibee was not a woman who died without issue, and reliance is placed upon the text of Manu, which says that "If among the wives of the same man one becomes mother of a son, Manu says that by that son all of them become mothers of male children," and inasmuch as Rajah Sewbux's second wife had a son, *viz.*, the Defendant, Mohori Bibee his fourth wife became a mother of male issue, and, therefore, did not die without issue. In other words the learned Counsel's first and main point was that the Defendant succeeded as the direct issue of Mohori Bibee, and that the Plaintiff, being merely an adopted son, did not take a share.

In my judgment this argument ought not to prevail.

Even if the text in Manu has reference to questions of inheritance, as to which there seems considerable doubt—see *Annapurni Nachiar* v. *Forbes* (1) and *Bhimacharya* v. *Ramacharya* (2), in my judgment the provisions in the paragraphs in the Mitakshara, to which I have referred, are not uncertain or doubtful and they govern this case. An examination of the provisions of this section of the Mitakshara convinces me that the paragraphs, which are material to this case, *viz.*, 9 and 11, refer to the case of a woman dying without issue in the ordinary meaning of the words, and that the fiction created by the above-mentioned text in Manu does not exclude the case from these provisions.

Applying, therefore, the rules there laid down, the property of Mohori Bibee on her death would have belonged to her husband if he had been alive; but "on failure of him, it goes to his nearest kinsmen *sapindas*."

Both the Plaintiff and the Defendant are *sapindas* of their father, but it was contended on behalf of the Defendant that he was the nearest *sapinda*, and was superior to the Plaintiff who was merely an adopted son. With this I do not agree: With respect to this matter I think that the rights of the Plaintiff, the adopted son, are similar to those of the defendant, the natural born son—[see *Joykishore* v. *Panchoo Baboo* (3) and *Padma Coomari Dabee* v. *Court of Wards* (4)], and that they both share in the property of Mohori Bibee as *sapindas* of their father.

The next point taken on behalf of the Defendant was that even if both the Plaintiff and Defendant came in as *sapindas* of their father, the rule which is applicable in certain cases, *viz.*, that the adopted son takes one-fifth only, should be applied to this case, which is one of competition between a real and an adopted son. The rule upon such a point as this has been laid down by the Privy Council in *Padma Coomari Dabee* v. *Court of Wards* (4), as follows:—An adopted son

(1) L. R. 26 I. A. 246, 253: s. c. 3 C. W. N. 730 (1899).

(2) I. L. R. 33 Bom 452, 460, 461 (1909).

(4) L. R. 8 I. A. 229, 246: s. c. 1 L. R. 8 Cal. 302 (1881).

(3) 4 C. L. R. 388 (1879).

occupies the same position in the family of the adopter as a natural born son except in a few instances which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa.

Now there has been no text produced which exactly covers the case in question, but the learned Counsel for the Defendant relies on a passage in Mr. Sastri's Hindu Law, 4th Ed., p. 171, which refers to the Dattaka Chandrika. This authority apparently extends the above-mentioned rule to cases of partition between male descendants in the male line down to the great grandson where there is competition between an adopted and real descendant, and he arrives at that result by way of an analogy which might cover all cases in which there is such competition.

In my judgment, however, the proper course to adopt is to apply the rule laid down by this Court in the above-mentioned case *Joykishore* v. *Panchoo Baboo* (3) and in the above-mentioned Privy Council decision, *Padma Coomari Dabee* v. *Court of Wards* (4), *viz.*, that the rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of a natural son, and as there is no express texts curtailing the rights of an adopted son who, like the Plaintiff in this case, is claiming succession to a share of the property of his adopting father's fourth wife, in my judgment, the Plaintiff is entitled to share equally with the Defendant.

Since this judgment was written my attention has been drawn to the decision of the Privy Council in *Nagindas Bhugwandas* v. *Bachoo Hurkissendas* (5), which was given on the 26th November 1915, and the report of which has only recently reached this country. On the points which are material to this case, it confirms the conclusions I had arrived at.

As to the argument of estoppel which was raised but not strongly urged, there is nothing in the submission to arbitration or the award which, in my judgment, prevents the Plaintiff from making the claim in this case.

Finally the learned Counsel for the Defendant asked that the question whether Mohori Bibee had any property of her own should be tried by a learned Judge on the Original Side, and intimated that he would take this issue at the Defendant's risk.

In my judgment it is desirable that this issue should be disposed of as soon as possible: if decided in one way, it will dispose of the whole case and this may save the parties further expense, and the best way of getting a decision on this issue will be to refer it for trial to a Judge on the Original Side.

This appeal will be dismissed with costs. The costs of the issue to be tried will be in the discretion of the learned Judge who tries it.

WOODROFFE, J.—I am of opinion that the text of Manu, according to which the son of a man by one of his wives is as a son to all his wives who are thus all mothers, does not operate for the purpose of determining the succession so as to make the Appellant issue of Sreemutty Mohori Bibee. In my opinion the Appellant is not entitled to claim as the son of that lady. It is unnecessary then to consider whether this text should be construed to include also the Plaintiff Hira Lal who was an adopted son of Rajah Sewbux Bogla through his wife Soli Bibee as well as Gungadhur his natural son

(3) 4 C. L. R. 538 (1879).
(4) L. R. 8 I A. 229, 246; s. c I. L. R. 8 Cal. 302 (1881).
(5) Decided by the Privy Council on 26th November 1915. See 20 C. W. N. cxxxv.

through his second wife Mohori Bibee. But if the text were to be held applicable to establish the Appellant's contention that he by a fiction takes as son of the deceased, which in fact he was not, then as neither the one nor the other are sons of Mohori Bibee in the natural sense of that term, I should in that case have seen no sufficient ground for distinguishing between the positions of the Plaintiff and the Defendant, and both Plaintiff and Defendant would be heirs in equal shares. As, however, pointed out by Chandavarkar, J., in *Bhimacharyya* v. *Ramacharyya* (2), the text of Manu on which learned Counsel for the Appellant relies has been explained in such a way as to imply that its application is of a limited character having no necessary reference to questions of inheritance. There are difficulties in applying that text in the way suggested by the Appellant which the judgment of my brother Mookerjee explains. In my opinion according to the Mitakshara text both the Appellant and Respondent succeed to the *stridhan* of their step-mother as the *sapindas* of their father, her husband, and the Appellant does not come in as issue as he contends. For Hira Lal as the adopted son of Soli Bibee is the step-son of the deceased just as Gungadhur is. The question then arises whether if both the Plaintiff and Defendant are entitled to claim as *sapindas* of their father, in what shares do they take. For the Appellant it is argued that in that case the Plaintiff as adopted son is only entitled to one-fourth which, according to the decision of this Court, is one-fourth of that which the Defendant gets or one-fifth to his four-fifths. The natural justice of the case favours equality of division, for Hira Lal on being adopted ceased to belong to his natural family and should not in the absence of any provision to that effect suffer by reason of the birth of natural sons to the father by other wives than she who was associated in such adoption. Though in succession to the estate of a father the adopted son takes a lesser share than the natural born son, no authority has been cited which directly establishes such a rule in the present case of inheritance to *stridhan* where neither Plaintiff nor Defendant are the natural or adopted sons of the lady whose property is claimed and where no natural reason exists for distinguishing between their respective cases. On the other hand both are *sapindas*, and as regards this *sapinda* relationship there is no difference between an adoptive and natural son. The adoptive son is his father's *sapinda* as the natural son is. Both are then entitled as *sapindas* of their father, the deceased's husband. There is no competition between them unless (as is not the case) there is any text which establishes a preferential claim in favour of the adoptive son. As against this there is authority in favour of holding that the adoptive son in general occupies the same position as a natural son. Thus in *Joykishore* v. *Panchoo Baboo* (3), it was held that the rights of an adopted son, unless contracted by express texts, are in every respect similar to those of a natural born son. There is, therefore, in my opinion no ground for disturbing the decision of Chitty, J., on this point. But in the absence of any special rule affecting the kind of succession before us, the Plaintiff and Defendant or adoptive and natural step-sons of the deceased should take in equal shares. I hold therefore upon the fifth and sixth issues that Plaintiff is an heir of Mohori Bibee and that he is entitled to an equal

(2) I. L. R. 33 Bom. 452, 460, 461 (1909).

(3) 4 C. L. R. 588 (1879).

share in her estate (whatever it may be) with the Defendant.

What that estate is and in particular whether the ornaments claimed in the plaint were in fact the *stridhan* property of the deceased to which the above findings apply, is not here decided for the facts are not before us nor any finding thereon. Mr. Chuckerbutty for the Appellant has contended that the deceased had no estate which the Court can administer and that he should have been permitted to lead evidence as to this at the time so that an administration account might have been avoided. On the other hand it is contended that the Defendant has admitted that there is some estate, and therefore the question what that estate is will be determined under the preliminary administration decree. I think that this matter should have been determined at the trial, for if it turned out that there was no property of the deceased the suit would have been dismissed, and if the amount of the estate had been shown to be trivial, the Plaintiff might not have elected to take an administration decree. The Court should therefore first determine whether there is any estate of Sreemati Mohori Bibee and only in the event of its finding in the affirmative make an administration decree. As regards issues 3 and 4 the estoppel alleged is not in my opinion established, and no question has arisen in this appeal as to the learned Judge's finding on the last or seventh issue. This disposes of all the issues raised. In my opinion the appeal fails and should be dismissed with costs.

Mookerjee, J.—This appeal involves an important question of Hindu Law of first impression, which may be formulated in these terms. A Hindu lady, governed by the Mitakshara School of Law, dies possessed of *stridhan* property; the rival claimants to her estate are, respectively, an adopted son of her husband taken in conjunction with another wife, and a son of her husband born of the womb of a third wife; is the latter the preferential heir in competition with the former, or do they both succeed by right of inheritance; if so, do they take in equal or in unequal shares? This question has arisen in connection with the estate alleged to have been left by Rani Mohori Bibee, the widow of Rajah Sewbux Bogla of this city. The Rajah successively took four wives. He had no son by his first wife, and consequently took a son in adoption in conjunction with her; that son is the Plaintiff in these proceedings and is the Respondent before us. After the death of his first wife, the Rajah took a second wife, by whom he had a son, the Defendant in these proceedings, and Appellant before us. After the death of the second wife, the Rajah took a third wife by whom he had a daughter; we are not concerned with her in these proceedings. After the death of the third wife, the Rajah took Mohori Bibee as his fourth wife; the Rajah subsequently died on the 5th October 1908, and about two years later, the Rani died on the 5th June 1910. The Appellant claims her whole estate as her sole heir, and contends, in the alternative, that he is entitled to at least a four-fifths share thereof. The Respondent asserts, on the other hand, that he is entitled to a half share of the estate left by the co-wife of his adoptive mother. Mr. Justice Chitty has upheld this contention. The Defendant has reiterated in this Court the objections unsuccessfully urged on his behalf before the trial Judge, and his claim has been sought to be sustained by reference to texts of Manu (IX, 183) and Yajnavalkya (II—117, 145). Indeed, no reference was made to the Mitakshara by the

Counsel for the Appellant till his attention was drawn thereto by the Court. It is, consequently, desirable to emphasise the cardinal rule enunciated by Sir James Colvile in *Collector of Madura* v. *Mootoo Ramalinga* (6), namely, that the duty of an European Judge who is under the obligation to administer Hindu Law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage, for, under the Hindu system of law, clear proof of usage will outweigh the written text of the law. The parties to this litigation are admittedly governed by the Benares School of the Mitakshara Law, and we must consequently turn in the first place to the Mitakshara, which, in the words of Sir James Colvile, is universally accepted by all the schools, except that of Bengal, as of the highest authority, and which, in Bengal, is received also as of high authority, yielding only to the Dayabhaga in those points where they differ.

Sec. XI of the second chapter of the Mitakshara, as translated by Colebrooke, treats of the separate property of a woman. The first eight paragraphs embody an exposition of the nature of *stridhan*. The author next propounds the distribution of *stridhan* on the basis of the text of Yajnavalkya (II, 145) "her kinsmen take it, if she die without issue." Para. 9 lays down that if a woman die without issue, that is, leaving no progeny, that is, leaving no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property shall be taken by her kinsmen, namely, "her husband and the rest." Paras. 10 and 11 distinguish different heirs according to the diversity of the marriage ceremonies; it is there laid down that in any of the four approved modes of marriage, the property belongs, in the first place, to her husband; on failure of him, it goes to his nearest kinsmen (*sapindas*). Vijnaneswar then proceeds, in para. 12, to consider the case of the woman who leaves progeny, *i.e.*, has issue, and, in the six following paragraphs, defines the order of succession of daughters and their descendants. We next come to para. 19: "if there be no grandsons in the female line, sons take the property: for it has been already declared "the male issue succeeds in their default." Yajnavalkya II, 118, Manu IX, 192 likewise shows the right of sons as well as of daughters to their mother's effects. "When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate'." Para. 20 interprets this to mean that brothers and sisters do not succeed together, but that one class excludes the other. Para. 21 follows with an explicit statement that the whole blood is mentioned to exclude the half-blood. Paras. 22 and 23 deal with the exceptional case of the daughter of a rival wife of a superior class, who takes the property of a childless step-mother of an inferior class. Para. 24 treats of grandsons who, on failure of sons, inherit the wealth of their paternal grandmother. Para. 25 then lays down that, on failure of grandsons also, the husband and other relatives succeed, and thus brings us back to the rule formulated in para. 9. The question consequently arises, whether the lady, whose estate forms the subject of controversy, died "without issue" within the meaning of para. 9, or "left progeny" within the meaning of para. 12. The Appellant maintains the latter alternative, and in

(6) 12 M. I. A. 397, 436 (1869).

support of his contention relies upon the text of Manu (IX, 183): "if among all the wives of one husband, one had a son, Manu declares them all to be mothers of male children through that son." The argument is founded on this text, that if one of the several wives of a person gives birth to a son, all the wives become the mothers of such son, who thereupon becomes entitled to succeed by inheritance to the wealth of all the wives of his father, as if he were their son within the meaning of the text of the Mitakshara. In my opinion, this process of reasoning is based on a manifest misapplication of the text of Manu. Kulluka Bhatta and Raghabananda, two of the Commentators of Manu, (Mandalik's Ed., p. 1208) explain the purpose of this text; the former points out that an adoption by the childless wife is excluded in such a case; the latter observes that this excludes levirate. This is also the view taken by Sarvajnanarayana, another commentator of Manu. In this view, it is needless to consider whether the term पुत्रिणी in the text of Manu means औरसपुत्रिणी (mother of a naturally born son) as the Commentator Nandana interprets it. It is sufficient for our present purpose to note that texts of the same import are found in other institutes, which indicate that this fiction had a very restricted application. Thus, Vishnu (XV, 41) ordains that "amongst wives of one husband also, the son of one is the son of all"; this is asserted to show that such son must present funeral oblations to all the wives of his father after their death (S. B. E. Vol. VII, p. 65). To the same effect is the ordinance of Vasishtha (XVII, 11): "if among many wives of one husband, one have a son, they all have offspring through that son; thus says the Veda." This has no reference to the right of succession of the son to the wealth of the wives of his father (S. B. E. Vol. XIV, p. 85). The context where the text mentioned occurs in Manu makes it reasonably plain that it has no reference to the question now under consideration. The text which immediately precedes declares as follows:—"if among brothers, sprung from one father, one have a son, Manu has declared them all to have male offspring through that son." This is quoted in the Mitakshara (Chap. I, sec. 11, para. 36) and is explained by Vijnaneswar as intended to forbid the aoption of others, if a brother's son can possibly be adopted, but not intended to declare him as the son of his uncle. It may be observed here paranthetically that the Judicial Committee have ruled that not only does not this text invalidate an adoption in such circumstances, but that all texts which prescribe the preferential adoption of the son of a brother of a whole-blood are merely binding upon the consciences of pious Hindus and do not possess the imperative force of laws [*Wooma Daee* v. *Gokulananda* (7)]. I feel no doubt that a similarly restricted interpretation should be adopted in the case of the text whereon the Appellant relies, and this view is plainly indicated by the Judicial Committee in *Annapurni* v. *Forbes* (1) where this very text of Manu is quoted and its scope and purpose explained as follows:—"we must suppose that all take the spiritual benefits of male issue; but the law is clear that for the purpose of inheritance, the natural mothers and fathers respectively are preferred." If the contention of the Appellant were to prevail, whenever a son is born of the womb of one of the wives of

(1) L. R. 26 I. A. 246, 253: s. c. 3 C. W. N. 730 (1899).
(7) L. R. 5 I. A. 40: s c I. L. R. 3 Cal. 587 (1878).

a person, all his wives would stand in the position of mothers to the boy and would be entitled to succeed to him equally by right of inheritance; for it would be obviously illogical to hold that the ladies become his mothers, but he does not become their son. Yet it was ruled by a Full Bench of this Court in *Jotilal* v. *Durain Kower* (8) that, according to the Mitakshara, in a divided family, a step-mother cannot succeed to the estate of her step-son; and this exposition of the law has been accepted as correct for over half a century.

Further, it is plain that the argument of the Appellant involves an *Atideca* upon an *Atideca*, that is, a fiction upon a fiction, or a remote analogy on a remote analogy; the adopted son would by a fiction be a real son of the adopter, and, then, by another fiction, a real son, not only of the adoptive mother, but of all the other wives of the adoptive father; a train of reasoning most repugnant to a Hindu jurist. We may also add that the contention of the Appellant is not supported by the decision in *Manilal* v. *Bai Rewa* (9), *Mahadu* v. *Bayaji* (10) and *Bai Kesser Bai* v. *Hansraj* (11), where a co-widow was preferred to the husband's brother and husband's brother's son as heiress to the *stridhan* of a Hindu widow who had died without issue; nor is assistance derived from *Bachha Jha* v. *Jugmon* (12), where under the Mithila Law, the husband's brother's son was preferred to the sister's son. We have been pressed, however, with the opinion of Commentators on the Institutes of Yajnavalkya as also on the Mitakshara, but, in my opinion, they do not support the contention of the Appellant that in para. 19 of sec. XI of Chap. II of the Mitakshara the term "son" includes the son of a rival wife. I am not now concerned with the question, which may, perhaps, hereafter arise, whether the term "son" includes a son taken by the woman in adoption in conjunction with or under an authority conferred by her husband. The only question for determination now is, whether the expression includes the son of a rival wife. In my opinion, the answer must be in the negative. The terms used by Yajnavalkya and Vijnaneswara, namely, अपुत्रमि and अनपत्याया make it clear that the text refers to the case where the woman dies "without issue" or "leaves no progeny" in the ordinary acceptation of those phrases. This is made clearer by the phrase used in para. 12, पुत्रवता अपत्यवती that is "a woman who has given birth to child." This is further emphasised in para. 19, where reference is made to the text of Manu (IX, 192) which speaks expressly of uterine brothers and uterine sisters. It is inconceivable that Vijnaneswara should have used the expressions he did in paras. 9, 12 and 19 or referred to the text of Manu (IX, 182), if he had intended to import into the term "son" a secondary sense of step-son. Why should we impute to Vijnaneswara a manifest violation of an elementary rule of interpretation, namely, that he uses the same word in two different senses in the course of the same discussion, (Dattaka Mimansa, II, 35; Vyavahara Mayukha, Ch. I, sec. 1, 11-15; Dayabhaga, Ch. III, sec. II, pl. 30), which furnish illustrations of the Arthaikatva Axiom, "to a word or sentence occurring at one and the same place, a double meaning should not be attached" एकत्र न द्वयम्;

(8) B. L. R. (F. B.) 67; W. R. (F. B.) 178 (1864).
(9) I. L. R. 17 Bom. 758 (1892).
(10) I. L. R. 19 Bom. 239 (1893).
(11) L. R. 38 I. A. 176: s c 10 C. W. N. 802; I. L. R. 30 Bom. 431 (1906).
(12) I. L. R. 12 Cal. 348 (1885).

ध्रुवं हः सकृदेवार्थं गमयति); for let it not be overlooked that although in the translation by Colebrooke the text of the Mitakshara is divided into distinct paragraphs, in the original the passage appears as one continuous and unbroken discussion. Reference has been made to Subodhini (Setlur's Ed., pp. 848-853), the Balambhatti (Setlur's Ed., p. 858, l. 9) (both Commentaries on the Mitakshara), the Viromitradaya (Ch. V, pt. II, sec. 14), Apararka (Anandasram Ed., Vol. II, 754), Vivada Ratnakar (Ch. X) and Kamalakara [Baroda Ed., p. 462; *Dwarkanath* v. *Sarat Chandra* (13)]. These do not support the contention that the term son in para. 19 includes the son of a rival wife, though some of them, for instance, the Viramitrodaya, apparently treats the son of a rival wife as a preferential heir to the husband. I am not now concerned with the question, whether the son of a rival wife can be squeezed in between the son and the husband and thus allowed to break through the compact line of heirs enumerated in the Mitakshara in paras. 20-21, but I may state that I do not at present see any plausible answer to, much less any valid criticism on, the view expounded by Chandavarkar, J., in *Bhimacharyya* v. *Ramcharyya* (2). That view is supported by a number of commentators, amongst others by Apararka (Vol. II, p. 754) and Kamalakar (p. 462). I hold accordingly that neither the Appellant nor the Respondent is qualified as "son" to take by inheritance the estate of their step-mother who died without issue and left no progeny. It follows necessarily that her estate upon her death, has devolved upon the *sapindas* of her husband in accordance with para. 25 read with paras. 9 and 11 of Ch. II, sec. XI of the Mitakshara. The Appellant and the Respondent are incontestably *sapindas* of their father in the same degree, and consequently they have jointly inherited the estate of their step-mother.

The question then arises for consideration, whether the Plaintiff and the Defendant are entitled to the estate in equal halves or whether the Respondent as the adopted son of his father is in a position of relative disadvantage. The Appellant affirms the latter alternative and relies upon the well-known text of Vasistha :— "If after he has been adopted, a legitimate son be born, then the Dattaka shall obtain a fourth share." This is of no assistance to the Appellant; for the context shows that the text of Vasistha refers only to the estate of the adoptive father (Vasistha XV, 1-9, S. B. E. Vol. XIV, p. 76). I am not unmindful that the principle has been extended to other cases (Dattaka Mimansa X, 1; Dattaka Chandrika II, 11, V. 17); but there is no text directly applicable to the contingency before us. On the other hand, we have the text of Vriddha Gautama cited in the Dattaka Mimansa (V. 43) which says that an adopted son endowed with excellent qualities and an after-born son are equal sharers. Of similar significance is the qualification formulated by Vasistha himself (XV, 10): "provided he be not engaged in rites procuring prosperity," which Krishna Pandit interprets as indicating that in this case the estate is to be divided equally between the legitimate son and the adopted son; the interpretation adopted by the author of the Dattaka Chandrika (V, 17-18) is obviously forced and, if one may say so without impropriety, erroneous. There is thus plain indication that even in archaic times, the rule was deemed

(13) 15 C. W. N. 1036, 1044 (1911).
(2) I. L. R. 33 Bom. 452, 460, 461 (1909).

harsh and an endeavour was made to restrict its operation. Consequently we should not extend its application to cases not only not comprised strictly within its letter, but undoubtedly beyond its true spirit; in this connection we may bear in mind that Hindu jurists, quite as much as English jurists, [*Ebbs* v. *Boulnois* (14)] recognise the well-known canon of interpretation that a special text or statute forming an exception to a general text or statute should be construed strictly and applied only to the cases falling clearly within it; the Mitakshara itself recognises the principle that where an exception exists to a general rule, the exception should be confined within the strictest limits so as not to encroach unduly upon the general rule [*Gangu* v. *Chandra* (15) and *Anandi* v. *Hari Suba* (16), Dattaka Chandrika sec. V, 27. Mitakshara on Prayaschitta, Ed. Moghe, p. 292; यावतावाधितं तं अनुपपत्ति प्रमो न भवति तावत्बाधनौयम). That the rule is of universal application is clear from the decision in *Surjokant* v. *Mahesh Chunder* (17), where an adopted son of one daughter and the legitimate son of another daughter were held to be equal sharers in the estate of their maternal grandfather. The only case where the rule has been applied, though it is not covered expressly by the text by Vashista, is *Raghabanund* v. *Sadhu Churn* (18), where partition was sought amongst the members of a joint Mitakshara family composed of the adopted son of one brother and the legitimate sons of two other brothers. The correctness of this decision which is in conflict with *Taramohan* v. *Kripamayee* (19) and *Dinanath* v. *Gopalchurn* (20), was doubted in *Baramanand* v. *Krishna Charan* (21), *Birbhadra* v. *Kalpataru* (22) and *Raja* v. *Subbaraya* (23). It was, however, recently followed by the Bombay High Court in *Bachoo Harkisendas* v. *Nagindas* (24). On appeal to the Privy Council, the decision of the Bombay High Court has been reversed and the view adopted by this Court in *Raghab* v. *Sadhu* (18) definitely overruled by a judgment which has been received in this country since the present judgment was composed. [*Nagindas* v. *Bachoo* (5) decided by the Judicial Committee on the 26th November 1915]. The position, then, is that there is neither authority nor principle which can be successfully invoked by the Appellant in support of his contention that the estate of his step-mother should be unequally divided as between himself (the real son of his father) and the Respondent (the adopted son of his father). We are consequently thrown back upon the fundamental position recognised in a long series of decisions that the adopted son becomes for all purposes the son of the father by adoption and occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined in the Dattaka Chandrika and the Dattaka Mimansa. *Sambhuchander* v. *Narayani* (25), *Padma Coomari* v. *Court of Wards* (4), *Kalikamal* v. *Uma*

(14) L. R. 10 Ch. App. 479; Co. Litt. 299a (1875).
(15) I. L. R. 32 Bom. 275 (1907).
(16) I. L. R. 33 Bom. 404 (1909).
(17) I. L. R. 9 Cal. 70 (1882)
(18) I. L. R. 4 Cal. 425 (1878).
(5) Decided by the Privy Council on 26th November 1915. *See* 20 C. W. N. cxxxv.
(18) I. L. R. 4 Cal. 425 (1878).
(19) 9 W. R. 428 (1868).
(20) 8 C. L. R. 57; 9 C. L. R. 379 (1881).
(21) 14 C. L J. 183 (1884).
(22) 1 C. L. J. 388 (1905).
(23) I. L. R. 7 Mad 253 (1883).
(24) 16 Bom. L. R. 263 (1914).
(25) 3 Knapp 55 (1835).
(4) L. R. 8 I. A. 229, 246: s. c. I. L. R. 8 Cal. 302 (1881).

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Sankar (26), *Umasankar* v. *Kalikamal* (27), *Jaykishore* v. *Panchoo Babu* (3), *Anandi* v. *Hari Suba* (16), *Jugernath* v. *Makhan* (28), *Tincowri* v. *Dinanath* (29), *Radhaprosad* v. *Ranimani* (30), *Narasamnal* v. *Bakarama* (31) and *Annapurni* v. *Collector* (32). The only point for consideration then is whether there is any text applicable to the present case which reduces the share of the adopted son. I have not been able to trace any text expressly applicable nor can I find any which even by implication supports the contention of the Appellant. I am not unmindful that in Ch. II, sec. XI, para. 9, of the Mitakshara the property goes to the kinsmen of the woman, namely her husband and the rest, and in para. 11, on the failure of the husband, it goes to his *sapindas*. In my opinion, this does not show that the property descends as if it belonged to the husband; the only effect of the two paragraphs is to determine the heir to the woman by application of the test of *sapindaship* with her husband. It follows accordingly that the Respondent takes the same share in the estate of her step-mother as he would have done if he had been a real and not the adopted son of his father. I hold finally that Mr. Justice Chitty correctly decided both the points in the case.

As regards the question of estoppel, there is nothing in the arbitration proceedings which debars the Respondent from contesting the claim of the Appellant, and the point which indeed was not seriously pressed does not require elaborate investigation.

I agree with the Chief Justice and Mr. Justice Woodroffe in the directions they propose to give with regard to the costs and the further trial of the suit.

Babu Satish Ch. Sen, Attorney, for the Appellant.

Mr. P. N. Sen, Attorney, for the Respondent.

Case remanded.

J. M. L.

(26) L. R. 10 I. A. 138: s. c. I. L. R. 10 Cal. 232 (1883).
(27) I. L. R. 6 Cal. 256 (1880).
(3) 4 C. L. R. 538 (1879).
(16) I. L. R 33 Bom. 404 (1909).
(28) 3 W. R. 24 (1865).
(29) 3 W. R. 49 (1865).
(30) 10 C. W. N. 695: s. c 3 C. L. J. 502; I. L. R. 33 Cal. 947 (1906).
(31) 1 Mad. H. C. R. 420 (1863).
(32) I. L. R. 18 Mad. 277, 281 (1895).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 637 OF 1912.

MOOKERJEE, J. NEWBOULD, J. 1915, Heard, 5, August. Judgment, 11, August.	NIKUNJA RANI CHOUDHURANI, Defendant. Appellant, *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, Plaintiff, Respondent.

Court Fees Act (VII of 1870), secs. 19E, 19I, 19J—Application for probate—Penalty for undervaluation—Suit if lies to recover—Defence, that penalty imposed without compliance with statutory requirements if admissible.

A suit by the Secretary of State lies for recovery of penalty imposed by a Revenue authority under statutory powers, where there is no statutory provision for recovery of the penalty by summary process; and even where there is such provision, such a suit is maintainable unless there is a statutory bar to its institution.

If the action of the Revenue authorities in imposing a penalty is ultra vires, *or, if he has not followed the procedure prescribed by the statute which is the source of his authority, there is no enforceable claim which a Civil Court is bound to recognise and the rule that a Civil Court has no jurisdiction to review the decision of a*

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Revenue authority on the ground that he has exercised his discretion erroneously does not apply to such a case.

Where an applicant for probate paid duty upon the estimated value of the estate, and the Court, in the absence of objection by the Collector to whom notice was given to enable him to test the valuation, granted probate, but subsequently the Collector having called upon the Petitioner to amend the valuation and pay additional Court-fee, the latter asserted that his valuation was correct but to avoid litigation agreed to pay the additional Court-fee demanded by the Collector, and the Board of Revenue, thereupon without moving the Court for an enquiry into the true value of the assets under sec. 191I, proceeded to impose a penalty upon the Applicant.

Held—*That there was no compliance with the statutory requirements and no suit lay to recover the penalty.*

Sec. 19E contemplates an application on the part of the person who has taken out probate and produces the same to be duly stamped.

In such a case the chief controlling Revenue authority is at liberty to refuse to stamp the probate till the penalty has been paid, and so no occasion can arise in such a case for recovery, by summary process or by suit, of the penalty imposed under sec. 19E.

MANEKJI *v.* SECRETARY OF STATE FOR INDIA (4) *referred to.*

This was an appeal preferred on the 20th March 1912 against the decree of A. R. Edward, Esq., Additional District Judge of Zillah Faridpore, dated the 8th February 1912, affirming the decree of Babu Behari Lal Chatterjee, Officiating Subordinate Judge at Faridpore, dated the 9th August 1910.

The facts of the case fully appear from the judgment.

Sir Rash Behary Ghosh, Babus Dwarkanath Chakerverty and *Chandra Kanta Ghosh* for the Appellant.

Babu Ram Charan Mitra for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendant in a suit for recovery of a penalty imposed on her under sec. 19E of the Court Fees Act, 1870. The facts material for the determination of the questions of law raised before us, are undisputed, and lie in a narrow compass. The Appellant applied for probate of a Will executed by her husband, Kailas Chandra Choudhury. Thereupon notice was issued to the Collector of Faridpore under sub-sec. 1 of sec. 191I of the Court Fees Act. As no reply was received from the Collector, probate was issued to the Petitioner on the 28th August 1908, on payment of Rs. 1,563, the duty payable upon her valuation of the estate. On the 10th December 1908, the Collector of Faridpore who had meanwhile communicated with the Collector of Backerganj where some of the properties were situated, held that the value of the estate was Rs. 1,69,123 and not Rs. 78,122 as stated by the Petitioner in her application for probate. He accordingly directed the Petitioner to amend the valuation and to explain the cause of under-valuation. Notice was served upon her on the 15th December 1908. On the 2nd January 1909, she presented a petition to the Collector in which she stated that the valuation as made by her agents and accepted by her in good

(4 [1896] Bom P. J. 751.

faith, was correct, as the majority of the properties were small shares in various estates and could not fetch large values. She added, however, that she had no desire to litigate the matter and deposited Rs. 1,821, the additional fee payable, on the hypothesis that the valuation of the Collector was correct. On the 15th January 1909 the Collector recommended to the Commissioner that the additional sum might be accepted, and the probate amended. This was endorsed by the Commissioner and submitted by him to the Board of Revenue for sanction. The Board, however, on the 4th July 1909, directed that double the fee payable, that is, Rs. 6,768 be levied as penalty from the Petitioner under sec. 19E of the Court Fees Act. This order, made without any notice to the Petitioner, was communicated to her on the 15th August 1909. On the 11th September 1909, she petitioned to the Board to reconsider the matter, but during the pendency of her application for review, the Collector instituted the present suit on the 11th December 1909 for recovery of Rs. 6,768. On the 16th January 1910, the Board, on review, reduced the penalty to Rs. 3,384 : on the 8th August 1910 the plaint was amended and the claim was reduced to that sum. The Defendant resisted the claim substantially on three grounds, namely, *first*, that the suit as framed was not maintainable; *secondly*, that the penalty had not been imposed in accordance with statutory provisions, and consequently, could not be recovered, and *thirdly*, that even if the penalty was recoverable no decree could be made against the estate in her hands. The Subordinate Judge overruled these contentions and decreed the suit. Upon appeal that decree has been affirmed by the District Judge. The present appeal was summarily dismissed under r. 11 of Or. 41 of the Code by Brett and Sharfuddin, JJ. The Appellant then applied for review of judgment and obtained a Rule. After the retirement of Brett, J., the Rule was made absolute by Sharfuddin, J., on the ground that important questions of law were involved in the appeal. The appeal has now come up before us for final disposal, and on behalf of the Appellant the three grounds urged in the Primary Court in answer to the claim have been reiterated.

As regards the first objection, namely, that the suit is not maintainable, we are of opinion, that there is no foundation for it. Assume that the penalty has been rightly imposed; there must be some method for its recovery. A suit for its recovery is not barred either explicitly or impliedly. There is no provision in the law for recovery of the penalty by summary process, as sec. 19E is not mentioned in sub-sec. 1 of sec. 19J. But even if a summary remedy had been provided, it would not follow that the Crown was not entitled to the ordinary remedy by a suit, which is open to all its subjects. In England, where the Crown claims sums due to it by way of penalty or otherwise, the recovery may be had by information [*Attorney-General* v. *Freer* (1), *Bradlaugh* v. *Clarke* (2) and *Cawthorne* v. *Campbell* (3)]. We feel no doubt that unless there is a statutory bar, a suit is maintainable by the Secretary of State for India in Council, for recovery of penalty lawfully imposed.

As regards the second objection, namely, that the penalty has been imposed in contravention of the statute and is consequently not recoverable, the question has been raised, whether it is open to the Civil Court to determine the matter. The deci-

(1) 11 Price 183 (1822).
(2) 8 App Cas. 354 (1883).
(3) 1 Anst 205, 214 (1790).

sion in *Manekji* v. *Secretary of State for India* (4) shows that a Civil Court has no jurisdiction to review the decision of a Revenue authority on the ground that the valuation had been incorrectly made or that the discretion in the imposition of the penalty had been erroneously exercised. But the position is different when the order for imposition of penalty is assailed on the ground that it has not been made in accordance with the statute. If the action of the Revenue authority is *ultra vires*, if he has not followed the procedure prescribed by the statute which is the source of his authority, there is no enforceable claim which a Civil Court is bound to recognise. We must consequently determine whether the imposition of the penalty in the case before us was *ultra vires*.

Sec. 19I of the Court Fees Act contemplates the prepayment of duty before an order for grant of probate is made. *In the goods of Omda Bibi* (5). In the case before us, this appears to have been done. A notice was thereupon issued to the Collector under sec. 19H to enable him to test the valuation. As no communication was received from him, the Court issued the probate. Subsequently, the Collector called upon the Petitioner to amend the valuation under sub-sec. 3 of sec. 19H. The Applicant for probate did not accept the valuation made by the Collector. She maintained on the other hand, that the original valuation made by her was not inadequate, but with a view to avoid expense and litigation, she deposited the excess sum demanded. The Board of Revenue thereupon proceeded to impose a penalty on the Applicant under sec. 19E. In our opinion, sec. 19E had no application in the events which had happened. As pointed out in the case of *Manekji* v. *Secretary of State* (4), sec. 19E contemplates an application on the part of the person who had taken out probate and produces the same to be duly stamped. There was no such application in the present case. The section further contemplates that the estimated value of the estate is less than what the value has afterwards proved to be. In the present case, there was no determination of the valuation by the Probate Court: there was, on the one hand, an estimate by the Petitioner, there was, on the other hand, an assessment by the Collector which was not accepted as correct by the Applicant; indeed, she disputed the correctness of the grounds for the higher assessment. There was consequently no room for the application of sec. 19E. If it was intended to take proceedings under sec. 19E, as the Petitioner disputed the correctness of the assessment by the Collector, the Court should have been moved for an enquiry into the true value of the assets under sec. 19H; and if the Collector had adopted such a course, it would have been incumbent upon him, as explained in the case of *In the goods of Stevenson* (6), to make out a case for enquiry upon definite facts. No such step was, however, taken, possibly for the reason that the Collector was of opinion that no penalty should be imposed. But whatever the reason might be, it is plain that there was no compliance with the statutory requirements and that the contingency contemplated in sec. 19E had not arisen. Nor was action taken under sec. 19G which is moulded on sec. 43 of 55 Geo. III, Ch. 184 and sec. 122 of 56 Geo. III, Ch. 56. We may here point out the reason why sec. 19J, which pres-

(4) [1896] Bom. P. J. 751.
(5) I. L. R. 26 Cal. 407: s c 3 C. W. N. 392 (1899).

(4) [1896] Bom. P. J. 751.
(6) 6 C. W. N. 898 (1902).

cribes the mode of recovery of penalties, makes no mention of sec. 19E. In a case where that section is properly applicable, the Petitioner is entirely in the hands of the chief controlling Revenue authority, who is at liberty to refuse to stamp the probate till the penalty has been paid; no occasion can consequently arise for recovery, by summary process or by suit, of the penalty imposed under sec. 19E. We are of opinion that the action of the Board of Revenue was entirely misconceived and that the imposition of the penalty under sec. 19E was *ultra vires*. There is thus no legal foundation for the claim.

As regards the third objection, namely, that the penalty is personal and is not recoverable from the estate, we need only say that it raises a question of first impression and of some nicety, which need not be determined in view of our decision on the second objection.

The result is that this appeal is allowed, the decree of the District Judge reversed and the suit dismissed with costs in all the Courts.

N. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 374 OF 1913.

CHAUDHURI, J.
NEWBOULD, J.
1916,
Heard,
10, February.
Judgment,
14, February.

BABU KRISHNA PRASAD, Plaintiff, Appellant,
v.
BABU RAMPERSHAD SINGH and others, Defendants, Respondents.

Hindu Law—Mitakshara—Mortgage by father, not proved immoral—Decree against father and sons, form of—Consideration proved—Lender if bound to prove application of money as stated in bond.

If the consideration for the mortgage was received by the mortgagor, the mortgage cannot be held inoperative merely because the mortgagee has failed to prove that the money was applied as stated in the mortgage bond.

KISHUN PERSHAD CHOUDHURY v. TIPAN PERSHAD SINGH (1) *followed.*

The mortgage being one executed by a Mitakshara father, and the sons having failed to show that the loan was taken for immoral purposes, a decree was passed in the form it was made in KISHUN PERSHAD v. TIPAN PERSHAD (1), e.g., *mortgage decree against the share of the father, and if the sale of that share was insufficient to satisfy the debt, interest and costs, balance to be realised by sale of the son's shares and interest in the ancestral property so far as necessary—six months' time being allowed for redemption.*

This was an appeal from a decision of Rai Purna Chandra Sarkar Bahadur, Subordinate Judge, Second Court, Patna, dated the 8th May 1913.

The facts of the case will sufficiently appear from the judgment.

Babus Umakali Mukherjee, Kulwant Sahai, Raghu Nath Singh and *Rajendra Prosad* for the Appellant.

Sir Rash Behary Ghose, Babus Jogesh Chandra Roy, Ganesh Dutt Singh and *Sivanandan Roy* for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

This is an appeal against the decree of the Subordinate Judge of Patna dismissing the Plaintiff's suit for enforcing a mortgage bond, dated the 2nd June 1905. The Defendant No. 1 is the original mortgagor, Defendants Nos. 2 to 4 are his minor sons and Defendants Nos. 5 to 8 are puisne mortgagees. The original mort-

(1) I. L. R. 34 Cal. 735: s. c. 11 C. W. N 613 (1907).

gagee is dead and his son has brought the present suit.

The suit was instituted on the 19th July 1910; it was decreed *ex parte*, that decree was set aside on the application of the infant Defendants after the decree absolute was made. Then they filed a written statement on the 24th March 1912. The learned Subordinate Judge has dismissed the suit with costs. Against that, the representative of the original mortgagee, who is now the Plaintiff has appealed.

There is no question that the mortgage in suit was executed by Defendant No. 1 and was duly attested. With regard to the passing of the consideration money, the learned Subordinate Judge seems to have made a confusion between two things, namely, the payment of money by the mortgagee to the mortgagor, and, the application of the money by the mortgagor for family and other purposes. The mortgage recites that the money was applied for the purpose of paying Rs. 3,000 due to a person of the name of Deo Nath Sahay, Rs. 1,000 to one Bissessur Singh, and Rs. 2,000 for marriage expenses of the mortgagor's son, which is stated to have been coming on very soon." There is not much documentary evidence in the case, in fact there is practically none and the whole of the case has been determined mainly upon oral testimony. We have no doubt at all on the evidence that the consideration for the mortgage was duly paid to the mortgagor. A point is made that in the mortgage-deed the letters and numbers indicating the series of the currency notes have not been given. But one knows that in Nagri accounts frequently these letters and numbers are not given. There is no reason to doubt that the payment was made. No doubt there is a charge of collusion and fraud against the mortgagor and the original mortgagee, the nature of which however has never been clearly stated. Simply because the original mortgagee was a Mukhtear, we are not prepared to hold that the transaction is fraudulent. We do not see any reason to doubt the attesting witness Bolaki, who was also examined when the case was heard *ex parte*. The only point urged was that he was also a Mukhtear. Simply because a man is a Mukhtear, his evidence cannot be rejected. There is no other reason suggested why he should be disbelieved. Munshi Lal, a Mukhtear has proved payment of the money to the mortgagor. It was argued that inasmuch as it was alleged that the mortgage bond was executed in the Bar Library there was no reason why the payment should not have been made there. Munshi Lal said that the payment was made when the Registration receipt was made over by the mortgagor to the mortgagee. That seems to us an acceptable explanation. The Defendant No. 1 has not come to the witness-box and we must hold upon the positive evidence which has been given that the money was paid by the mortgagee as stated in the deed. Thakur Prosad, one of the attesting witnesses, is dead. Ramprosad, the writer, was subpoenaed but could not be found at the time of the hearing. Harbans Sahay was also subpoenaed. He failed to appear on the date fixed and a short adjournment asked for to enable him to appear was disallowed. He is a pleader and seeing that the case went over the day the Plaintiff's application might have been granted, but surely no adverse inference can be drawn because he was not examined. As regards the application of the money for the purposes mentioned in the mortgage, it appears that Deo Nath and Bissessur were subpoenaed by both sides to give evidence.

They were not, however, examined. One of them was called upon to produce the bond in respect of the loan which is alleged to have been taken by the original mortgagor from him. That bond was not produced. We are not prepared upon the evidence, as it stands, to come to the conclusion that the money was not paid to these persons as recited in the document. The main ground of attack has been made that Rs. 2,000 which is stated to have been taken for the marriage could not have been so used as the marriage had taken place in Asar 1311. The date depends upon oral testimony. The evidence on behalf of the Plaintiff is that the marriage took place after the execution of the mortgage. The evidence on the other side is that the marriage took place before the deed. The petition of the mortgagor, Ex. A, dated the 24th May 1904, for withdrawing some money from Court has been relied upon by the Defendants as it contains a statement that the mortgagor who was the applicant was unable to withdraw some money upon a payment order, dated the 13th April 1904 as he had to go away in consequence of "the marriage of a relation going to take place." That petition does not state that it was the marriage of his son. If it had, it would have been some corroboration of the Defendants' case that the son's marriage took place about that date. Nothing could have been easier for the Defendants than to prove when the marriage took place. They are persons who keep accounts, and I should have expected them to produce evidence from their books to show when the marriage actually took place. They have not produced their accounts. It is not safe to depend upon oral evidence of the character placed before us for a positive finding about the date of the marriage. But it is unnecessary to go into the matter, because the learned Vakil for the Appellant has contended that assuming that the Plaintiff has failed to prove that the money was applied as stated in the mortgage-bond, the mortgage cannot be held inoperative as against the first mortgagor if he received consideration for the mortgage. He has relied upon the decision in the case of *Kishun Pershad Choudhury* v. *Tipan Pershad Singh* (1). The correctness of the decision in that case seems to have been accepted in the Full Bench case of *Bidya Prosad Singh* v. *Bhup Narain Singh* (2). It is not shown that the money was taken for immoral purposes,—the evidence of immorality being of the flimsiest character and in our opinion unreliable. Although it may be said that the application of the money as stated in the mortgage deed has not been proved, we think that the Appellant is justified in asking us to make a decree in the form as it was made in the case of *Kishun Pershad* v. *Tipan Pershad* (1). That case differs from the decision in the case of *Surja Proshad* v. *Golab Chand* (3). Having regard to the fact that has practically been accepted by the Full Bench as good law on the subject, we see no reason why it should not be accepted and followed. The decree, therefore, will be in the form given in that case. The Plaintiff will have the usual mortgage decree for the sum due upon the mortgage security against the share of the father. The decree will also entitle him, if the sale of the share and interest of the father be not sufficient to satisfy the debt, interest and costs, to realise the balance by sale of the minor's

(1) I. L. R. 34 Cal. 735 : s. c. 11 C. W. N. 613 (1907).
(2) I. L. R. 42 Cal. 1068 : s. c. 19 C. W. N. 849 (1915).
(3) I. L. R. 27 Cal. 762 (1900).

shares and interest in the ancestral property, so far as may be necessary to satisfy the amount due. A period of six months will be fixed in the decree for redemption. The Appellant is entitled to his costs of this Court as well as of the lower Court as against Defendants Nos. 1 to 4. The other Defendants have not appeared before us.

N. G. *Appeal allowed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 678 OF 1915.

HOLMWOOD, J.
IMAM, J.
1916,
3, January.

NABADIP CHANDRA NANDI and others, Petitioners,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. XVI, rr 10, 12—Fine for non-production o documents, cond tions to be fulfilled before imposing fine—Duty of Courts and Settlement Officers to strictly follow the l w rel ting to issue and se v e of sum mons.

Or. XVI, r. 10, of the Civil Procedure Code does not apply where there has been no summons upon any body to produce the documents, and no order under r. 12 can be made until the procedure laid down in r. 10 has been followed where that Rule applies.

The Civil Courts, and particularly the peripatetic Settlement Courts which cause a large amount of disturbance to local interests, cannot be too careful to follow the provisions of law strictly as regards summoning persons and documents before them.

This was a Rule granted on the 9th July 1915 against an order of Mr. A. K. Jamieson, Settlement Officer of Midnapur, dated the 19th February 1915, affirming the orders of Babu Krishna Gopal Ghosh, Assistant Settlement Officer of that place, dated 18th November 1914.

The facts as set out in the order of the Settlement Officers were as follows :—

A notice was served on the Petitioners to file the *jamabandi* of Mouza Saridaspore, the same being found necessary for ascertaining the rent of the tenants. The date as given in the notice was 1st November 1914 though in the order-sheet the date appeared to be 4th November 1914. The notice was received by the Appellant on 2nd November 1914. The case was not taken up by the Assistant Settlement Officer till 4th November when a petition was received from the Appellant asking for time which was granted up to 6th November and then again up to 10th November. On the latter date an agent of Appellant appeared before the Assistant Settlement Officer and it was alleged on behalf of the Petitioners that he tendered the *jamabandis* but they were refused. The Assistant Settlement Officer's proceedings however showing that they were not tendered, the Appellant and his brother who were joint proprietors were each fined Rs. 100 and a daily fine of Rs. 3 was imposed in addition until the *jamabandi* should be produced. On 29th November a *jamabandi* of the year 1279 was produced but it did not contain the information necessary to determine the question at issue and the Assistant Settlement Officer called for the *jamabandi* of 1296, the daily fine being directed to remain in operation until this *jamabandi* should be produced and by 25th December 1914 the fine had mounted to Rs. 500 on which date a distress warrant was issued.

The Settlement Officer in dealing with the matter observed :

" The whole point is whether the papers were actually produced on 10th November 1914 and refused by the Assistant

Settlement Officer. I should in any case prefer to accept the statement of a responsible officer such as the Assistant Settlement Officer to that of an *amla* but apart from this I can conceive of reasons why they should be refused.'

After specifying these reasons the Settlement Officer proceeded as follows :—

"I am satisfied therefore that the papers were not produced till 29th November 1914. I can find no excuse for non-production of papers. This is the second year of settlement work in the village in question and the landlord should have had the papers last year at Khanapuri but did not take the trouble to get them ready nor did he take any steps to produce them till notice was served on him and as a matter of fact this same landlord is giving trouble by non-production of papers in every camp in which villages of his estate is situated. I therefore think he has been rightly fined. As to the amount of fine however I think that the production of papers on 29th November 1914 was at least a partial compliance with order. The daily fine should not have run after that date. The result is that I confirm the finding of the lower Court but reduce the fine to one of Rs. 314, *i.e.*, Rs. 100 each on the two landlords and Rs. 3 per day each from 10th November 1914 to 29th November 1914, *i.e.*, 19 days. The full amount of Rs. 500 has been deposited, out of it Rs. 314 will be credited as fine and the balance refunded."

The Petitioners moved the High Court and obtained this Rule.

Babus Bepin Behary Ghose (Jr.) and *Jyotish Chandra Hazra* for the Petitioner.

Babu Ram Charan Mitra for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We are of opinion that this Rule must be made absolute on the ground on which it was issued. In the first place there was no summons upon any body to produce the documents and therefore Or. XVI, r. 10, did not apply, and secondly if Or. XVI, r. 10, did apply, the procedure laid down in that rule was not followed, and until it was followed, no order under r. 12 could possibly be made. The Civil Courts and particularly the peripatetic settlement Courts which cause a large amount of disturbance to local interests cannot be too careful to follow the provisions of law strictly as regards summoning persons and documents before them. It appears to us that the proceedings of the Assistant Settlement Officer and Settlement Officer affirming them were wholly without jurisdiction and must be set aside; and if the Assistant Settlement Officer requires any documents from the Petitioners he must proceed strictly in accordance with law.

The Rule is made absolute with costs to the Petitioners, two gold mohurs. The fine if paid must be refunded.

N. G. *Rule made absolute.*

[CRIMINAL REFERENCE.]

REF. No. 54 OF 1915.

CHITTY, J.
WALMSLEY, J.
1915,
10, February.

THE KING-EMPEROR,
v.
AUSHI BIBI, Accused.

Jury, misdirection to—Confession before village salish—Evidence Act (I of 1872, sec 24—Person in authority—Indian Penal Code (Act XLV of 1860), secs $\frac{302}{115}$, $\frac{328}{116}$, *—Abetment of murder by poisoning and causing hurt by means of poison—Absence of evidence as to amount of poison proposed to be administered.*

The accused was charged under secs. 302/115 and 328/116, I. P. C., the case for the prosecution being that the accused suspecting an intrigue bewteen her husband and a certain woman gave a powder to a girl with instructions to give it

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to the woman. Owing to the intervention of a relative of the girl the powder was not given to the woman. The accused asked the girl to give her back the powder and the girl returned a portion of it. On the matter getting about in the village a salish *was summoned before whom the accused made a confession and produced the powder. The chemical analyser's report was that traces of white arsenic were found in the powder but it was not disclosed how much arsenic was there. It was found that the president and members of the* salish *told the accused that if she confessed they would compromise the matter. The Sessions Judge in charging the jury said that the confession was not inadmissible because the members of the* salish *were not persons in authority and the accused was not then charged with any offence.*

Held—*That the Sessions Judge misdirected the jury in the matter of the confession.*

The president of a panchayet *may be a person in authority within the meaning of sec. 24 of the Evidence Act, and to tell the jury that he was not, was clearly erroneous, the matter depending on a question of fact,* viz., *whether the confession was caused by any inducement, threat or promise, having reference to the charge against the accused.*

NAZIR JHARUDAR *v.* THE EMPEROR (1) *and* THE EMPEROR *v.* JASHA BEWA (2) *referred to.*

That the salish *being summoned to consider the case which was being made against the accused, she was before the* salish *on that charge and the Sessions Judge was wrong in directing otherwise.*

That having regard to the inducement offered by the president and members of the salish *to the accused it is extremely doubtful whether the confession should have been allowed to be placed before the jury at all. It certainly ought not to have been placed before them without an explanation as to how they should value it having regard to the circumstances in which it was made.*

That the chemical analysis not disclosing how much arsenic was found in the powder there was no evidence on the record against the accused as to the amount of poison which was proposed to be administered and it was doubtful whether the case would come under sec. 302 or sec. 328, I. P. C.

This was a reference under sec. 307, Cr. P. C., made by S. E. Stinton, Esq., Sessions Judge of Dacca, on the 23rd December 1915 as he disagreed with the verdict of the jury who found the accused not guilty of the charges framed against her.

The material portion of the Sessions Judge's charge to the jury is set out below.

"Accused suspected Adarjan of intriguing with her husband. Adarjan was in the habit of going to Chandra Ban's house on the way from Abu's house where she lives to her daughter's husband's house and of taking *pan* with Chandra Ban.

"Accused's husband Nazir Gain is uncle of Chandra Ban's father. Adarjan's daughter Uttam is married to Chandra Ban's *chacha sasur*.

"Aushi gave some white powder to Chandra Ban; and asked her to administer it to Adarjan mixed with lime with *pan* or mixed with rice because Adarjan was intriguing with her husband. She adjured her in the name of God not to tell anyone.

Soon after Chandra Ban's aunt Nekjan came to Chandra Ban's *bari* to tether a cow. Chandra Ban showed her the powder and told her Aushi had given it

(1) 9 C. W. N. 474 (1905).
(2) 11 C. W. N. 904 (1907).

to give to Adarjan. Nekjan tested the powder by putting some in water and on the rind of a lemon and told her not to give it to Adarjan as it would kill her.

Soon after Aushi came back and asked for the powder back, saying that inspite of the oath Chandra Ban had revealed the matter and furtively took back the packet. Chandra Ban kept back part of the powder wrapped in the same paper. This was on Wednesday. The matter leaked out. A *salish* was held on Friday in the house of Chandra Ban's father Abbasali. Chandra Ban was sent for and produced the powder she had kept back and told what she knew to Manu Mandal who presided at the *salish*. Aushi was sent for and questioned. At first she denied, but when pressed she admitted that she had given the powder to Chandra Ban and fetched the rest (which she had taken back from Chandra Ban) and made it over to the *salish*. It was sent to the president who sent it with a report to the Thana. Whence it was sent packed and sealed to the Court Officer for transmission to the Chemical Examiner. His report shows that white arsenic was found in the contents of the packet.

The most important witness is Chandra Ban. If you believe her you will have no doubt that accused gave her the powder to administer to Adarjan. You have seen the manner in which she has given evidence. Have you any reason to doubt that she is giving a substantially true account of what happened. Has she any motive for telling a false story against accused. Is she likely to invent such a story?

She is corroborated by Nekjan who says that Chandra Ban shewed her the powder and told her that accused had given it to administer to Adarjan. She describes how she tested this powder. She told Chandra Ban's mother Afjan.

Afjan says Nekjan reported this matter to her that afternoon. She says Chandra Ban came to her house next day and told her about it. Chandra Ban says she told her mother the same day. Is the discrepancy such as to affect the credibility of Chandra Ban? Also by evidence of what took place in the *salish* on Friday.

The witnesses of the *salish* are Raman Sarkar, Alam, Abdul, Abbasali (members of the *salish*) Chandra Ban and Adarjan. Manu Haji who presided at the *salish* was examined in the Magistrate's Court, but died shortly before the present trial.

These witnesses are agreed on the following points :—

The *salish* was called by Abbasali who gave out that accused had given the stuff to his daughter.

Chandra Ban and Aushi were sent for, Chandra Ban produced the portion which she had kept back. Aushi at first denied but afterwards admitted that she had given the stuff to Chandra Ban and went and brought the remainder from her *bari* and produced it before the *salish*. It was made over to Manu who took it to the president.

There are some discrepancies as to details —*e.g.*, whether Aushi went alone to her *bari* or whether Abdul and Nazar went along with her or behind her. Whether she produced the poison from a chest or a box. Whether Aushi was questioned by Manu alone, or all members of the *salish*, whether Aushi admitted before or after the *salish* told her they would settle the matter, etc., etc.

I do not know whether you will attach importance to such discrepancies in minor points. Remember that the *salish* took place in August. It is likely that witnesses do not remember exactly the details of what took place.

Such discrepancies are always found

when a number of people describe, each from his own point of view, events witnessed by all.

The question for you is whether you can accept the account of the *salish* as true on the essential points above referred to.

If you believe that Aushi produced the powder before the *salish*, you will find this a very strong corroboration of Chandra Ban's story.

The fact that Chandra Ban produced the portion of the powder which she kept back is also important corroboration.

Her confession before the *salish* is admissible if it was made voluntarily. According to sec. 24, Evidence Act, a confession is not admissible if it appears to the Court to have been caused by any inducement, threat or promise having reference to a charge against an accused person proceeding from a person in authority and sufficient, in the opinion of the Court to give the person grounds, which would appear to him reasonable for thinking that by making it he would gain any advantage or avoid any evil of a temporary character in reference to proceedings against him.

In the present case there is nothing to show that accused was threatened. Alam says that accused at first denied and then admitted when he told her the *salish* would compromise.

A confession made under these circumstances is not inadmissible, because—(1) the members of the *salish* were not persons in authority, (2) the accused was not then charged with any offence. You have evidence of the manner in which the substance was transmitted from the *salish* to the president, Police, Court Officer, Assistant Surgeon's office and then by post to the Chemical Examiner. You have the Chemical Examiner's report that white arsenic was found in the contents. On this evidence you will have no doubt that the substance given by accused to Chandra Ban produced before the *salish* contained white arsenic, unless you think that the arsenic was introduced into it at same stage. Are these grounds for any such supposition?

What was accused's intention? Did she know that the stuff contained poison and did she intend to poison Adarjan? What was her motive? There is . . . . . evidence that she has been on bad terms with Adarjan for the last two years or so.

Two grounds for enmity—

(1) She suspected her of intriguing with her husband.

Chandra Ban says she told her this when giving her the poison. If you believe this you will find it strong evidence that she intended to poison Adarjan.

She says "accused complained to me on previous occasions about her husband's conduct."

Adarjan says she was told six months ago that Aushi suspected her with her husband.

Afjan says that accused has been saying for the last year that her husband was intriguing with Adarjan.

(2) There is evidence (Nekjan and Adarjan) that Adarjan owed Aushi a rupee. They quarrelled and came to blows over it.

It is for you to consider whether accused was jealous of Adarjan with her husband and whether such jealousy is a sufficient motive for trying to poison her,

Accused's conduct.

She did not try to administer poison directly. She got hold of Chandra Ban, a young girl. She got the poison back from her when the matter came out. When getting it back she tried to avoid

the notice of Chandra Ban's husband and uncle who were working on the yard.

Before the *salish* at first she denied, but when pressed admitted. She said she got it from a *badia*. There is no direct evidence that she knew it was poison. It is for you to consider whether such knowledge can be inferred from her conduct. As a rule no such evidence of knowledge is obtainable. Knowledge is not a tangible thing. It has to be inferred from circumstances and conduct.

Have the witnesses any motive for implicating accused falsely?

Chandra Ban is related to both and apparently on good terms with both accused and Adarjan, no suggestion that she personally has any motive. Nekjan is Chandra Ban's aunt. Afjan is her mother.

Raman Sarkar is Ukil Jamai of Abbasali, Chandra Ban's father. Alam is Abbasali's *bhaira*. Abdul is nephew of Adarjan.

Abbasali deposed for the Kasimpore Zamindar in a tree-cutting case against Nazir Gain, accused's husband, in which he was acquitted in the last rains. Is this ground for supposing that Abbasali has got up this case against accused? Abbasali says he is on good terms with her. Nothing to show what was nature of Abbasali's evidence or that he personally had any ill will towards Nazir.

No suggestion that any of the witnesses has a personal grudge against accused or her husband.

Warnings—(1) Burden of proof entirely on the prosecution not on the accused. (2) You are sole judges of fact. You are not bound to accept any opinion expressed by the Court. (3) If you have reasonable doubt on any point you will give accused the benefit."

The jury returned a verdict of not guilty. The Judge disagreeing with the verdict as clearly perverse and contrary to the weight of evidence referred the case to the High Court.

The Reference is as follows :—

"The facts for the case have been stated and the evidence discussed in the charge. The evidence of Chandra Ban, if believed, proves beyond doubt that the accused gave her a certain powder to be administered to one Adarjan whom she suspected of intriguing with her husband. In my opinion there is no reason for disbelieving her. She told her story in, to my mind, a most convincing manner and she is corroborated by her aunt Nekjan to whom she showed the powder immediately afterwards.

There is very strong evidence that a *salish* was held two days later, before which Chandra Ban produced a portion of the powder which she had kept back, and not returned to the accused and the latter produced the remainder and admitted that she had given it to Chandra Ban.

Credible evidence has been given of the stages by which this powder reached the Chemical Examiner, whose report shews that it contained white arsenic.

There is no ground for supposing that the arsenic was introduced after the accused gave the powder to Chandra Ban.

It is proved, in my opinion, that accused has been for the last two years on bad terms with Adarjan whom she suspected of intrigue with her husband.

None of the witnesses appears to have any motive for giving false evidence against the accused.

In my opinion the accused should be convicted on the charge under sec. 302/115, I. P. C.

Babu Kali Prosunna Piplai (for *Babu Hem Chunder Mozumdar*) for the Accused.

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Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference under sec. 307, Cr. P. C. in the matter of Aushi Bibi who was charged before the Additional Sessions Judge of Dacca and a jury with offences under secs. 302/115 and 328/116, I. P. C. The case against Aushi Bibi was that she suspected an intrigue between her husband and Adarjan. She accordingly gave a powder, which was subsequently found to contain arsenic, to Chandra Ban —a girl of 13 years of age—the wife of Jarip. This girl was a relation of the accused. Aushi Bibi told Chandra Ban to give the powder to Adarjan by mixing it with lime in a *pan* or by mixing it with rice. The powder which was wrapped up in a red paper was taken by Chandra Ban; and, as her aunt, Nekjan, came to the *bari* shortly afterwards, she showed it to her aunt and told her what had happened. Nekjan told her not to give it to Adarjan but to throw it away. Nekjan tested some of it by putting it in water when it is said to have become dark. Chandra Ban also said that Nekjan further tested it by placing it on the rind of a *jambura* or lemon. This incident Nekjan does not mention. This was on Wednesday. On the Friday the matter got about in the village and a *salish* was summoned and Aushi Bibi and Chandra Ban were called before the assembly. Manu Mandal, the president, questioned them both; and, though Aushi Bibi at first denied having got the poison, she eventually went and produced it. Manu Mandal is dead; but the witnesses who speak to what took place in the *salish* prove that she at first denied the occurrence but, on being told that the *salish* would compromise the matter, she went and brought the powder of her own accord. It should be stated that Aush Bibi had asked Chandra Ban to give he back the powder and that Chandra Ban ha given her back a portion retaining a por tion herself. This other portion Chandr Ban also produced before the *salish*. Bot the portions were placed together and sen eventually to the chemical analyser wh reported that traces of white arsenic wer found in the powder. That is the cas against the accused; and, on the evidence the jury returned a unanimous verdict o not guilty. The learned Additional Ses sions Judge disagreeing with that has re ferred the case for our decision.

In the first place, we should mentio that the learned Judge has possibly mi directed the jury in the matter of the cor fession to the members of the *salish*. H says in his charge : "A confession mad under these circumstances is not ina missible, because (1) the members of th *salish* were not persons in authority, (the accused was not then charged with an offence."

As to the first reason, there are decisio of this Court holding that the president a *panchayet* in such circumstances is may be a person in authority within th purview of sec. 24 of the Indian Evidenc Act. We may refer to the two cases *Nazir Jharudar* v. *The Emperor* (1) an *The Emperor* v. *Jasha Bewa* (2). would depend on the question of fac whether the confession was caused by an inducement, threat or promise, havin reference to the charge against the accu ed person. It should, therefore, ha been left to the jury to say whether the was any such inducement, threat or pr mise in this case; but to tell them th the president of a *panchayet* was not person in authority within the meaning

(1) 9 C. W. N. 474 (1905).
(2) 11 C. W. N. 994 (1907).

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sec. 24 of the Evidence Act was clearly erroneous.

The second reason given by the learned Judge is also incorrect, because the *salish* was undoubtedly summoned to consider the case which was being made against Aushi Bibi of having given poison to Chandra Ban to be administered to Adarjan. She was, therefore, before the *salish* on that charge.

In this case there appears to have been a direct inducement from the president and members of the *salish* that if she confessed they would compromise the matter. It is, therefore, extremely doubtful whether this confession should have been allowed to be placed before the jury at all. It certainly ought not to have been placed before them without an explanation as to how they should value it having regard to the circumstances in which it was made.

Excluding that confession from consideration, there remains only the evidence of Chandra Ban corroborated,—so far as it is corroborated—by the evidence of Nekjan. We feel unable to say, in these circumstances, that the jury were wrong in rejecting this evidence against the accused Aushi Bibi. They had these facts before them and they were entitled to reject that evidence for any reason that they thought proper.

There is the further fact that the chemical analysis does not disclose how much arsenic was found in this powder. There is, therefore, no evidence on the record against the accused as to the amount of poison which was proposed to be administered to Adarjan.

It would be difficult, therefore, to say whether the case would come under sec. 302 or sec. 328, I. P. C., or whether there would be any offence proved against Aushi Bibi at all. We accordingly direct that the verdict of the jury be upheld and that Aushi Bibi be acquitted.

S. C. M. *Verdict upheld.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 41 OF 1916.

CHITTY, J.
WALMSLEY, J.
1916,
11, February.

BAIJNATH MARWARI and another, 2nd Party, Petitioners,
v.
W. S. STREET and others, 1st Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145—Joint title to land, effect of, on the applicability of the section.

The mere fact that there may be a joint title to the land would not prevent the application of sec. 145, Cr. P. C.

BASANTA KUMARI DASSI *v.* MOHESH CHANDER SAHA (1) *followed.*

This was a Rule granted on the 11th January 1916 against an order of Mr. A. P. Middleton, Sub-divisional Magistrate of Dhanbad, dated the 17th November 1915, declaring under sec. 145, Cr. P. C., the first party to be entitled to possession of the land in dispute.

The facts will appear from the judgment of the Sub-divisional Magistrate set out below.

"This is a dispute regarding possession of 100 bighas of underground rights in Lahupati Mauza.

The facts are very simple, yet both parties have fought the case very hard; at what must have been considerable expense to themselves. The Mauza was settled by the proprietors with Ram Bandhu Chatterjee and Mati Lal Murwari. The first party's contention is that it was partitioned into two equal shares. Subsequently the heirs of Ram Bandhu

(1) 17 C. W. N. 944 (1913).

transferred their right to his widow, from whom the 1st party derive their title. The company after getting their senses exercised various acts of possession (boring for samples of coal, digging inclines, raising coal and building some huts) up till last August, when admittedly the disputed property was left in neither party's possession owing to a notice under sec. 144, Cr. P. C., being issued from this Court on both parties. The second party denies the partition and while admitting the first party's possession say that this possession was only exercised after a protest by them and after a constable had in consequence been deputed to see that the peace was not disturbed. It is further argued for the second party that a coal mining lease is only a license which does not connote exclusive possession but always allows the grantor or his representative to mine coal himself. That actual possession of underground rights only extends to the coal actually cut and removed, while constructive possession remains with the person who has the right title. This seems to me to introduce subtleties with which sec. 145 was never intended to deal. A Magistrate acting under the section is primarily concerned with actual possession and only with title in so far as it affords presumption of possession. I regard it as directly opposed to common sense to say that there is no actual possession of underground rights except as regards the coal (*i.e.*, other mineral) actually removed. If a party, who digs inclines and gets coal, is not in actual possession, then language has lost all meaning—and in this case the first party's possession is not seriously disputed—the one member of the second party, who admits to any knowledge of the facts of possession states quite plainly that he went on to the ground to dispossess the first party.

It was finally suggested that neither party was in possession within two months of these proceedings being drawn up but that is due to the issue of a notice under sec. 144, Cr. P. C., on both parties and it has been held by the Calcutta High Court that such an order makes no real break in possession although the party who was immediately before in possession is thereby temporarily precluded from exercising his possession.

I consider it clearly proved, and indeed admitted that the 1st party was in actual possession at the time of the issue of notice under sec. 144. I therefore declare the first party to be entitled to possession of the land in dispute and forbid all disturbance of his possession until he is evicted in due course of law."

Sir S. P. Sinha and *Babus Monmotho Nath Mukerjee* and *Sishir Kumar Mitter* for the Petitioners.

Mr. J. W. Chippendale for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

In this case, after perusing the record and hearing the parties on either side, we think that the Rule should be discharged. It is true with reference to the partition at the close of 1905, which was alleged by the first party, and denied by the second, the Magistrate has not recorded any specific finding that that partition did, in fact, take place or that there was any division of the property by metes and bounds between the predecessors of the two parties now before us. He has, however, found in unmistakable terms that the first party were in possession and that the fact of their possession was not seriously disputed. He calls it throughout actual possession; and his judgment can only be read in the sense that he means it was both actual and ex-

clusive of the other side. The mere fact that there may be a joint title to the land would not prevent the application of sec. 145, Cr. P. C., as is shewn by the case of *Basanta Kumari Dassi* v. *Mohesh Chander Saha* (1). The Rule is accordingly discharged.

S. C. M. *Rule discharged.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 95 AND 122 OF 1916.

CHITTY, J.	**MAHABIR THAKUR and anr., Petitioners,**
WALMSLEY, J.	**v.**
1916,	**THE KING-EMPEROR on the complaint of Mahomed Alum, Opposite Party.**
Heard,	
18, February.	
Judgment,	
23, February.	

Indian Penal Code (XLV of 1860), secs. 197, 198—Issuing or signing a false certificate—'Certificate" meaning of—Civil Procedure Code (Act V of 1908), Or. 21, r. 2—Petition in Court stating satisfaction of decree if a certificate within the meaning of the sections.

The two Petitioners were convicted under secs. 197 and 198 and secs. 197/109 and 198/109 respectively, the charge being that one of the Petitioners purporting to represent the decree-holder in a certain suit signed and filed a petition in the Court of the Subordinate Judge stating, contrary to fact, that the other Petitioner who was the judgment-debtor had paid off the decretal amount to the decree-holder through him, her Ammuktear.

Held—*That the petition in question filed before the Subordinate Judge was not a certificate within the purview of secs. 197 and 198, I. P. C., neither of the requirements of a "certificate" within the meaning of the sections being satisfied in the case.*

That there is no provision of law which requires a decree-holder or his agent to give or sign a certificate of payment or adjustment, nor is there any provision of law which makes the statement of the decree-holder or his agent as to payment or satisfaction admissible in evidence as such certificate, that is without further proof.

That the word "certificate" may be used as synonymous with certification but that is clearly not its meaning in secs. 197 and 198, I. P. C.

These Rules were issued on the 24th and 31st January 1916 respectively against an order of Syed Izhar Hussain, Deputy Magistrate of Mozafferpur, dated the 30th November 1915, convicting Petitioners under secs. 197 and 198 and secs. 197/109 and 198/109, I. P. C., respectively and sentencing each to one year's rigorous imprisonment under each of the sections, the sentences to run concurrently, which order was on appeal affirmed by Mr. R. Sheepshanks, Sessions Judge of Mozafferpur, on the 17th January 1916.

The facts of the case will sufficiently appear from the judgment.

Mr. Jackson and *Babus Dasarathi Sanyal, Chandra Sekar Banerjee* and *Debendra Narain Bhattacherjee* for the Petitioner in No. 95.

Sir S. P. Sinha and *Babus Sajani Kanto Sinha* and *Gopendra Nath Das* for the Petitioner in No. 122.

Babus Aghore Nath Chatterjee and *Atul Krishna Roy* for the Opposite Party.

Mr. Sultan Ahmed for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

These two cases arise out of the same trial and may be conveniently disposed of together. The Petitioners Ram Kumar Patlaik and Mahabir Thakur were convicted under secs. 197 and 198 and secs. 197/109 and 198/109 respectively and sentenced each to one year's rigorous imprisonment under each section, the sentences to run concurrently. The finding,

(1) 17 C. W. N. 944 (1913).

THE

Calcutta Weekly Notes.

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The Advocate-General of Bengal..

The Hon'ble Mr. Kenrick, retired from his office on the 8th of March last. But so far as we are aware he did not make over charge to any successor in his office. The office remained vacant up to the end of last week. The consequences of this might be serious to the public and even to individuals in the Presidency of Bengal. Suits relating to public trusts, charitable or religious, which under sec. 92 of the Civil Procedure Code, have got to be instituted with the previous consent of the Advocate-General in writing, may conceiveably have got barred owing to that office having remained vacant for the last ten days. Suits for abatement of any public nuisance could not, if necessary, be instituted or any injunction or other urgent relief obtained in respect of such nuisances under sec. 91 of the said Code, for the same reason. Then again occasion might have arisen during the sitting of the last Calcutta Court of Sessions for the Advocate-General to enter a *nolle prosequi* under sec. 333 of the Criminal Procedure Code when there was no Advocate-General in the Presidency to exercise this prerogative of the Crown in respect of accused persons.

The Government of India and the Government of Bengal were both aware at least six months before that the Advocate-General would retire in March as six months' previous notice had been given to him terminating his term of office. It seems certainly remarkable that the Executive Government of the country should never during this long period have contemplated the contingency of serious legal consequences resulting to the public and private persons in the event of the office remaining vacant even for a single day. It is because of the provisions of the Civil and Criminal law to which we have referred that it has never been the practice to allow the Advocate-General to leave the country even during holidays and vacations. So we are all the more surprised at what appears to be an oversight, on the part of the Government, of very well-known provisions of the law. The new Government of India Act, 1915 (5 and 6 Geo. V, Ch. 61) sec. 114 confers the same powers on the Advocate-General in respect of initiation of proceedings on behalf of His Majesty as are possessed by His Majesty's Attorney-General in England. The vacancy in the office might prove for this reason as well a source of embarrassment to the Government as to private individuals.

We surmise that the delay in the appointment is due very likely to the Government of India not having as yet arrived at any definite decision as to whether the Advocate-General of Bengal is to continue to be the legal adviser to the Government of India as he has been for more than a century or he is to be the legal adviser to the Presidency Government alone as in Madras and Bombay. We think six months' time was long enough for the Local and the Supreme Governments to have come to a definite decision in the matter. But the office of the Advocate-General not being in the gift of the Government of India, the previous sanction of the Secretary of State has to be obtained in making any change in the status or emoluments of the office and that we apprehend may

be the reason of the delay. But on many previous occasions officiating appointments had been made and although we are of opinion that there was sufficient time for making the permanent appointment on the vacation of the office by the last incumbent, yet, at any rate, nothing stood in the way of the authorities making an officiating appointment, so as to prevent a vacancy occurring in such an important office for even a single day.

Society of Comparative Legislation.

The last January issue of the *Journal of the Society of Comparative Legislation* contains as usual a large amount of instructive and useful information about laws and legislation not only of the different parts of the British Empire, but also of the United States and the continent of Europe. The present issue may be said to mark the coming of age of the Society as it is now twenty-one years since the Society was ushered into existence. There is no question that "to-day, when the bonds of our vast Empire are being drawn closer, the appeal for such a record of legislation is even stronger." "In the mechanism of modern States the capital fact, according to Sir Henry Maine, is the energy of the legislatures. In the British Empire alone there are no fewer than sixty legislatures. In the United States there is almost an equal number. Each of these is working out its own problems in its own way—problems differentiated by local conditions, but often identical on principle." We are glad to learn that the Society has now secured the support not only of the Dominions and the Crown Colonies but also of the Foreign Office, the Colonial Office and the Board of Trade and we expect of the India Office as well. No doubt the ideals of the Society yet remain to be realized but we feel that the Society has made a fair progress in the right direction. The laws and legislation may vary according to local conditions but they should all be based on one immutable principle of equity, justice and fair-play which alone form the strongest bond of union between the different parts of the vast British Empire.

CAN MUNICIPALITIES OR OTHER PUBLIC CORPORATIONS MAKE RACE-DISTINCTION IN THEIR BYE-LAWS.

The Journal of the Society of Comparative Legislation publishes in the said issue amongst the noted decisions of the Empire a summary of a decision of the Transvaal Division of the Supreme Court of South Africa which declared that a bye-law framed under powers given to a Municipal Council for the "working" of tramways for "public use" did not justify any regulation which made any distinction in the use of the car by Europeans, Natives and Asiatics. The decision and the notes thereon have reviewed the question with a breadth of view which we are sure will lead to a better understanding between the different races of the Empire than the empty platitudes of politicians and statesmen. We publish the note *in extenso* and the very pointed judicial pronouncement at its conclusion which answers the question without reserve.

"An interesting qaesion regarding the powers of municipalities to introduce into their by-laws discriminations between white and coloured persons was decided by the Transvaal Division of the Supreme Court in *Williams and Adendorff* v. *Johannesburg Municipality*, [1915] T. P. D. 106.

In the Transvaal Ordinance No. 2 (private) of 1906, "to consolidate and amend certain laws relating to the Municipality of Johannesburg," it was provided in sec. 31 that "the sole and exclusive right was thereby given to the Council to establish, maintain, and work electric or mechanically worked tramways for public use within the municipality," while sec. 41, sub-sec. 65, gave them power to make by-laws or regulations for licensing and regulating locomotives, tramcars, omnibuses, and all private vehicles. This statute, except certain sections (including sec. 31, but not sec. 41, sub-sec. 65), was repealed by the Local Government Ordinance, No. 9 of 1912, sec. 176 of which enables by-laws to be made for regulating the use of tramways and (*inter alia*) for "appointing separate tramcars for the use of white persons and of natives or Asiatics or other coloured persons respectively and restricting the use of such cars to such persons and prohibiting the use of any tramcars by persons who are not respectably dressed or well conducted." Sec. 184 provides that "by-laws and regulations made in respect of the area of jurisdiction of any local authority under any law repealed by this Ordinance shall from the commencement of the Ordinance be of the same force, and effect, within such area, as if they had been made under this Ordinance."

The by-laws made by the Council in virtue of their powers under the Ordinance of 1906 give the conductors of tramcars a general power to exclude dirty and offensive persons. By-law 33 provides that "the Council may at its discretion set apart and license any carriage or portion of a carriage for the use of passengers of European race only, and may further set apart and license any carriage or portion of a carriage for the use either of passengers of Asiatic race or of coloured passengers only, or for the exclusive use of both coloured persons and persons of Asiatic race," and makes it an offence to enter or travel upon or attempt to enter or travel upon "any carriage or portion of a carriage set apart and licensed by the Council for a class of passengers to which he does not belong, except persons holding special permits and domestic and personal servants travelling with their master, provided always that nothing in the by-law shall be deemed to release the Council of any obligation that may attach to it to provide reasonable accommodation for every class of passenger."

The rules for conductors framed under the authority of the Council forbid conductors to allow coloured persons (except domestic servants subject to certain conditions) to travel on ordinary service cars.

On Sunday, February 8, 1914, the Appellants, who are Cape coloured men, boarded a tramcar of the Johannesburg municipality which was an ordinary service car. They tendered the legal fare to the conductor, who refused to accept the same and ordered them to leave the car. They refused; but were almost immediately thereafter ordered to leave by an inspector, who informed them that, being coloured persons, they had no right to travel on the tramcar with white persons. They were then put off the tramcar.

The two coloured men then applied to the Witwatersrand local Court for an interdict restraining the Johannesburg municipality or its servants from refusing to allow the abovenamed applicants to travel on any of its tramcars from place to place within the municipality of Johannesburg. The application was refused on the ground that sec. 176 of the Local Government Ordinance was not *ultra vires* the Council and that it specially conferred the power upon the municipality to make the by-laws they have, and that the by-laws empowered the municipality to do what it claimed the right to do.

On appeal to the Transvaal Provincial Court (de Villiers J. P., Bristowe and Curlewis, JJ.) this decision was reversed. In the first place, it was held that the validity of the by-laws which were made in February 1906 had to be tested according to the provisions of the Johannesburg Municipal Ordinance, 1906, under which they were made and published; *Germiston Municipality* v. *Rand Cold Storage Co., Ltd.*, 1913, T. P. D. 530. In the second place, it was held that though secs. 31 and 41 of the 1906 Ordinance gave the Municipality power to make by-laws and regulations for regulating the working of tramways and tramcars, and impliedly power to make regulations as to the manner in which tramways and tramcars may be used by members of the public, such did not include authority to the Council to differentiate between classes of the community or to discriminate between the European (white) section and the coloured and native sections of the community as to the tramcars or carriages or portions thereof which may be used by one or other section, as long as such use is made of them as is proper and in accordance with the purposes of the service. The tramways authorised are to be "for public use." A tramway service for white persons only would hardly be one "for public use."

Sec. 176 of Ordinance 9 of 1912 does not contemplate exclusion of coloured persons, but segregation. Such provisions could hardly be considered to come within the scope of sec. 85 of the South Africa Act. That section gives the Provincial Councils power to legislate "in relation to matters coming within the following classes of subjects—that is to say *(inter alia)* municipal institutions." Under that power they can create bodies for the management of municipal affairs, and can endow them with all powers necessary to the discharge of the functions of *local administration*, but it does not enable them to vest in the local authority extraneous or fancy powers which form no part of a municipality *qua* municipality. "The test seems to be" (as Bristowe, J., puts it, quoting *Attorney-General for Ontario* v. *Attorney-General for the Dominion*), [1896] A. C. 348, "not so much what powers are in fact given to municipalities, as what powers are requisite for the purposes of Local Government."

The decision reminds one of the legislation in the United States of America, where in most States it has been distinctly laid down that no citizen of the State shall, by reason of race,

colour, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of the accommodation of inns, hotels, restaurants, common carriers, or conveyances. So the constitution provides specifically that the right of all citizens to travel upon all public conveyances shall not be infringed. Stimson, *American Statute Law* (1886), sec. 6,054, and the *Law of the Federal and State Constitutions of the U. S.* (1908) on pp. 131-2.

Why should it be otherwise? As Bristowe, J. remarks: 'Nor does there seem any special reason why persons who dwelt on the eastern slopes of the Ural Mountains should be denied a privilege which would be accorded to the inhabitants of the western slopes.'"

W. R. B.

IN WHAT LANDS OCCUPANCY RIGHT MAY BE ACQUIRED?

In this article I propose to consider the question—with respect to what classes of lands the right of occupancy may be acquired.

In what lands right may be acquired.—Lands must be held for agricultural or horticultural purposes, otherwise no right of occupany can be acquired. As pointed out by Phear J. in a case arising under Act X of 1859:—"The occupation intended to be protected under this section (sec. 6 of that Act) is occupation of land considered as the subject of agricultural or horticultural cultivation and used for the purposes incidental thereto, such as the site of the homestead, the raiyat's or *mali's* dwelling house and so on. I do not think that it includes occupation the main object of which is the dwelling house itself, and where the cultivation of the soil, if any there be, is entirely subordinate to that," *Kalee* v. *Janki*, 8 W. R. 250. And it has been held in all the later cases that there can be no right of occupancy in land used mainly for any but agricultural or horticultural purposes. Sirada Charan Mitra's *Land Laws of Bengal*, 315-316.

Agricultural.—The term "agriculture" is of wider import than the term "cultivation." It is pointed out in the Oxford Dictionary that "agricultural means the science or art of cultivating the soil including the allied pursuits of gathering in the crops and rearing live stock, tillage, husbandry, farming (in the widest sense); "Cultivation" on the other hand, is defined as meaning the tilling of land, tillage, husbandry. It is obvious, therefore, that "agriculture" has a much wider import than "cultivation." Consequently, a purpose may be connected with agriculture but not necessarily ancillary to cultivation.

Horticultural.—Horticulture means the cultivation of a garden or the science of cultivating or managing garden, including growing flowers, fruits and vegetables. *Hedayet* v. *Kamalanand*, 17 C. L. J. 411. Where land has been let out for horticultural purposes, and the lessee held the land for the statutory period as an orchard, he acquired an occupancy right therein under the old law, *Ibid*, also *Chowdhry* v. *Gour*, 2 W. R. (Act X) 40, *Kalee* vs *Janki*, 8 W. R. 250, *Harry* v. *Nursing*, 21 Cal. 129; *Umrao* v. *Mahomed*, 4 C. W. N. 76; 27 Cal. 405; and the present Act does not seem to have made any variation in this rule, especially as there is nothing in its definition of raiyat which excludes a person who has taken land for horticultural purposes. Where a tenant of land has the right to bring it under cultivation he shall be deemed to have acquired the right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it. Act VIII of 1885, 35, (2) Explanation. But if the lease was for the purpose of gathering fruits from the trees or the land, it can not be affirmed that the lease was for horticultural purposes, *Hedayet* v. *Kamalanand*, 17 C. L. J. 411.

Basti or Homestead.—No right of occupancy can be acquired in land used for building purposes, *Bakhal* v. *Dinomayi*, 16 Cal. 652. But if a piece of land was used by the cultivator for his own habitation and it is part of his entire agricultural holding, he could acquire a right of occupancy in it with the rest of the land in the holding, *Pagose* v. *Rajoo*, 22 W. R. 591: *Mohesh* v. *Bishonath*, 24 W. R. 102. But if the homestead land did not form part of an agricultural holding, he had no right of occupancy as the rent law did not apply. A tenant, who is not a raiyat in respect of a piece of *bastu* or homestead land but is so in respect of the agricultural land which he holds in the village, and the homestead land is held "otherwise than as part of the tenant's holding as a raiyat," he must be regarded, in the absence of any allegation of local custom or usage, as holding the homestead land in accordance with the provisions of the Bengal Tenancy Act applicable to land held by a raiyat; such a tenant has, under sec. 21 of the Act, a right of occu-

pancy in the piece of homestead or *bastu* land as well as in the agricultural land in the village of which he is a settled raiyat, *Golam* v. *Abdool*, 13 C. L. J. 225: *Harihar* v. *Dinu*, 11 C. L. J. 176. The provisions of the Bengal Tenancy Act are applicable also to the homestead of a person who is a raiyat, although he is not a raiyat of the village in which the homestead land is situated, and is not a raiyat of the same landlord as the landlord of the homestead land, or in other words, although he does not hold his homestead under the same landlord under whom he holds his holding and although his holding may be in a different village from that in which his homestead is situate. *Harihar* v. *Dinu*, 11 C. L. J. 170, fg. *Kripa* v. *Seikh*, 1 C. L. J. 322: 10 C. W. N. 911; *Protap* v. *Bissessar*, 9 C. W. N. 116: *Golam* v. *Abdul*, 13 C. L. J., 225. But see *Kuldip* v. *Chhatur*, 3 C. L. J. 285. Thus provided a tenant is a raiyat, he may acquire a right of occupancy in his homestead land whether it be held as part of his agricultural holding or not, unless there be a local custom or usage to the contrary, *Rakhal* v *Dina*, 16 Cal. 652, and this is so whether he is a raiyat of the same village in which the homestead is situate or not, and whether he is a raiyat of the same landlord of the homestead land or not. *Dina* v. *Sashi*, 20 C. W. N. 550: 22 C. L. J. 219. But where the holding of a raiyat consists partly of agricultural and partly of homestead land and he let out the homestead portion of his holding, although that portion is not agricultural, the incidents of the sub-lease would be governed by the provisions of the Bengal Tenancy Act having regard to the nature of the original tenancy of the raiyat and not by the Transfer of Property Act. The sub-lessee is, therefore, an under-raiyat under the Bengal Tenancy Act, and, if he holds land as a settled raiyat not under the same landlord but under a different landlord and in a different village contiguous to his homestead, he acquires a right of occupancy in the homestead under the provisions of secs. 20 and 182, Bengal Tenancy Act, though he has only the interest of an under-raiyat with respect to it. For the provisions of the Act applicable to land held by a raiyat shall regulate the incidents of the tenancy of the homestead. *Krishna* v. *Jadu*, 21 C. L. J. 275: s. c. 19 C. W. N. 914. This seems to be anomalous. *Homestead* here denotes land which is actually used by the raiyat for residential purposes and it is not sufficient that its character is such as would justify its use as homestead, *Dina* v. *Sashi*, 22 C. L. J. 219: s. c. 20 C. W. N 550.

Arhat, Shop, Ghat, Bazar.—Similarly, no right of occupancy can be acquired in land used for *Arhats*, *Ghats*, *Bazars*, Indigo factories or manufactories, Sarada Charan Mitra's *Land Laws of Bengal*, 316. At the same time the original purpose of the tenancy should be kept in view. And although a raiyat, who had taken a lease of land for cultivating purposes, might afterwards convert it into a site for a shop and receive the profits from the shopkeepers, he might yet acquire a right of occupancy therein under the old law, *Khajurunnissa* v. *Ahmed*, 11 W. R. 88; *Mohar* v. *Ram*, 21 W. R. 400, as he can do under the present.

Jalkar, Tanks and Fishery.—Occupancy right cannot be acquired in *jalkars* or fishery or tanks, when they are not *appurtenant* to land acquired or held for cultivation, *Wooma* v. *Gopal*, 2 W. R. (Act X) 19; *Siboo* v. *Gopal*, 19 W. R. 200; *Nidhi* v. *Ram*, 20 C. W. R. 341; *Unni* v. *Mani*, 8 C. W. N. 192; *Mahananda* v. *Mangala*, 34 Cal. 937: s. c. 8 C. W. N. 804. But where land was let for cultivation and there was a tank on it, the water of the tank being used for domestic purposes or for irrigation or steeping of jute or similar other crops, the tank would go with the land as part of the agricultural holding and if there was a right of occupancy in the land there would be a right of occupancy in the tank as appurtenant to the land, but where the tank was the principal subject of the lease, and only so much of the land passed with the tank as was necessary for it, namely for the banks, there could not be any right of occupancy in it [*Ibid*, and *Sham* v. *Court*, 23 W. R. 432; *Juggobandhu* v. *Promotho*, I. L. R. 4 Cal. 767; *Bollye* v. *Akram*, I. L. R. 4 Cal. 961] as a tank used only for the rearing and preservation of fish, when it is not a part of the agricultural holding, Act VIII of 1885, sec. 193. The test to be applied is whether the grant is subsidiary to agricultural pursuits, or it is merely for the purpose of rearing and catching fish, *Hedayet* v. *Kamalanand*, 16 C. L. J. 411: s. c. 14 C. W. N. 372.

Pasture Land.—The right may be acquired in pasture land, *Fitz Patrick* v. *Wallace*, 11 W. R. 231. But it is necessary to prove that the grazing was in relation to cultivation, which is the primary purpose for which a raiyat acquires the right to hold land. If, as a matter of fact,

the grazing was in relation to agriculture and if, immediately or shortly after the lease had been granted, the tenant grazed cattle on the land as subsidiary to agricultural pursuits, the inference would legitimately follow that the lease was for agricultural purposes and was granted for the purpose subordinate to that of cultivation. If that is established, the tenant may very well claim to have acquired the status of an occupancy raiyat, *Hedayet* v. *Kamalanand*, 16 C. L. J. 411 : s. c. 14 C. W. N. 372. But a tenant cannot acquire a right of occupancy merely by the use of the pasture land of his landlord if he does not pay rent for the same, though he may acquire a right in the nature of an easement, Sarada Charan Mitra's *Land Laws of Bengal*, p. 318.

Land taken to gather and Store Crops.—The gathering and storage of crops raised by a raiyat is clearly a purpose auxiliary to cultivation and when land has been let out for a purpose like this the provisions of the Bengal Tenancy Act apply and the lessee becomes a raiyat in respect thereof. In such a case right of occupancy can be acquired in such land, *Dina* v. *Sashi*, 22 C. L. J. 219.

Utbandi Land.—In case of *utbandi tenure*, by which the raiyat holds a certain area of land, but for which he pays rent according to the quantity of the land which year by year he cultivates, the rent varying according to the cultivated area, under the Acts of 1859 and 1869 if the raiyat paid rent for the period he could cultivate, and did not pay when he could not cultivate, or paid only for as much land as he could cultivate in any year, the holding and cultivation for more than twelve years, though discontinuous, gave him a right of occupancy, *Dwarka* v. *Naboo*, 14 W. R. 193 : See also *Premananda* v. *Surendra*, 20 W. R. 329. The Bengal Tenancy Act has made material alteration of the law upon this point. In this respect *utbandi* land is dealt with in the Act differently from ordinary raiyati land in which by sec. 21 a settled raiyat has a right of occupancy, no matter how short a time he has held it. Sec. 180 of the Bengal Tenancy Act prohibits the acquisition of an occupancy right in land ordinarily let under the custom of *utbandi* until that particular land has been held for twelve years continuously, *Beni* v. *Bhuban*, I. L. R. 17 Cal. 392. A right of occupancy therefore cannot be gained in a piece of land held on the *utbandi* system, if the possession of the land has not been continuous, though it may have commenced more than twelve years previously. Sec. 19 of the Act, however, makes an exception in favour of the right acquired before the commencement of the Act, by operation of any enactment, custom or otherwise.

Char or Diara Land.—In the case of *char* (which means an alluvial land formed in a river or which accreted to its bank) and *diara* (which means an island formed in the bed of a river), [*Wilson's Glossary*] lands which are always under risk of being diluviated, and sometimes unculturable, the law has provided that the mere fact of occupation of such lands as a raiyat by a settled raiyat is not sufficient to create any right of occupancy in them. They must also be held "for twelve continuous years" before the right can accrue. *Char* or *diara* land may, however, in due course of time be so permanent in character that the Collector of the District may declare that they have ceased to be *char* or *diara* lands and then a raiyat may acquire the right of occupancy in them in the same way as in any other land. Act VIII of 1885, sec. 180. But he has the same right in any land which had accreted to his *jote* as he has in his original holding; and when a raiyat has occupancy right in a *jote*, he is entitled to hold such accreted lands as an increment to that *jote*, *Gourhari* v. *Bhola*, I. L. R. 21 Cal. 233; *Gobindmani* v. *Dinobandhu*, 15 W. R. 87; *Attimoollah* v. *Shahiboolla*, 15 W. R. 149; *Bhagabat* v. *Doorgbijoy*, 16 W. R. 95; 8 B. L. R. 73; *Finlay* v. *Gopee*, 24 W. R. 404 not followed.

Radharomon Mookerjee, M.A., B.L.,

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—Before Lords Atkinson, Shaw, Parker and Sumner. *Herbert Morris (Ltd.) v. Saxelby*. 8th February 1916.

Covenant in restraint of trade—Principles to ascertain how far it is reasonable and prejudicial to the interest of the public discussed.

This appeal raised the question of the validity of a covenant in restraint of trade exacted by a master from a servant.

The Respondent, who was employed by the Appellant, executed an agreement in favour of his employer, which provided among other things as follows :—

That he (*i.e.*, the Respondent) would not at any time during a period of seven years from the date of his ceasing to be employed by the company, whether under this agreement or

otherwise howsoever, either in the United Kingdom of Great Britain or (*sic*) Ireland, carry on, either as principal, agent, servant, or otherwise, alone or jointly, or in connexion with any other person, firm, or company, or be concerned or assist, directly or indirectly, whether for reward or otherwise, in the sale or manufacture of pulley-blocks, hand overhead runways, electric overhead runways, hand overhead travelling cranes, or any part thereof, or be concerned or assist as aforesaid in any business connected with such sale or manufacture.

The Respondent left the Appellants and entered the service of a firm who were the principal competitors of the Appellants. The Appellants thereupon sued for an injunction against the Respondent.

Sargant, J., held that although the restriction imposed by the covenant was not unreasonable from the Appellant's point of view, as it was reasonably necessary for the protection of their business, the covenant ought not to be enforced against the Respondent, because that would deprive the Respondent and the public of the benefit of the skill and experience of the Respondent's mental equipment.

That view was affirmed on appeal and the Appellant's claim was dismissed. The House dismissed the appeal. Lord Atkinson in the course of his judgment observed as follows :—

It had been generally assumed that the law on the validity of contracts in restraint of trade had been authoritatively determined by the decision of this House in the *Nordenfelt* case [(1894) A. C., 535] and that it was laid down in the clearest and most happily selected language in the oft-quoted passage (at p. 565) of the judgment of Lord Macnaghten, so that it was, he thought, no longer necessary to refer to the earlier authorities.

It would be observed that Lord Macnaghten used the plural "parties concerned" in the earlier portion of the passage, meaning, apparently, to include both the covenantor and covenantee, while in the latter portion of the passage he merely spoke of "protection" to the covenantee, which did not injure the public. But in the opening lines of the passage he had already said that the individual (here the covenantor), as well as the public, had an interest in freedom of trading.

In the case of the *Leather Cloth Company* v. *Lorsont* (L. R., 9 E., 345), a case, no doubt, of the sale of the goodwill of a business, he found that Vice-Chancellor James also used the phrase "not unreasonable for the protection of the parties," meaning both covenantor and covenantee. That judgment differentiated the case of the sale of goodwill from the case of master and servant or employer and employee. The vendor in the former case, in the absence of some restrictive covenant, would be entitled to set up in the same line of business as he sold in competition with the purchaser, though he could not solicit his own old customers. The possibility of such competition would necessarily depreciate the value of the goodwill. The covenant excluding it necessarily enhanced that value, and presumably the price demanded and paid, and therefore all those restrictions on trading were permissible which were necessary at once to secure that the vendor should get the highest price for what he had to sell and that the purchaser should get all he had paid for. Restrictions on freedom of trading were in both classes of case imposed, no doubt, with the common object of protecting property. But there the resemblance between them ended.

In all cases such as the present one had to ask what were the interests of the employer that were to be protected, and against what was he entitled to have them protected. He was undoubtedly entitled to have his interest in his trade secrets protected, such as secret processes of manufacture which might be of vast value. That protection might be secured by restraining the employee from divulging these secrets or putting them to his own use. He was also entitled not to have his old customers by solicitation or such other means enticed away from him. But freedom from all competition *per se* apart from both those things, however lucrative it might be to him, he was not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee.

It was perfectly clear on the evidence that the danger against which the Appellants desired to be protected was neither the enticing away of customers nor the divulgence or use and employment of any trade secret. It was, that the Respondent would carry away and might put to use in the establishment of their trade rivals, the superior skill and knowledge which he had by his talent acquired in their works, raise the character of the output of their rivals, improve their methods, and thereby make them more formidable competitors in trade of the Appellants. That, he thought, was plain, and every word of the able and con-

vincing judgment of Lord Justice Farwell in *Leng* v. *Andrews* [(1909) 1 Ch., 763-773] applied to it.

On the whole, he was of opinion that the agreement, binding for seven years, and applying to the whole of the three kingdoms, was not reasonable in reference to the respective interests of the parties concerned, and was prejudicial to the interests of the public. He accordingly thought that the order appealed from was right and should be affirmed, and the appeal should be dismissed with costs.

Lord Shaw thought that the case was covered by the authority of *Mason* v. *Provident Clothing Company* [(1913) A. C., 724]. He said that the claim against Mr. Saxelby's setting up or assisting in any business which did the special engineering work in which he was trained was rested on the likelihood that his own abilities, skill, and knowledge would be of advantage to himself or others as competitors in manufacture and trade. So rested, it was an audacious claim, whether regarded from the point of view of the parties or of the public. From the point of view of the Appellants it was a claim against competition *per se*, a claim to cripple all rivals in trade by the denial to them of a supply of all skilled labour which had had the advantage of being performed under the Appellants, and accordingly *pro tanto* to compel them to seek for labour in a foreign market. From the point of view of the Respondent it was, justly interpreted, a claim to put him in such a bondage in regard to his own labour that, if he sought to find employment or advancement elsewhere, he must, for seven years of his life, become an exile.

From the point of view of the public one would have thought that it was at least not inconsistent with the public interest to "let knowledge grow from more to more." And under modern conditions, both of society and of trade, it would appear to be in accord with the public interest to open and not to shut the markets of these islands to the skilled labour and the commercial and industrial abilities of its inhabitants, to further and not to obstruct for these *les carrieres ouvertes*.

Sir Robert Finlay, *K. C.*, *Messrs. Walter*, *K. C.* and *Kerly*, *K. C.*, for the Appellants.

Messrs. Romer, *K. C.* and *Sheldon* for the Respondent.

B. D.

KING'S BENCH DIVISION.—Before Mr. Justice Scrutton. *Wynstanley* v. *Macartney*, *McElroy*, *& Co.*, *Ltd.*, January 12th 1916.

Proper use of evidence of experts in handwriting.

This was an action for damages for alleged wrongful dismissal. One of the questions in the case was whether a certain signature was genuine. An expert in handwriting deposed that the signature was not genuine.

Mr. Justice Scrutton made the following observations as to the use of experts in handwriting :—

"As to the signature itself, two bank clerks at whose bank the company had an account, familiar with the Defendant's signature, would have passed it as genuine. One from another bank which had such an account would have queried it and referred it to his superior officer. One expert who had compared the two signatures then disputed as seen in photographs with two genuine signatures also in photographs came to the conclusion that the two former were forgeries and the two latter were genuine.

He was not impressed with this expert's evidence. The use of experts in handwriting was in complicated documents to call the attention of the tribunal to small peculiarities which it might otherwise overlook. In case of one signature compared with others, except in the case of bank clerks who frequently saw the writer's signatures in business, there was little if anything that the expert could do which the tribunal could not do for itself. On the signatures alone which he had carefully compared he would certainly not be able to find the signature to be a forgery and he would on the whole, though with some hesitation, pronounce it to be genuine."

Messrs. Inskip, *K. C.*, and *C. Wertheimer* for the Plaintiff.

Messrs. Gibbons, *K. C.*, and *J. Ashton Cross* for the Defendants.

B. D.

which for the present purpose we may assume to be correct, was that Ram Kumar purporting to represent the decree-holder in a certain suit signed and filed a petition in the Court of the Subordinate Judge stating, contrary to the fact, that Mahabir Thakur, the judgment-debtor, had paid off the decretal amount to the decree-holder through him, her Ammuktear. Mahabir Thakur was found to have abetted Ram Kumar in so doing.

The question on these Rules is whether the signed petition of Ram Kumar was a "certificate" within the purview of secs. 197 and 198. Both the Courts below have held that it was, but we find ourselves unable to agree with them. The mistake appears to have arisen from a careless reading of Or. XXI, r. 2, of the Civil Procedure Code and a misappreciation of the meaning of the word "certify" there used. The learned Sessions Judge says "certificates of satisfaction are required to be given by Or. XXI, r. 2, C. P. C., and it is certain that they are admissible in evidence." A perusal of the Rule shows that the word "certificate" finds no place there. The word "certify" means primarily to assure, to vouch, to make certain. Every act of certifying does not necessarily result in a "certificate," meaning thereby a signed document vouching a particular fact. The word "certificate" may, no doubt, be used as synonymous with "certification" (see *Saadoollah Shaikh* v. *Kalee Churn* (1) but that is clearly not its meaning in secs. 197 and 198, I. P. C. The decree-holder is not bound to certify in writing a payment or adjustment of his decree. It may be done orally, either by himself or any person who can properly represent him. We know of no provision of law which requires him so to certify by "issuing or signing a certificate."

(1) 12 W. R 358 (1869).

Turning then to secs. 197 and 198 what do we find? The certificate in respect of which a man may be punished if it is false to his knowledge or belief, must be either—(1) one that is required by law to be given or signed or (2) that relates to any fact of which such certificate is by law admissible in evidence. One or other of these requirements must be fulfilled before a man can be dealt with under these sections. Neither requirement has been fulfilled in this case. There is, as above stated, no provision of law which requires a decree-holder or his agent to give or sign a certificate of payment or adjustment. Nor is there any provision of law which makes the statement of the decree-holder or his agent as to payment or satisfaction admissible in evidence as such a certificate, —that is without further proof. The statement may, no doubt, be proved against him but that is not what the section says. Various instances are given in the text books of the class of certificates contemplated by these sections. We need not enumerate them here. They are no doubt for the most part official, or quasi-official certificates, certificates to be given by officials or others, as prescribed in various statutes. There is however no particular limitation to the character of the certificate meant, except that which we find in sec. 197 itself. It must fulfil one of the requirements there set out. If it does not, a man cannot be punished under these sections in respect of it.

In this view of the matter, the convictions on the Petitioners cannot stand. We need not at present express any opinion on the further question whether the act of Ram Kumar brings him within the mischief of some other section or sections of the Indian Penal Code; whether he has possibly committed some other offence.

Nor need we consider whether or not Mahabir Thakur has abetted him in so doing. The Rules are made absolute, the convictions and sentences on the Petitioners are set aside. Their bail bonds will be discharged.

S. C. M. *Rule made absolute.*

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

VISCOUNT HALDANE.	SRIMATI NRITYA-
LORD PARMOOR.	MONI DASSI and
LORD WRENBURY.	ors., Appellants,
MR. AMEER ALI.	*v.*
1915,	LAKHAN CHUN-
Heard, 24, 25, 26 and	DER SEN (since
29, November.	deceased) and
1916,	others, Respon-
Judgment, 31, January.	dents.

Limitation Act (IX of 1908), sec. 14—Suit for recovery of possession by part owner—Other co-owners made Defendants, setting up their own title—Decree made in their favour by first Court, set aside on appeal—Fresh suit—Suspension of limitation pending prosecution of claim in previous suit—Power of Appeal Court to transfer Defendants to category of Plaintiffs—Benami transaction, test.

Where the sons (B and M) and grandsons by a predeceased son (C) of a deceased Hindu (G), being members of a joint Dayabhaga Hindu family, with a view to deceive the creditors of B and M, in 1891, executed a document whereby they purported to acknowledge that G's widow S was the real owner of properties which in fact they had inherited as G's heirs; and S having begun to deal with the properties adversely to the real owners from January 1892, C's branch of the family in 1896 sued for a declaration of their own title and the title of M's representatives (whom they joined as Defendants) to shares in the properties, and the latter associated themselves with the Plaintiffs and asked for an adjudication of their right to a one-third share and a distinct issue in respect of their claim was without objection raised and decided and the Court made a decree on 20th April 1903 in favour of both the Plaintiffs and M's representatives; but on appeal the decree so far as it was in favour of the latter was set aside on 22nd February 1904 on the ground that not being Plaintiffs they could not be given any relief in that suit, and M's representatives thereupon on 14th November 1904 instituted a fresh suit for recovery of their share.

Held—*That though limitation began to run against them from 1892, it remained in suspense, whilst they were* bonâ fide *litigating their rights in the previous suit, and this suit was therefore not time-barred.*

LAKHAN CHUNDER SEN *v.* MODHU SUDAN SEN (1) *affirmed.*

That in the previous suit the Appeal Court should, in exercise of power possessed under the Civil Procedure Code, have transferred M's representatives from the category of Defendants to that of Plaintiffs and maintained the decree passed in their favour by the Original Court.

In cases where it is asserted that an assignment in the name of one person is really for the benefit of another, the real test is the source whence the consideration came.

These are two consolidated appeals, numbered respectively 70 of 1911 and 5 of 1912, from two judgments and decrees of the High Court at Calcutta. In 70 of 1911, that Court, on its Appellate Side, reversed a decree of a Single Judge of the Court, made in a suit brought by the Respondents, as Plaintiffs, against the Appellants and others, as Defendants, for a declaration of their title to, and for partition of, certain property; for an account

(1) 12 C. W. N. 326: s. c I. L. R. 35 Cal. 209 (1907).

SRIMATI NRITYAMONI DASSI *v.* LAKHAN CHUNDER SEN.

of mesne profits, and for other consequential relief. The Single Judge dismissed the suit with costs. The Appellate Court decreed the claim of the Plaintiffs with costs.

The appeal, 70 of 1911 was filed in the ordinary course, and the main questions for determination in it were : (1) A question of limitation and (2) a question as to the right of the Plaintiffs to have the immovable property, mentioned and described in the plaint and proceedings as "the scheduled premises," partitioned, on the grounds set forth in the plaint. The names of the principal parties to the suit appear in the pedigree given in their Lordships' judgments.

The circumstances out of which the appeal arose were as follows :—

Guru Charan Sen, whose name appears at the head of the pedigree, died in 1872, leaving a widow, and three sons named Baney Madhub Sen, Money Madhub Sen and Chuni Lall Sen. The Respondents are the descendants of Money Madhub Sen and the Appellants are the widow and two of the sons of Baney Madhub Sen. Chuni Lall Sen, the third son, died in November 1881. In 1896 some of his sons brought a suit to have their rights and interests ascertained and declared in the said scheduled premises, consisting of some eight houses in Calcutta, for possession of their shares in the property, and for other relief. The suit was virtually one of ejectment, as the properties had been for some years in the possession of the principal Defendants in the suit. In that suit, numbered 882 of 1896, the present Respondents were made Defendants with others. They, however, supported the claim of the Plaintiffs, and also asked for a declaration that they, too, were entitled to a share in the property in dispute. The suit was tried by Mr. Justice Henderson, sitting as a Single Judge of the High Court, and, on the 20th of April, 1903, he delivered his judgment and decree. He found that the eight scheduled properties in suit never passed from the possession and ownership of the said Guru Charan Sen, during his lifetime; also, that a deed of declaration of the 30th June 1891, and a deed of trust of the 18th of January 1892, upon which the Defendants relied, were not real transactions and were inoperative to pass any property. He therefore substantially decreed the claim of the Plaintiffs, and further declared that the present Respondents, who were some of the Defendants in the suit, were also entitled to a one-third share of the property.

An appeal, numbered 29 of 1903, was then filed by the Defendants who really contested the suit, and that portion of the decree of the Single Judge, which gave the relief asked for by the present Respondents, was set aside on the 22nd of February 1904, on the ground, *inter alia*, that, as the suit was one for ejectment and not a partition suit, relief could not be given, as between two co-Defendants.

The Respondents thereafter instituted the present suit and in their plaint, dated the 14th of November 1904, set out at great length the facts upon which they based their claim to a share in the property in dispute, the facts upon which they based their claim to a share in the property in dispute, consisting of eight houses in Calcutta described as "the scheduled premises." As the sons and grandsons of the said Money Madhub Sen, they sued the representatives of the said Baney Madhub Sen, and Chuni Lall Sen, the brothers of the said Money Madhub Sen, and his widow Munjuri Dassi (the last-named being made a Defendant as she refused to join as a co-Plaintiff in the suit) on the

allegation that the property in dispute belonged to the said Guru Charan Sen, their ancestor, who died intestate on the 12th of November 1872, leaving him surviving his widow Surat Kumari Dassi, who died on the 1st of November 1892, and three sons, the said Baney Madhub Sen, Money Madhub Sen, and Chuni Lall Sen, upon the death of the said Guru Charan Sen his property passed to his said three sons as his heirs, and on the death of the said Money Madhub Sen one-third of it passed to the Plaintiffs as his heirs; and they prayed, *inter alia*, for a declaration of title to and partition of their said one-third share in the scheduled premises.

In May 1905 the Appellants Sreemutty Nrityamoni Dassi, the widow of the said Baney Madhub Sen, filed a written statement wherein she pleaded *inter alia* that the said scheduled premises belonged to her mother-in-law Surat Kumari Dassi and that, in or about the year 1891, the said Surat Kumari Dassi, in pursuance of a *bonâ fide* family arrangement, made a gift of her *stridhan* properties amongst the three different branches of the families of her three sons, and, in consideration of the said gift, the said Baney Madhub Sen and Money Madhub Sen, by a deed of covenant, dated the 30th of June 1891, transferred whatever right, title and interest, if any, they had in the said scheduled premises to the said Surat Kumari Dassi, who, by a deed of trust, dated the 18th of January 1892, dedicated the said scheduled premises to the family Idols, and that she, since the date of the said trust deed, had been, and was still, in possession of the said scheduled premises as a trustee.

In the first instance the suit was dismissed by Mr. Justice Bodiely, one of the Judges of the High Court, sitting as a Single Judge, on the ground that it was barred by the Limitations Act (Viet. XV of 1877). The Plaintiffs appealed from his decree and their appeal was heard by the Chief Justice and two Judges of the Court, who allowed the appeal and remanded the case to the Court below to be tried on the merits. This judgment is *Lakhan Chunder Sen* v. *Modhu Sudan Sen* (1). In the course of his judgment, which was concurred in by his colleagues Maclean, C. J., observed as follows :—

"Their case is that their rights must be taken to have been suspended between the 20th of April 1903, the date of the decree in the first suit and the 22nd of February 1901, the date of the reversal of that decree . . . . . It is also contended that sec. 11 of the Limitation Act covers the present case. As to the latter point we feel great doubt, whether the case falls within that section; but it is unnecessary to decide that point, as we think the present Appellants are entitled to succeed upon the other point.

"It is clear that under the decree of the 20th of April 1903, the present Appellants with others were declared entitled to a one-third share in the property and that the present Respondents were ordered to deliver up quiet possession to them of this share. It is perfectly true that that decree was passed in a suit in which the position of the parties may be said not to have been properly framed. No doubt if the attention of the Court, when it passed that decree, had been called to this, it would, in the circumstances, have transferred the present Appellants from the category of Defendants into that of co-Plaintiffs. It seems to us, however, that this was a decree which, so long as it stood undischarged, was susceptible of execution at the hands of the present Ap-

(1) 12 C. W. N 826 : s. c. I. L. R. 35 Cal. 209 (1907).

pellants, and whilst that decree existed, it was not open to them in the circumstances to institute a fresh suit for the attainment of the very object which had been successfully attained by them in the previous suit. We think, therefore, in these circumstances that the right of the Plaintiffs to bring an action to recover the property was suspended between the 20th of April 1903 and 22nd of February 1904, and that the case falls within the principle laid down by the Judicial Committee of the Privy Council in the cases of *Ranee Surnomoyee* v. *Soshee Mookhee Burmonia* (2) and of *Prannath Roy Chowdhury* v. *Rookea Begum* (3). It is conceded that at the time of the institution of the first suit, the Plaintiffs' claim was not barred.

"In this connection the language of Lord Eldon in *Pulteney* v. *Warren* (4) has some application: "If there be a principle, upon which Courts of Justice ought to act without scruple, it is this; to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought. That proposition is broadly laid down in some of the cases." This view was approved of by the House of Lords in the *East Indian Company* v. *Campion* (5)."

Mr. Justice Chitty who heard the case at this second trial dismissed the suit both on the ground that it was time-barred and also because the Plaintiffs had failed to prove the *benami* character of the transaction of 1891.

The Plaintiffs appealed from the decree of Mr. Justice Chitty. The Appeal Court by their judgment and decree, dated the 20th of January 1909, reversed the decree of the first Court and decreed the suit of the Plaintiffs. They held that they could not go behind the conclusion at which both the Courts had arrived in the previous suit, No. 882 of 1896, there being in their opinion no fresh evidence in the present case.

They, in effect, decided that the transactions of the year 1891 were an "illusory" arrangement entered into for the purpose of defeating the creditors of Baney Madhub Sen and Money Madhub Sen, and that the document, dated the 30th of June 1891, termed in the third issue a deed of declaration, could have no valid effect, and was never intended to operate, whatever its legal effect may have been. With regard to the document of the 18th of January 1892, which was a conveyance of the properties in dispute for religious purposes, they considered that nothing passed by it, as the grantor, the said Surat Kumari, was not entitled to the properties at the time. They further held that, in the circumstances, no questions of estoppel or limitation arose, and that no family arrangement, of the kind set up by the Defendants had been proved; and they added that, having regard to the previous suit, it looked as if the matter in dispute between the parties was *res judicata*.

The Appeal No. 5 of 1912 arose out of a suit instituted by the Respondent against the Appellants on the 27th of January 1905, in the Court of the Subordinate Judge of Alipur in Bengal, for recovery of property described in the schedule to the plaint as follows:—

(1) Premises No. 111, Cotton Street, Calcutta.

(2) Premises No. 116, formerly 102, Cotton Street, Calcutta.

(3) Panhati property.

(4) Agarpara property.

(2) 12 M. I. A. 244 (1868).
(3) 7 M. I. A. 357 (1859).
(4) 6 Vesey 92 (1801).
(5) 6 Bligh 187 (1837).

The First Court dismissed the suit in so far as it related to (1) above but gave the Plaintiffs a decree for the properties, (2), (3) and (4). On appeal the High Court confirmed the decree of the First Court with a modification in respect of the Panihati property. The present Appeal was filed in pursuance of special leave to appeal, granted by an Order of His Majesty in Council, dated the 19th of July 1910.

The Plaintiff who was the eldest son of the said Baney Madhub Sen, brought the suit against his mother and brothers, and another, and in his plaint, dated the 28th of January 1905, alleged that, as one of the seven sons and heirs of his father, Baney Madhub, he was entitled to a one-seventh share in the properties (1), (2) and (3) and to recover possession thereof by partition. He sought also, as the eldest son in the family, to recover possession of the entire Agarpara property, (4) above, or, in the alternative, one-seventh share thereof by partition.

The principal Defendants, namely, the mother and one of the brothers of the Plaintiff, contended, *inter alia*, that the said Surat Kumari was the real owner of the properties in suit, and not a *benamdar* in respect of them, that on the 30th of June 1891 and the 27th of July 1891 respectively she executed four deeds of gift of the properties belonging to her absolutely, in favour of—(1) the said Baney Madhub Sen; (2) the first Defendant; (3) Srimati Kusumani Dasi, widow of the said Chuni Lall Sen; and (4) Gokul Chandra Sen, and other sons and heirs of the said Money Madhub Sen executing, on the said 30th day of June 1891, a deed of declaration in respect of certain Calcutta properties, and a deed of assignment in favour of Surat Kumari in respect of the trust property at Panihati and Agarpara, in accordance with a *bonâ fide* family arrangement arrived at previously between the said Surat Kumari, Baney Madhub Sen and Money Madhub Sen, the first Defendant, and other members of the family.

With the consent of the parties the documents printed in the paper book prepared in the said Appeal 29 of 1903 were, so far as they were relevant, admitted in evidence in the suit. Some additional oral and documentary evidence was also adduced on behalf of the parties.

On the 29th of December 1906 the Subordinate Judge delivered his judgment and decree. He held that the Plaintiff could not maintain his claim for partition in the suit and he dismissed his claim altogether in respect of No. 111, Cotton Street. But he decided that the Plaintiff's title to a seventh share in No. 116, Cotton Street and to a one-twenty-first share in the Panihati property in suit was established and that the Plaintiff should recover joint possession thereof. With regard to the Agarpara property he found that the Plaintiff was entitled to hold that property as a trustee, under the terms of the document, dated the 11th of August 1882.

The Defendants appealed to the High Court from the decree of the Subordinate Judge. Their appeal was heard by two learned Judges of the Court who, on the 11th of December 1908, delivered their judgment and decree by which they affirmed the decree of the Subordinate Judge, except in so far as they ordered that the suit of the Plaintiff, in respect of two bighas of land with buildings on it, which was *debottar* property, forming a part of the Panihati property, should be dismissed.

They observed that the main question raised for their decision in the appeal re-

lated to the ownership of the premises No. 116, Cotton Street. They set out the history of the family and the previous litigation from the year 1857, when Guru Charan Sen, the grandfather of the Plaintiff, was adjudicated an insolvent, and then gave their decision on the above-mentioned question in the following terms :—

"On the 30th June 1891, a number of deeds were executed relating to the properties of the family, and these were followed by one of the 27th July 1891. In these deeds Surat Kumari was recognised as having been the owner of, not only the properties covered by the present suit, but also the properties covered by the suit in this Court, which were subsequently declared by a Division Bench on appeal to have been the properties of Guru Charan and not of Surat Kumari. One of these deeds related to No. 116, Cotton Street and it was given to Nrityamoni.

"It is not necessary for us to enquire whether the gift to Nrityamoni was intended to be a gift to Baney Madhab or his branch of the family, because, on the evidence, we cannot come to any other conclusion than that arrived at by the lower Court as regards the true ownership of this property. In the present case the Defendants rely on the gift by Shyama Charan to Surat Kumari as if it were a genuine transaction. In the suit, however, in this Court Shyama Charan was said to have been the *benamdar* of Surat Kumari, she having supplied the funds. There is also some evidence to show that both Shyama Charan and Surat Kumari were merely names used by Guru Charan for protection against his creditors and the claims of the Official Assignee. We cannot expect that very satisfactory evidence would be forthcoming to elucidate the true nature of transactions which took place nearly half a century ago; but the materials on the record are sufficient for the conclusion that the purchase of the premises No. 102, Cotton Street from the Official Assignee by Shyama Charan and the gift by the latter to Surat Kumari were colourable, that Guru Charan continued to be the true owner, and that possession always remained with him and, after his death, with his sons.

"The conduct of the Plaintiff in connection with the deeds of 1891 is, no doubt, gravely to be deprecated. He has told obvious lies to conceal the part he took in the transactions of that year. But his conduct is no legal bar to his claiming a share of No. 116, Cotton Street. The observations in the judgment of this Court with reference to this property as well as No. 27, Burtolla Street are *obiter*, as the issue in that case related to other properties.

"We are, therefore, of opinion that the decree of the Lower Court, so far as it relates to No. 116, Cotton Street, is correct, and that the Plaintiff is entitled to a decree for a seventh share of it."

Hence these consolidated appeals.

Mr. L. DeGruyther, K. C., and *Mr. G. E. A. Ross, K. C.*, for the Appellants submitted that the suit was barred by limitation under Art. 142, Sch. II, Act XV of 1877. Reference was made to *Muhammad Amanulla v. Badan Singh* (6).

Sir William Garth and Mr. Spence for the Respondents submitted that the suit was not barred by limitation, and that in any case in view of the Defendants' contention which had been accepted by the Court below, no question of limitation arose.

Mr. L. DeGruyther in reply referred to the following authorities on the subject

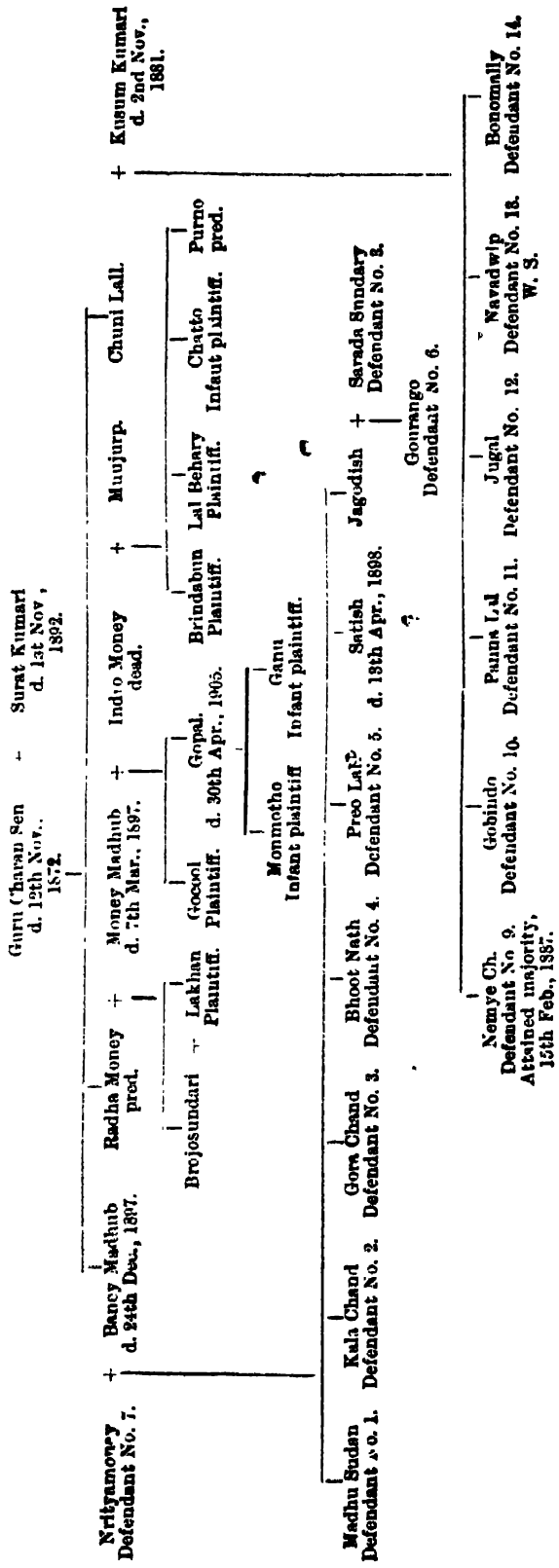
(6) I. L. R. 16 I. A. 148 (1889).

of *benami* transactions :—*Eshenchunder Singh* v. *Shamachurn Bhutto* (7) and *Nirmal Chunder* v. *Mohamad Siddick* (8).

THEIR LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The two suits which have given rise to the present Appeals were instituted, one in November 1904 in the High Court of Calcutta, in its Ordinary Original Civil Jurisdiction, the other in the Court of the Subordinate Judge of the district of 24-Pegunnahs, in Bengal.

The parties to this protracted litigation, with the exception of the Appellant Nrityamoni Dassi and the other female Defendants, are the descendants of one Guru Charan Sen, a Hindu inhabitant of Calcutta, who died in the year 1872, leaving him surviving three sons named respectively Baney Madhub Sen, Money Madhub Sen, and Chuni Lall Sen, and a widow, Surat Kumari Dassi. The Appellant is the widow of Baney Madhub who died in 1897. The following genealogical table will explain the relationship in which the parties stand to one another :—



(7) 11 Moo. I. A 7 at p. 28 (1866).
(8) L. R. 25 I. A. 225 at p. 236 (1898).

Guru Charan Sen appears to have been at one period of his life a very wealthy

man, and was possessed of considerable house property in Calcutta, besides some lands in the village of Panihati in the district of Nuddea. Among the house property were eight houses situated in Banstollah Street and its vicinity, which, for the sake of brevity, may be conveniently referred to in this judgment as "the eight houses." Besides these and several others which need not be specifically mentioned, he owned 102, Cotton Street and 27, Burtollah Street.

Between 1855 and 1857 Guru Charan Sen became heavily involved in debt, one of his principal creditors being James Church, junr., and Co., to whom he had apparently been a *banian*. Early in 1875 he appears to have executed in their favour a bond by which he hypothecated, among other property, "the eight houses," subject to certain prior encumbrances created in favour of one Shama Charan Mul'ick, to whom also he was heavily in debt; and in a suit brought immediately thereafter on the bond he confessed judgment. Thereupon, on the application of another creditor, Guru Charan Sen was adjudicated an insolvent and all his property vested in the Official Assignee. This was followed by a suit at the instance of Shama Charan Mullick in respect of his debt. The Official Assignee then brought his action to get the insolvent's properties into his hands. All three suits were referred to arbitration, and under the award made in those proceedings Shama Charan Mullick obtained priority. The Official Assignee, in accordance with the directions contained in the Award, sold most of the houses belonging to the insolvent, inclusive of 102, Cotton Street and 27 (now numbered 34,) Burtollah Street. But for some unexplained reason the "eight houses" never came into the possession of the Official Assignee; and, although the Award contained a direction to that effect, it is now admitted they were never brought to sale. These eight houses unquestionably belonged to Guru Charan Sen, subject, it is said, to certain payments out of the rents and issues for the maintenance of two idols, and he appears to have retained possession of them until his death in November 1872, when his three sons succeeded to the same. No application, however, for the substitution in the Collector's Register of their names as owners in place of their father was made until 1877, when they were recorded as *shebaits*, the ordinary designation for a person holding property dedicated for, or charged with, the maintenance in any way of Hindu religious worship. But it is not disputed that the income arising from the eight houses—save as to a small portion which was spent for keeping up the two family idols—was applied towards the general expenses of the joint family.

Chuni Lall, the third son, died in 1881, leaving a widow, named Kusum Kumari Dassi, and several sons, of whom Nemye Charan is the eldest. But his death made no difference in the mode of dealing with the income of the eight houses or in the general condition of the family, which was that of an ordinary Hindu joint family, of which Baney Madhub, the eldest male member, was the *karta*.

This state of things continued until 1891, when the events took place which gave rise to the litigation of 1896 and also form the subject of the present dispute.

As already stated, 102, Cotton Street, and 27, Burtollah Street also belonged to Guru Charan Sen. These were put up to sale by the Official Assignee. One was purchased by Shama Charan Mul'ick, the other by one Heera Lal Seal for Shama Charan Mullick, and to whom Heera Lal

appears to have afterwards transferred it by deed. Why this devious course was adopted in respect of these houses is a matter of inference. Shama Charan Mullick is also stated to have bought up the claims of most of the other creditors. In 1861 he conveyed 102, Cotton Street, and 27, Burtollah Street, to Surat Kumari Dassi, the wife of Guru Charan Sen; and one of the main questions in the present litigation is whether she took them as absolute owner or merely *benami* for her husband and the joint family, of which he was the *karta* and the head.

Between 1888 and 1890 the two brothers Baney Madhub and Money Madhub found themselves heavily involved in debt: their *banianship* business had brought them no profit; Money Madhub had already suffered imprisonment for debt, and evidently the creditors were pressing their demands. To add to these difficulties, differences and disputes had commenced in the family chiefly owing to the indebtedness of the two brothers; whilst the mother, Surat Kumari Dassi, in whose name, either as absolute owner or in trust for the family, some of the properties stood, was getting very old. The sons of Guru Charan Sen had before them the fate of their father, who, though he had no doubt contrived to save some part of his possessions from the general wreck of his fortunes, had died an undischarged bankrupt. It is easy in these circumstances to imagine why it was considered advisable by the principal adult members to devise some method to shelter the family properties remaining in their hands from their creditors. It is not clear whether Baney Madhub was the prime mover in evolving the scheme, as was alleged afterwards by Money Madhub, but both took an equal part in carrying it out. This was indubitably, it might be said admittedly, the motive cause for the execution of the documents, with the nature and effect of which their Lordships have to deal in these two appeals.

Early in 1891 a solicitor of the name of Netye Dass Dey was instructed to draw up certain deeds by which Baney Madhub, Money Madhub, and the repesentatives of Chuni Lall were to transfer absolutely the "eight houses" to Surat Kumari Dassi, who on her side, in consideration thereof, was to convey in three separate parcels the houses which stood in her name. 102, Cotton Street, the large family residence of Guru Charan Sen, had by this time become divided into three separate premises bearing separate Municipal numbers—115, 116, and 117, Cotton Street—the first being occupied as the joint family dwelling-house. Another house, No. 111, had been acquired, in the name of Surat Kumari Dassi, and was added wholly, or partly to the *boitakkhana*, or male reception room, of No. 115.

To resume the narrative of events leading to the litigation in which the family has been involved since 1896, Netye Dass Dey carried out his instructions and drafted the required deeds. Evidently these were not considered sufficient to answer the object in view, and another well-known solicitor of the Calcutta High Court, named Mr. Nemye Charan Bose, was consulted on the subject, and he appears to have been of opinion that the projected transfer of the "eight houses" to Surat Kumari could not be sustained against the claims of the creditors. He accordingly prepared another deed, which was approved, and on the 30th June 1891, Baney Madhub and Money Madhub executed this document, called by the parties in these proceedings "the deed of covenant," by which they disclaimed all right to and interest in the

eight houses, and acknowledged that their mother, Surat Kumari Dassi, was the real owner, and that they had been realising the rents of this property on her behalf. They further stated that, as she was desirous of taking over its charge herself, and in consideration of her not demanding an account from them of their stewardship, they were making this declaration in her favour. Nemye Charan Sen, the eldest son of Chuni Lall, who was *sui juris* at the time, did not join in the deed, though he witnessed it. There is no suggestion of any kind in this document that the "eight houses" were *debuttur*.

On the same day, *viz.*, the 30th June 1891, they executed another document, by which they substituted their mother as trustee in their stead in respect of a Government of India promissory note for a sum of Rs. 5,000 held by the Official Trustee, and of certain lands in the village of Agarpara which had vested in them under a trust deed executed by their grandmother, Surjumoney Dassi, the mother of Surat Kumari.

By the same deed they assigned or purported to assign to her the sole management of the ancestral lands at Panihati, over part of which their grandfather, Bissumber Sen, the father of Guru Charan, had erected a dwelling-house and a *thakoorbari* (temple), where he had placed two family idols. This property was held by Guru Charan during his life, and on his death had devolved on his sons. In the document under reference it was recited that the management of the temple and of the worship was conducted by them until then in conjunction with their mother.

Contemporaneously with these two deeds, Surat Kumari executed three separate "deeds of gift"; by one she gave to Nrityamoni Dassi, the wife of Baney Madhub, in trust for herself and her sons, 116, Cotton Street; by the other 117, Cotton Street and 34, Burtollah Street to Kusum Kumari Dassi, the widow of Chuni Lall, and "her sons and grandsons" in succession; and by the third, No. 111, Cotton Street to Baney Madhub.

On the 27th July 1891, she executed in favour of Munjuri Dassi, the wife of Money Madhub, of his two sons by a predeceased wife, and of Brajo Sundari Dassi, the wife of his eldest son, Lakhan Chander Sen, a deed of gift in respect of 115, Cotton Street.

She thus allotted to the three branches of the family the property which under the transfer by Shama Charan Mullick stood in her name, and to which, according to the Appellant's case, she was absolutely entitled. The reason why the gifts were made to the female members of the three branches is obvious. The object plainly was to avoid the possibility of the houses in question being attached and sold at the instance of the creditors of Guru Charan's sons.

It is to be observed that parts of all three houses appear to have been let out to tenants, and that although No. 115 was allotted to Money Madhub's branch, Baney Madhub's family, with Surat Kumari, continued to reside there for some time at least, though in 1892 Nrityamoni herself, with her mother-in-law, Surat Kumari, appears to have moved to Panihati.

On the 18th January 1892, Surat Kumari executed a deed of trust, by which she dedicated the "eight houses" to the worship of certain idols named therein, and appointed Baney Madhub, his wife Nrityamoni and Saroda Sundari Dassi, the widow of one of his sons then deceased, as trustees of the endowment she purported to create by this document. From this time, it is clear, Baney Madhub began to collect

the rents and issues of the "eight houses" to the exclusion of the other two branches. The rent receipts are headed "Estate of Surat Kumari Dassi," and are signed by him for himself and his co-trustees. Bitter disputes naturally sprang up in the family, which finally led to the institution of a suit in the High Court of Calcutta in its Original Civil Jurisdiction on the 21st of December 1896, by the sons of Chuni Lall other than Nemye Charan Sen against Baney Madhub, Money Madhub, Nrityamoni Dassi and Saroda Sundari Dassi. As Nemye had attested the "deed of covenant" he was joined as a Defendant. Their mother, Kusum Kumari, was made a party after the action was launched.

The Plaintiffs charged that the statements in the "deed of covenant" of 1891 were wholly false; that Surat Kumari had no title or interest whatsoever in the properties to which it related; that it was concocted with the object of sheltering the eight houses" from the creditors of Baney Madhub and Money Madhub; that Surat Kumari had no right to dedicate the said houses; and that the "deed of covenant," together with the deed of trust of the 18th January 1892, were wholly inoperative against them and did not affect their rights in the properties in question. And they asked that their share and the share of their brother, Nemye Charan, may be ascertained, and the "nature and extent of their right may be declared."

Money Madhub did not enter any defence, but in an affidavit relating to the discovery of documents in his possession, made on the 1st May 1897, he alleged that he had executed the "deed of covenant" under the undue influence of Baney Madhub and Surat Kumari Dassi, both of whom had assured him that under the arrangement, all the sons and representatives of Guru Charan Sen would remain in possession of the "eight houses," and that he had no intention of defrauding his creditors, or depriving the sons of Chuni Lall of their rights in the said properties.

Money Madhub died during the pendency of the suit, and his sons were substituted in his place, and Munjury Dassi was brought on the record as the mother and representative of her son Poorno, who had died after Money Madhub.

The sons of Money Madhub, whilst repudiating the charges made against their father, associated themselves with the claim made by the Plaintiffs, in that suit, and asked that their rights and interests might also be declared in those proceedings. The contesting Defendants, Baney Madhub, Nrityamoni and Saroda Sundari filed a joint written statement in which they traversed the main allegations of the Plaintiffs regarding the object with which the documents referred to were executed in 1891. With respect to the property in dispute, they admitted that it belonged originally to Guru Charan Sen, but they alleged that it was assigned by him to James Church, Junr., and Co. in satisfaction of their claim, and that Shama Charan Mullick purchased the same from them with monies belonging to and paid to him by Surat Kumari Dassi, that Shama Charan Mullick also bought at the Official Assignee's sale, 102, Cotton Street and 27, Burtollah Street, and subsequently transferred all the houses to Surat Kumari, who held them ever since in her own right as absolute owner, consideration for the transfer, in this instance also, being paid by her with her own money.

Baney Madhub died before trial, and his sons were brought on the record as his heirs and representatives. Some of them filed separate written statements in which the allegation about the purchase of the "eight houses" is put somewhat differ-

ently, but the variation does not affect the real defence, *viz.*, that the houses were the absolute property of Surat Kumari, acquired with her own money.

The suit came for trial before Mr. Justice Henderson, of the Calcutta High Court, who, after an exhaustive examination of the evidence, held in substance that the "eight houses" never belonged to the mother; that they all along remained the property of Guru Charan Sen, and devolved, on his death, on his three sons; that the "deed of covenant" executed in 1891 was merely with the object of sheltering the "eight houses" from their creditors; and that neither that document nor the deed of trust of the 18th January 1892, affected the rights and interests of the Plaintiffs or of the representatives of Money Madhub. He accordingly decreed the claims of the Plaintiffs in that suit. He made a similar decree in favour of the sons of Money Madhub.

On appeal, the High Court in its appellate jurisdiction, affirmed the findings of Henderson, J., so far as the "eight houses" were concerned, and affirmed his decree in favour of the Plaintiffs in that suit, *viz.*, the sons of Chuni Lall, other than Nemye Charan, but differed from him in the opinion he had incidentally expressed regarding the right of Surat Kumari in 102, Cotton Street and 27, Burtollah Street, which was not directly in issue in that case. With regard to the claim of Money Madhub's sons, the learned Judges considered that as they were Defendants Mr. Justice Henderson's decree in their favour could not be maintained. They accordingly varied his decree in that respect, and relegated them to a fresh suit for the relief to which they were clearly entitled. It was unfortunate that the learned Judges did not exercise the power which they possessed under the Code of Civil Procedure, to transpose the sons of Money Madhub from the category of Defendants to that of Plaintiffs, and to maintain Mr. Justice Henderson's decree in their favour. Had they done so they would have spared this family another ten years' litigation. The mistake was purely technical and could have been set right by a small amendment without the parties resorting to a fresh suit.

The appellate decree was made on the 22nd February 1904, and on the 14th November of the same year Lakhan Chunder Sen and his brothers, the sons of Money Madhub, brought the present suit, 826 of 1904, in the High Court of Calcutta, in its ordinary original civil jurisdiction, for the assertion of their rights to a one-third share in the "eight houses" which had devolved on their father on the death of Guru Charan.

The allegations and charges in the plaint are, like the defence, substantially the same as in the previous suit. The Appellant Nrityamoni Dassi, who was the real contesting Defendant, raised a further plea that the suit was barred under the statute of limitation.

The case was heard in the first instance by Bodiely, J., who upheld the Defendants' objection, and dismissed the suit. On appeal, the High Court reversed his decree, and remitted the cause for trial on the merits with the following remarks:—

"The appeal must be allowed with costs both here and in the Court below, and the case must be remitted to be tried out on the merits if, after the contest which took place in the previous suit, the present Respondents think that there are still any merits to be discussed."

The case then came before Chitty, J., who, in face of the judgment of the Appellate Court on the question of limitation, held that the Plaintiffs' suit was "out of time," as Surat Kumari's possession was

adverse to their father, Money Madhub, from the 30th June 1891. He also held that they had failed to prove "the *benami* character of the declaration of trust." He accordingly dismissed the suit.

On appeal the decision of Chitty, J., was set aside, and the Plaintiffs' claim was decreed with costs. The present appeal before this Board is by Nrityamoni Dassi, who claims to hold the property under the trust deed executed by Surat Kumari on the 18th January 1892; and the plea in bar of the suit is again urged on her behalf.

As their Lordships concur generally with the reasons given by the Appellate Court for overruling the plea of limitation, they do not wish to prolong the present judgment by dealing with the question at any length. They desire, however, to observe that if the property belonged in fact to Surat Kumari, and was held by her all along in her own right, as has been the Defendants' contention throughout the various stages of this long-drawn litigation in India, obviously no question of limitation arises; neither their father nor the Plaintiffs had or have any title to it, and their suit must fail on that ground.

If, however, the "eight houses" never belonged to Surat Kumari, as is now conceded at their Lordships' Bar, if they always remained the property of Guru Charan Sen and devolved on his sons by right of inheritance, then the declarations made by them in the "deed of covenant," which are now admitted to be wholly false, in no way altered the title. It did not purport to transfer any right: it was only an admission of a right which did not exist. There is no allegation, far less any evidence, that Surat Kumari pretended to exercise any right under that document adversely to the real owners until January 1892. It was after the execution of the trust deed of 1892 that Baney Madhub, purporting to act as one of the trustees, began to collect the rents and issues of the eight houses to the exclusion of the other co-sharers. Limitation would no doubt run against them from that time. But it would equally without doubt remain in suspense whilst the Plaintiffs were *bonâ fide* litigating for their rights in a Court of Justice. They had in the suit of 1896 before Mr. Justice Henderson associated themselves with the Plaintiffs in that action, and had asked for an adjudication in those proceedings of their rights. A distinct issue was framed in respect of their claim, to which no objection seems to have been made by the Appellant Nrityamoni; and the learned Judge who decided the case pronounced, with reference to their prayer, the folowing order:—

"The Defendants, the representatives of Money Madhab, will be declared jointly entitled to a one-third share in the scheduled properties, and the Official Referee will make similar enquiries with regard to their share and the share of Nemye Charan Sen, as to mesne profits and the deeds, assurances, and other things which may be necessary. These Defendants will be entitled to get possession of the shares to which they have been declared entitled."

It was an effective decree made by a competent Court, and was capable of being enforced until set aside. Admittedly, if the period during which the Plaintiffs were litigating for their rights is deducted, their present suit is in time. Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court.

As regards the nature and effect of the deed of covenant of the 30th June 1891, their Lordships have no hesitation in holding, in concurrence with the High Court, that it was wholly illusory; that it never operated to transfer any rights, nor in fact was it intended to do so; and that it was a mere device for deceiving the creditors

of Baney Madhub and Money Madhub, and sheltering the property under their mother's name by making an acknowledgment of a right which never existed. All the facts and circumstances taken in conjunction with the statements in the document itself contradict the suggestion that it was part of a *bonâ fide* family arrangement.

Their Lordships are of opinion that the decree of the High Court in Suit No. 826 of 1904 is right, and should be affirmed.

Their Lordships have kept quite separate the question relating to the right to 102, Cotton Street, and 27, Burtollah Street, which is involved in the suit of Madhusudan Sen, brought in the Court of the Subordinate Judge of the 24-Parganahs. It arose only incidentally in the litigation of 1896, and in Suit No. 826 of 1904, mainly in consequence of the endeavour on the part of the Defendants to confuse the issues by placing the "eight houses" in the same category as the other houses as property acquired by Surat Kumari Dassi with her own money from Shama Charan Mullick.

Madhu Sudan is a son of Baney Madhub, and he brings this suit for a declaration of his right as one of Baney Madhub's sons to a one-seventh share of 116, Cotton Street, and in the Panihati lands and 111, Cotton Street, and in respect of the *shebaitship* of the Agarpara property. He alleges that the deeds of gift executed by Surat Kumari only gave effect to a family partition under which his father received 116, Cotton Street as his share in the Cotton Street property, and that the transfer to Nrityamoni was wholly nominal.

The Subordinate Judge dismissed his claim with respect to 111, Cotton Street, holding that that property was sold by Baney Madhub *bonâ fide* for the satisfaction of the debts of the joint family, for which purpose it was, in fact, transferred to him by Surat Kumari, in whose name it stood. He also held, in substance, that the transfer of 102, Cotton Street, and 27, Burtollah Street, by Shama Charan Mullick to Surat Kumari was really for the benefit of Guru Charan Sen, that she had no beneficial interest in the same, and that the allotments made in 1891 by the several deeds of gift as well as the document of the 18th January 1892, were executed "with the object of dividing the properties of the three brothers in such a way that their creditors might not seize them in satisfaction of their claims," and that Baney Madhub took 116, Cotton Street in the name of his wife. He accordingly decreed the Plaintiffs' claim with reference to that property, the Panihati lands and the *shebaitship*, and his decree has been, with a slight modification, affirmed on appeal by the High Court of Calcutta.

Nrityamoni has appealed, and the sole question for determination now left in this case is whether the two houses were conveyed to Surat Kumari by Shama Charan Mullick in her own right as beneficial owner, or, to use the Indian technical expression, *benami* for Guru Charan Sen and the joint family. Their Lordships have repeatedly laid down that in cases where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came. At this distance of time it is hardly likely that evidence would be forthcoming on either side to establish or rebut conclusively the allegation. The case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. On the Plaintiffs' side it is contended that 102, Cotton Street was the family dwelling-house, and that Guru Charan had the strongest possible motive

to try to preserve it for the family. The Subordinate Judge finds as a fact, a view which is affirmed by the High Court, that he had means, in spite of his insolvency, to buy it back. From this conclusion on the evidence as it stands their Lordships find it difficult to dissent.

On the Defendants' side, it was urged in the written statements that Surat Kumari had bought these two houses, equally with the "eight houses," with her own money. There was absolutely no evidence in support of this allegation; no books of accounts showing payments, and no vouchers or receipts have been produced, nor is there any suggestion that any such ever existed and were now lost. At a later stage of the case, the difficulties which surrounded the Defendants' allegation were perceived, and it was then suggested that the conveyance by Shama Charan was a voluntary gift to Surat Kumari, who was a connection of his. If it was a gift, it might, as is contended on behalf of the Plaintiffs, as reasonably be a gift to the family in her name.

Guru Charan was an undischarged insolvent; a purchase by him in his own name, or a gift to him in his own name, would have been swept up by the Official Assignee for the benefit of his creditors. What more natural then, it is said, than that the conveyance should be in the name of the wife? In this connection it is to be noted that although Shama Charan Mullick acquired the houses in 1859, and the transfer to Surat Kumari was made in 1861, the possession all along appears to have remained as before with Guru Charan, for neither Shama Charan nor Heera Lal ever took possession of the properties.

It is unnecessary to discuss how far these probabilities and inferences, standing by themselves, would outweigh the ostensible title, for the books of accounts that were produced in the litigation of 1896 and are exhibited in the present suits, kept from 1872, coupled with the circumstances referred to above, leave little reason for doubt that the conveyance of 1859 in favour of Surat Kumari was in reality for Guru Charan Sen and his family. They show beyond any reasonable doubt that the rents and issues arising from these two houses were kept in exactly the same way as the rents of the "eight houses"; that they were entered in the books of the three brothers, for Surat Kumari had no books of her own, and were applied towards the expenses of the family. The inference is irresistible that she was not the beneficial owner of any of the houses.

The mortgages in respect of the houses in question executed by her by way of security for the *bainanship* of Bancy Madhub and Money Madhub respectively, do not militate, in their Lordships' opinion, with this conclusion. As the property was in her name, the mortgages could only be made by her. It is to be remarked, however, that in almost every instance, Guru Charan Sen was also made a party. Nor do the dispositions she purported to make by her Will in 1883 affect the position. Had she died without expressing her wishes as to how the property should be allotted, it would have, in all probability, given rise to a contest. It stood in her name and was open to the contention that it was her *stridhan* to which the two surviving sons were entitled, to the exclusion of the sons of Chuni Lall who had died in her lifetime.

For these reasons their Lordships are of opinion that the judgment of the High Court is right and that both these appeals should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The Appellants will pay the costs of the appeals.

SRIMATI NRITYAMONI DASSI *v.* LAKHAN CHUNDER SEN.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors : *Messrs. Downer* and *Johnson* for the Respondents.

B. D. *Appeal dismissed with costs.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 1300 OF 1914.

CHAUDHURI, J.
1915,
Heard,
30, November.
Judgment,
20, December.

KUMAR KRISHNA DUTT,
v.
HARI NARAYAN GANGULI.

Attorney and client—Attorney's costs, if may be declared a charge on infant's immoveable property recovered by suit when irrecoverable from next friend—Infant if may be sued and personal decree made against—Immoveable and moveable property, no distinction between— Attorney's lien, meaning of.

An attorney appointed by the next friend of an infant to prosecute a suit for recovery of immoveable property may sue the infant for and obtain a decree declaring a charge in respect of the balance of costs in the property recovered by the suit where it appears that there is no chance of such costs being recovered from the next friend. No decree can be made in such a suit against the infant personally.

The Defendant Hari Narayan Ganguli who was a minor through his mother Sreemuti Sushila Sundari Debi as his next friend instituted a suit on the Original Side of the Calcutta High Court being suit No. 158 of 1912, against one Sreemuti Promoda Moyee Debi for a declaration that he (Hari Narayan Ganguli) was entitled to premises Nos. 9 and 9/1, Sikdarbagan Street and No. 96, Cornwallis Street and for recovery of possession of the said premises. The suit was decreed *ex parte* with costs and the Plaintiff, Kumar Krishna Dutt, who is an attorney of the Calcutta High Court and in whose favour Sreemuti Susbila Sundari Debi as the next friend of Hari Narayan Ganguli signed the warrant of attorney in Suit No. 158 of 1912, brought this suit against the minor Hari Narayan Ganguli to recover the attorney's costs of Suit No. 158 of 1912 and prayed for a declaration that he was entitled to a charge on premises Nos. 9 and 9/1, Sikdarbagan Street and No. 96, Cornwallis Street which were recovered through his exertions in Suit No. 158 of 1912.

The Defendant, Hari Narayan Ganguli, was a minor at the time of the hearing of the suit and entered appearance and filed his written statement through his guardian *ad litem* Sarat Chandra Chatterjee.

Mr. N. N. Sircar (with him *Messrs. B. C. Mitter* and *C. C. Ghose*) for the Plaintiff. I come under sec. 68 of the Indian Contract Act. The privity of contract is between the next friend and the Plaintiff but to prevent circuity of action creditors are allowed to proceed against the estate direct. *Pritchar* v. *Roberts* (3). The same principle has even been extended to cases on torts. *In re Raybould* (15). An infant's share can be charged. *In re Wrights' Trust* (10). An infant can be sued for costs. *Watkins* v. *Dhunnoo Baboo* (11). The case of *Branson* v. *Appaswami* (14) is in my favour. In India there is no difference between real and personal property, *Norendranath Sarcar* v. *Kamalbasini Dassi* (7), and there is no reason why immoveable property cannot be charged for attorney's costs. *Ispahani* v. *Chundi Charan Pal* (13).

Mr. I. B. Sen (with him *Messrs. B. C.*

(3) L. R. 17 Eq. 222 (1573).
(7) I. L. R. 23 Cal. 563 at p. 573 (1896).
(10) [1901] 1 Ch. 317, 321 (1900).
(11) I. L. R. 7 Cal. 140 (1881).
(14) I. L. R. 17 Mad. 257 (1894).
(15) [1900] 1 Ch. 199.
(13) 9 C. W. N. short notes p. 197 (1904).

Ghose and *B. K. Chaudhuri*) for the Defendant. In *Watkins* v. *Dhunnoo Baboo* (11) the infant's guardian protected himself from personal liability by an agreement with the attorney. Here there was an express agreement between the attorney and the next friend to pay the attorney's costs. Sec. 68 of the Indian Contract Act contemplates direct dealing between the infant and the person who supplies necessaries. Sec. 68 does not apply to a case where the services are rendered to the next friend who promises payment for such services. Here the services were really rendered to the next friend and not to the infant. Infant is not liable for costs but the next friend becomes liable. *Re Flower* (16). Halsbury's Laws of England, Vol. XVII at p. 138. Refers to sec. 68, Contract Act and reads Pollock and Mulla's Comments on *Watkins* v. *Dhunnoo Baboo* (11). In *Shama Charan Mal* v. *Chowdhry Debya Singh* (12) the principle underlying the decision in *Watkins* v. *Dhunnoo Baboo* (11) was not supported in its entirety.

Cites *Branson* v. *Appaswami* (14).

[CHAUDHURI, J.—But there the minor on attaining majority repudiated the services.]

Mr. Sen.—The decision is independent of that consideration. Besides, I cannot be in a worse position merely because I am still a minor and have had no chance of accepting or repudiating the services of the attorney. Cites *Radha Nath Bose* v. *Suttoprosono Ghose* (17). Solicitors' lien in England is either by common law or under statute. The Statute, Solicitors Act, 1860 (23 and 24 Vict., c. 127), sec. 28 allowing solicitors' charge upon "property of whatsoever nature" is not in force in India. The Attorneys in India are, therefore, entitled only to the common law lien. Common law lien being in the nature of a retaining lien does not attach to real estate. *Shaw* v. *Neale* (1).

[CHAUDHURI, J.—In this Court in partition suits infants' shares are charged for the costs of partition in favour of their attorneys.]

Mr. Sen.—That is so. Immovable property is not the same as real estate. But the reasons against common law lien attaching to real estate forbid with equal force such lien attaching to immovable property. Cites Seton on Decrees, Vol. II (7th Ed., 1912), p. 1046.

Mr. Sircar (in reply) cites *Dowse* v. *Gorton* (18). Refers to Laws of England, Vol. XVII, p. 138.

C. A. V.

The JUDGMENT OF THE COURT was as follows:—

CHAUDHURI, J.—This is a suit by an attorney to recover from the Defendant, who is an infant, the sum of Rs. 446-2 for balance of taxed costs in suit No. 158 of 1912, which was instituted in this Court on the infant's behalf by his mother as next friend, for declaration of the infant's title to and possession of certain houses in Calcutta. The Plaintiff submits that he is entitled to a charge for the said sum on the said premises, and further that he is entitled in this suit to an order for sale of the premises in default of the payment of the amount claimed.

The Defendant, by his guardian *ad litem*, Sarat Chandra Chatterjee, has filed a written statement in which he submits that there can be no decree for costs against

(11) I. L. R. 7 Cal. 140 (1881).
(12) I. L. R. 21 Cal. 872 (1894).
(14) I. L. R. 17 Mad. 257 (1894).
(16) 19 W. R. 578 (1871).
(17) 2 Ind. Jur. N. S. 269.
(1) 6 H. L. C. 581 (1858).
(18) [1891] A. C. 190.

the infant Defendant personally, nor can such costs be recovered from the infant Defendant's estate: that the Plaintiff should have proceeded by way of an application in Chambers on summons, or, if referred to a suit, such suit ought to have been instituted in the Small Cause Court: he does not admit that Rs. 446-2 is due and submits that the costs in suit No. 158 of 1912 were unreasonably and unnecessarily incurred by the engagement of two counsel, one of them a senior counsel, inasmuch as the suit was undefended: and that further the Plaintiff is not entitled to the costs (1) of procuring the attendance of two witnesses named in the 8th paragraph of the written statement and (2) of the production of records from the Small Cause Court when certified copies would have been sufficient: he also states that the taxation of the Plaintiff's bill in the first suit was *ex parte* and submits that the infant Defendant is not bound thereby.

No witnesses have been examined on behalf of the Defendant, and I hold upon the evidence on behalf of the Plaintiff that the original Suit No. 158 of 1912 was properly instituted and was for the benefit of the infant: that it also became necessary to execute the decree obtained in that suit, and possession of the properties has been recovered on behalf of the infant Defendant: that two counsel including a senior, were properly engaged and the costs of procuring the attendance of the witnesses above mentioned, and of the production of records were justly incurred: and that the taxation was properly made. The present guardian *ad litem* attended for the greater part of the time when the bill was under taxation. He did not attend at the final stage, when an undertaking, which had been given on behalf of the next friend to file a warrant of attorney, was not complied with, and no letter of authority was produced by him on the mother's behalf. In fact learned Counsel appearing, instructed by the attorney for the guardian *ad litem*, stated that he could not press any of the charges as the guardian was not prepared to give any evidence. This suit I hold has been properly instituted. The mother had, no doubt, signed a warrant of attorney in Suit No. 158, and she was primarily liable for its costs. An application in Chambers for realisation upon the allocatur could only have been made against her in that suit. A suit for declaration of a charge on immoveable property is not maintainable in the Small Cause Court. Besides the question raised in this suit, as to whether immoveable property belonging to an infant can be so charged, is a question of some difficulty, and a fit one for this Court.

Formerly in England before statutory provision was made, it was undoubtedly the law that a solicitor could not claim a charge on real estate, even if recovered by his services—see *Shaw* v. *Neale* (1). It was said by the Lord Chancellor in that case that "to hold that a solicitor obtaining a real estate for his client could be entitled to a lien upon it for his costs and charges, would be entirely contrary to the principle upon which the doctrine of lien proceeds. There can be no lien upon any property unless it is in the possession of the party who claims the lien. But if an estate is recovered by a solicitor or, if through a solicitor it is conveyed to the client, the solicitor is not in possession of the estate, but his client is in possession of it. All that the solicitor has, are the deeds and documents. He has a lien upon them. He may render them available for the purpose of establishing his claim. But it is quite clear that he cannot say that he has any such lien upon the estate as, within

(1) 6 H. L. C. 581 (1858)

the principle of the doctrine which I have suggested, can entitle him to maintain it as a charge upon the property." Since that case the principle has been largely extended, and its applicability to cases other than those of possession recognised, and a statutory charge on all classes of property has been created in England in favour of solicitors, by 23 and 24 Vict., c. 127. The law in England has since been more and more liberally construed in favour of solicitors.

In *Baile* v. *Baile* (2), it was argued that the employment of a solicitor by the next friend could not be construed as his employment by the infant Plaintiff within the meaning of sec. 28 of the English statute, but this contention was overruled by the Vice-Chancellor.

In *Pritchard* v. *Roberts* (3), the solicitor had at first applied under the Declaration of Titles Act of 1862 in the name of the infant and got a declaration in his favour, but not possession of the estate. Then a bill was filed in the infant's name for partition or sale, and ultimately the infant's share was sold and the proceeds were paid into Court to the credit of the partition suit. Then the solicitor applied to have it declared that he had a lien on the fund in Court for the costs incurred on the petition under the Declaration of Titles Act, of the partition suit and the suit he had instituted to have the lien on the funds recovered. It was argued on his behalf that the costs might have been recovered in an action at law against the infant on the strength of *In re Howarth* (4), and might be treated as necessaries: *Helps* v. *Clayton* (5). Sir Charles Hall, V. C., held that the Plaintiff was entitled to all the costs he had asked for and to have his lien declared. He held that inasmuch as those costs might in a circuitous manner be made to come out of the infant's estate, namely, if the solicitor had sued the next friend of the infant for those costs and recovered them, the next friend might have recovered them against the infant's estate, it was right and equitable to make the order.

In *Ex parte Tweed* (6), sec. 28 of the Solicitors Act of 1860 was held applicable to a solicitor who had acted for the executor in certain probate proceedings as to a charge for his costs in an action upon the property devised and bequeathed by the Will, as property "recovered and preserved" through his instrumentality, the bulk of the property being realty. Originally the probate of a Will did not affect the realty or those interested in it in any way. But the effect of 20 and 21 Vict., c. 77, secs. 61, 62, one of the learned Judges held, had done away with the distinction between personalty and realty, and the order was accordingly made. In this country it has been laid down by the Privy Council that there is no difference between real and personal property, *Narendra Nath Sarkar* v. *Kamalbasini* (7).

That an attorney has a lien for his costs on the funds recovered in suit has long been recognised in our Courts. In *Devkabai* v. *Jefferson* (8), Sargent, C. J. said, "It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vict., c. 127, by which that lien was very much extended. By that law the solicitor had a lien for his costs on any funds or sum of money recovered for, or which

(2) L. R. 13 Eq. 497 (1872).
(3) L. R. 17 Eq. 222 (1873).
(4) L. R. 8 Ch. App. 415 (1873).
(5) 17 C. B. N. S. 553 (1864).
(6) [1899] 2 Q. B. 167.
(7) I. L. R. 28 Cal. 563 at p. 573 (1896).
(8) I. L. R. 10 Bom. 248 (1886).

became payable to, his client in suit. The mere fact of the appointment of a Receiver in that case did not, according to him, bring it within the ordinary rule as to solicitor's lien. It was an administration suit and the learned Chief Justice held that the Trial Court could, if it thought fit, have allowed the next friend his costs out of the estate. It was not so ordered by the Trial Court, and that was also one of the grounds why the lien claimed in that case was not allowed.

In *Khetter Krista Mitter* v. *Kally Prosunno Ghosh* (9), the learned Judge said as follows :—" Whether the attorney's lien on the fund recovered in suit is the most appropriate mode of description, it is unnecessary to discuss, for the nature of the right is free from doubt. It is a claim on the part of the attorney to have secured to him his due reward out of the fruit of his labour, and for that purpose to call in aid the equitable interference of the Court." In this Court it has been held that such right extends to immoveable property. In fact in later English cases it has been held that it is not quite correct to say that the Solicitor's lien is a " Common law lien "—see the observation of Rigby, L. J., in *In re Wright's Trust* (10), and endorsed by the Lord Chief Justice on page 324. It is a lien which has been recognised by every branch of the High Court in England, and since there is no distinction in this country between personal and real property, we are not hampered by the distinction, which used to be made in England, when justice and equity are in favour of the right claimed. The broad principle underlying the recognition of the charge is that a solicitor ought to be secured the fruits of his labour, although, in the case of absence of contractual liability, the charge has sometimes been described as being in the nature of a salvage lien and in the case of absence of contractual capacity as arising out of the supply of necessaries.

In *Watkins* v. *Dhunnoo Baboo* (11), the solicitor instituted a suit to recover certain costs from the minor's estate. The infant, through his mother as next friend, had originally sued his uncle for an account and partition of the estate of his grandfather, and partition was directed, and the infant's share upon such partition was delivered to the Receiver of this Court. Then a suit was instituted against the infant and others challenging the infant's title. That suit was dismissed, but no costs could be recovered from the adverse party although attempts were made to execute the decree for costs. It was contended against the solicitor's claim that there was no contract by or on behalf of the infant who, under the Civil Procedure Code, had to act vicariously through other persons. The learned Judge held that the costs of a proper suit, or defence of a suit in which his property was involved, were recoverable from the infant's estate and that the attorney was entitled to succeed. Such costs were treated as being in the nature of necessaries for an infant.

In *Shama Charan Mal* v. *Chowdhry Debya Singh* (12), the learned Judges followed the above case, although they said that it was not necessary to discuss whether the principle, which underlay the decision in *Watkins* v. *Dhunnoo Baboo* (11) could be supported in its entirety.

In *Ispahani* v. *Chandi Charan Pal* (13), Harington, J., held that a solicitor's charge on property recovered, was a first charge.

(9) 2 C. W. N. 503 : s. c. I. L. R. 25 Cal. 887 (1898).
(10) [1901] 1 Ch 317, 321 (1900).
(11) I L. R. 7 Cal. 140 (1881).
(12) I. L. R. 21 Cal. 572 (1894).
(13) 9 C. W N. short notes p. 197 (1905).

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Branson v. *Appaswami* (14), has been cited as opposed to the ruling in *Watkins* v. *Dhunnoo Baboo* (11), but in that case the suit was repudiated by the minor on attaining majority, and it was held that *Watkins* v. *Dhunnoo Baboo* (11) had no application, inasmuch as the infant in that case had not repudiated, but was still an infant when the suit was instituted.

I quite agree with the contention that there cannot be a personal decree against the infant, but I hold, upon a consideration of the facts of this case and the law as it at present stands, that the attorney is entitled to have a charge declared on the properties for the amount claimed in this suit, and he is entitled to enforce same in this suit. There is evidence that he has not been able to realise the amount from the lady, but he has not proceeded in execution against her. She is a lady apparently without any property. I would have required the attorney to exhaust his remedies against the mother before allowing him to proceed against the infant, following the observation made in *Baile* v. *Baile* (2) that the attorney was bound to show the incapacity of the next friend to pay, or at least attempt to make her pay, those costs, before coming to assert the charge, if I felt that there was any reasonable chance of getting any relief from the mother. It seems to me that to ask him to take proceedings against the lady would be to throw the burden of additional costs upon the infant, which ought to be avoided. I am also specially inclined to make this order inasmuch as I understand from learned counsel, who appeared, instructed by the guardian *ad litem*, that he was at one stage prepared to pay the costs claimed in this suit if the charges made by him against the attorney of incurring costs unnecessarily, were shown to be unjust. Such charges have clearly been shown to have been altogether unjust and were improperly made. The attorney would be entitled to add his costs of this suit to his claim and enforce them against the infant's properties recovered in the original suit. I would have directed the guardian *ad litem* personally to pay the costs of this suit, if I felt there was any chance of recovering such costs from him. The infant should not be ordinarily burdened with such costs if they can be avoided. This case has not taken beyond a day's hearing and was necessary to institute to have the charge declared, and it does not seem to me unjust to make the order for costs as above.

Mr. K. C. Mukherjee, Solicitor, for the Plaintiff.

Messrs. Bonnerjee and *Bonnerjee*, Solicitors, for the Opposite Party.

S. M. B.

(2) L. R. 13 Eq 497 (1872).
(11) I. L. R. 7 Cal. 140 (1881)
(14) I. L. R. 17 Mad. 257 (1894).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1392 OF 1914.

MOOKERJEE, J. RICHARDSON, J. 1915, 27, July.	ABJAL MAJHI and others, Plaintiffs, Appellants, *v.* INTOO BEPARI and ors., Defendants, Respondents.

Civil Procedure Code (Act V of 1908), Or 41, r. 33—Scope and effect of, as to powers of Appellate Courts—Dismissing entire suit on Plaintiff's appeal when part of claim admitted by Defendant who prefers no appeal.

In a suit for arrears of rent the Plaintiff claimed rent at a particular rate. The Defendants admitted a lower rate and the Court of first instance decreed the suit at this admitted rate. The Plaintiff having appealed, the District Judge dismissed the

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entire suit although the Defendants did not prefer an appeal nor file any cross-objection.

Held—*That r. 33 of Or. 41 is very widely expressed but it should not be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of statutes like those which relate to limitation or payment of Court-fees.*

That ordinarily r. 33 should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the Appellant further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience.

That in the present case the lower Appellate Court allowed the Defendants in substance to evade the provisions of the Civil Procedure Code, the Limitation Act and the Court Fees Act; and even assuming that r. 33 is applicable to a case of this description the judicial discretion vested in the Court of Appeal below was not properly exercised.

This was an appeal preferred on the 1st June 1914 against the decree of P. E. Cammiade, Esq., District Judge of Zilla Backergunge, dated the 19th February 1914, affirming the decree of Babu Monindra Prosad Sinha, Officiating Additional Munsif at Barisal, dated 24th September 1913.

The facts of the case will appear from the judgment.

Babu Abinas Ch. Guha for the Appellants.

Babu Nakuleshwar Mukherjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiffs in a suit for arrears of rent. The Plaintiffs claimed rent at the rate of Rs. 31-6 a year. The Defendants admitted that rent was payable at the rate of Rs. 24 a year. The Court of first instance decreed the suit in part and allowed the claim at the rate of Rs. 24 a year. The Plaintiff appealed against this decree. The Defendants were satisfied with this decree and they did not prefer an appeal nor did they file a cross-objection as provided in the Code. But the District Judge, on the appeal by the Plaintiffs has dismissed the entire suit. The Plaintiffs have now appealed to this Court and have argued that the District Judge should not on their appeal have deprived them of the benefit of the decree of the Trial Court. In support of this contention reliance has been placed upon the cases of *Rangalal* v. *Jhandu* (1) and *Gangadhar Maradi* v. *Banobashi Padipur* (2). On behalf of the Defendants, Respondents, reliance has been placed upon r. 33 of Or. 41 of the Code which authorises the Appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. The Rule further lays down that this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents or parties, although such Respondents or parties may not have filed any appeal or objection.

This Rule is no doubt, very widely expressed; but clearly, it should not be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of statutes like those which

(1) I. L. R. 34 All. 32 (1911).

(1) I. L. R. 34 All. 32 (1911).
(2) 24 I. C. 208 (1914).

relate to limitation or payment of Court-fees. R. 22 of Or. 41 of the Code provides that any Respondent, who has not appealed from any part of the decree, may take cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month, from the date of service, on him or his pleader, of notice of the day fixed for hearing the appeal or within such further time as the Appellate Court may see fit to allow. Court-fee advalorem is also required to be paid on the memorandum of cross-objection, under Art. 1, Sch. I of the Court Fees Act, 1870. In the case before us, the Defendants not only did not prefer an appeal against the decree of the Trial Court in so far as it was adverse to them, they did not file a memorandum of cross-objection. When the District Judge permitted them to contend before him that the decree against them should be discharged on the appeal preferred by the Plaintiffs, he allowed them in substance to evade the provisions of the Civil Procedure Code, the Limitation Act and the Court Fees Act. We are of opinion that even if it be assumed that r. 33 is applicable to a case of this description the judicial discretion vested in the Court of Appeal below has not been properly exercised. We may also observe that, as was pointed by Jenkins, C. J., in *Gangadhar* v. *Banobashi* (2), ordinarily r. 33 should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the Appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. This is the rule recognised in England under Or. 58, r. 4, R. S. C., which furnished the basis for Or. 41, r. 33 of our Code [*Attorney-General* v. *Simpson* (3) and *Middlemas* v. *Wilson* (4)] though a different rule was possibly recognised in earlier decisions [*Rawlins* v. *Powel* (5) and *Watts* v. *Symes* (6)].

If the course followed by the Court of Appeal below were approved, a party would be penalised merely because he had preferred an appeal against the decree of the Court of first instance; we cannot persuade ourselves to hold that this could have been the intention of the Legislature.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below.

S. C. M. *Appeal allowed.*

(2) 24 I. C. 208 (1914).

(3) [1901] 2 Ch. 671.
(4) L. R. 10 Ch. App. 280 (1875).
(5) 1 P. Wms. 299 (1715).
(6) 1 D.G. M. and G. 240 (1851).

[CIVIL APPELLATE JURISDICTION]

Appeal from Original Decree No. 493 of 1908.

Mookerjee, J. N. R. Chatterjea, J. 1915, Heard, 9 and 10, August. Judgment, 10, August.	Akimunnessa Bibi and others, Defendant, Appellant, v. Bepin Behary Mitter, Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908), R. 33, Or. 41—Appellate Court, power of, to allow withdrawal of suit with liberty to bring fresh suit when part only of decree is appealed against.

The Plaintiff's suit for recovery of possession of land on declaration of title was decreed in part and the Defendants appealed against the decree in so far as it was against them. The Plaintiff did not prefer any cross-appeal or cross-objection.

Held—*That under r. 33 of Or. 41, it was competent to the High Court in appeal to*

AKIMUNNESSA BIBI *v.* BEPIN BEHARY MITTER.

allow the Plaintiff to withdraw from the entire suit with liberty to bring a fresh suit upon the same cause of action; but this power must be cautiously exercised and should not be permitted to be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes, e.g., *the Limitation Act and the Court Fees Act.*

In the circumstances of the case the High Court allowed the Plaintiff on terms as to costs to withdraw from the suit with liberty to bring, subject to the law of limitation, a fresh suit in respect of the same cause of action only with regard to the lands which had been decreed in his favour by the lower Court.

This was an appeal preferred on the 9th November 1908 against the decree of Babu Asutosh Banerjee, Subordinate Judge, 2nd Court of Barisal of Zilla Backergunj, dated the 8th June 1908.

The facts of the case will appear from the judgment.

Babus Dwarkanath Chakrabarty and *Romesh Chandra Sen* for the Appellants.

Babus Mohendra Nath Roy, Baranashi-basi Mookerjee and *Hari Charan Ganguly* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal in a suit for recovery of possession of land on declaration of title. The trial Court decreed the suit in part. The Defendants have appealed against the decree in so far as it is adverse to them. The Plaintiff has neither preferred a cross-appeal nor presented a memorandum of cross-objections. On a previous occasion, a Division Bench of this Court directed a local investigation. That investigation has now been made and the appeal is before us for final disposal. After the arguments on behalf of the Appellants had been concluded and while the arguments on behalf of the Respondent were in progress, an application was made to us on behalf of the Plaintiff for leave to withdraw from the suit with liberty to bring a fresh suit upon the same cause of action. This application has been opposed by the Appellants on two grounds, namely, *first*, that as a portion only of the subject-matter of the controversy is before us, it is not competent to this Court to allow the Plaintiff to withdraw from the entire suit with liberty to bring a fresh suit upon the same cause of action; and, *secondly*, that the circumstances do not justify the grant of the prayer of the Plaintiff.

As regards the first objection, it is plain that Rule 33 of Order XLI of the Code entitles us to allow the Plaintiff to withdraw from the entire suit with liberty to bring a fresh suit, although the Plaintiff has not preferred an appeal against the decision of the Court below. Rule 33 authorises the Appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require; and, the Rule explicitly states that this power may be exercised by the Court, notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents or parties, although such Respondents or parties may not have filed any appeal or objection. The latter part of the Rule is expressed in very comprehensive language and unquestionably covers a case of the description now before us. We are not unmindful that, as has been repeatedly observed, for instance, in the cases of *Rangalal* v. *Jhandu* (1), *Gangadhar*

(1) I. L. R. 34 All 82 (1911).

v. *Banabashi* (2), *Abjal Majhi* v. *Intoo Bepari* (3) and *Ananga Mohan* v. *Bijoy Chandra* (4), this power must be cautiously exercised and should not be permitted to be invoked in favour of a litigant so as to enable him to evade the provisions of other Statutes, *e.g.*, the Limitation Act and the Court Fees Act. To take one illustration: where the Plaintiff has obtained a decree for a portion of his claim and has appealed for relief in respect of the remainder, the Defendant, who has not taken the statutory steps to assail the decree in so far as it is adverse to him, should not be allowed to contend that not only the appeal by the Plaintiff, but the entire suit should be dismissed. It is not necessary, however, to apply that doctrine to the case before us. Here, the Plaintiff does not ask for a relief which has been denied to him by the Court below; he seeks merely to be relieved from the position of embarrassment in which he has been placed by the decree of the primary Court. In our opinion, Rule 33 of Or. XLI may justly be applied to the case before us. We are thus brought to a consideration of the second objection, namely, that, in the circumstances of the present case, the Plaintiff should not be allowed to withdraw from the entire suit with liberty reserved to institute a fresh suit upon the same cause of action. An examination of the protracted proceedings in this litigation has convinced us that the plaint is open to objection and that the mode of trial in the Court below has not been conducive to a correct determination of the real controversy between the parties. It was for this reason that this Court was constrained on the last occasion to direct a local investigation. The result of that investigation has been placed before us; we need only say that it is by no means satisfactory, and that if the appeal were heard on the merits to its final stage, possibly a further investigation might be necessary. In these circumstances, we feel no doubt that the Plaintiff should be allowed to withdraw from the suit. But we are not prepared to allow the Plaintiff liberty to bring a fresh suit in respect of the portion which has been decided against him by the Court below. The Defendants frankly conceded that they were anxious to retain the judgment in respect of the portion which has been decided in their favour not merely because they have got a favourable decree but also because they might use it against the Plaintiff in another litigation not now before us. We are of opinion that this is a consideration which would not weigh with us in determining whether the Plaintiff should be allowed to withdraw from the suit. We, therefore, allow the Plaintiff to withdraw from this suit with liberty to bring, subject, of course, to the law of limitation, a fresh suit in respect of the same cause of action, only with regard to the land which have been decreed in his favour by the Subordinate Judge; but such liberty is not reserved to him with respect to that portion of his claim which has been decided adversely to him. This order is made on the condition that the costs in the Court below, namely, Rs. 413-11 and the costs subsequent to the decree, namely, the costs of the local investigation, *i.e.*, Rs. 129 and the costs of this appeal are deposited by the Plaintiff in the Court below within three months from the date. The amount to be deposited will be specified in the order of this Court, to avoid possible dispute. If the amount is not deposited as directed, this appeal will

(2) 24 I. C. 208 (1914).

(3) S. A. No 1392 of 1914: Since reported 20 C. W. N. 542.

(4) S. A. No 596 of 1913.

stand decreed and the suit will stand dismissed with costs in both Courts. We assess the hearing fee in this Court at ten gold mohurs.

As one of the Respondents is an infant, we desire to add that in our opinion the application for withdrawal is undoubtedly for his benefit.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER No. 358 OF 1912.

HOLMWOOD, J. IMAM, J. 1916, 25, January.	MIAH UZIR ALI SARDAR, Plaintiff, Appellant, *v.* SAVAI BEHARA and ors., Defendants, Respondents.	

Civil Procedure Code (Act V of 1908) sec. 107, Or. 41, rr. 23 and 25—Appeal Court if may remand cases otherwise than under—Addition of parties on appeal and amendment of plaint, if justify remand

The Appellate Court has power to amend a plaint by adding new parties, and when this has been done, the added as well as the original Defendants have a right to file fresh written statements and to have the whole case re-opened. In such circumstances the Appellate Court has power to remand the case for trial independently of rr. 23 and 25 of Or. 41 of the Civil Procedure Code.

The general power, given by sec. 107 of the Code to the Appellate Court, of remanding cases for trial by the original Court, is not governed or limited by Or. 41 alone, but it is subject to such conditions and limitations as may be prescribed in the Rules and Orders, and the amendment of a plaint and addition of parties in a Court of Appeal is one of the conditions prescribed in the Rules and Orders.

NABIN CHANDRA TRIPATI *v.* PRAN KRISHNA DE (1) *referred to.*

This was an appeal from an order of G. S. Dutt, Esq., Additional District Judge of Jessore, dated the 15th April 1912, reversing an order of Babu Tarak Nath Dutta, Subordinate Judge at Jessore, dated the 31st May 1911.

The appeal arose out of a suit brought by the Plaintiff to eject the Defendants from certain plots of land. The Plaintiff who was originally a joint proprietor of the estate came into exclusive possession of it upon partition. The lands in suit, he alleged, had been granted to the predecessors-in-interest of the Defendants in service tenure for bearing *palkis*, that the Defendants had refused to perform the service when called upon by the Plaintiff and hence the suit.

The Defendants who did not deny that the grants were originally made in service-tenure as alleged by the Plaintiff averred that the proprietors subsequently resumed the tenure and resettled the land with the Defendants' predecessors as *jamai* land, that this *jamai* tenancy they had sold by *kobala* to a Mr. Macleod from whom they took back the land as under-raiyats. They alleged they had transferable right in the *jama* and held as under-raiyats on a valid title.

The Subordinate Judge decreed the suit in favour of the Plaintiff holding that the Defendants had failed to prove resumption and resettlement.

On appeal it was contended *inter alia* that the Subordinate Judge had erroneously rejected important documentary evidence which would establish resumption and that he was also wrong in refusing to make Mr. Macleod and the Plaintiff's co-sharers. Gobardhun and Juta, parties, so that the matters in dispute might be finally deter-

(1) I. L. R. 41 Cal. 108 (1913).

mined in the presence of all parties concerned.

The District Judge held that the Subordinate Judge was wrong in holding that the documents were not presented in time and in rejecting them on that ground and was further of opinion that the three persons mentioned above should be added as parties. In this view, he remanded the suit for trial by the Subordinate Judge after admitting the excluded documents and after adding the said three persons as parties. The Plaintiff preferred this second appeal.

Babus Mohendra Nath Roy and *Amarendra Nath Bose* for the Appellant.

Mr. H. D. Bose, *Babus Siva Prasanna Bhattacharjee* and *Tarakeswar Pal Chaudhuri* for the Respondent.

The Judgment of the Court was as follows :—

This is appeal from an order remanding a case in appeal. The plaint was filed so long ago as the 13th May 1910. The judgment of the Subordinate Judge in the Court of first instance is dated the 31st May 1911 and the judgment now under appeal before us is dated the 15th April 1912, we are now at the end of January 1916. It is in our opinion very lamentable that this matter should be still undecided, more specially as, for the reasons which we are about to give, there does not appear to have been any substance in the appeal.

It is contended firstly that inasmuch as the Court of first instance did not decide the case upon a preliminary point the order of remand ought to have been made under Or. XII, r. 25, and that the Appellate Court should have kept the case on its own file. In this connection it is conceded that the irregularity cannot be given effect to unless the Appellant was prejudiced by the procedure adopted; and in order to establish that he was so prejudiced it is pointed out that two orders which are alleged to be erroneous in law were passed incidentally by the Lower Appellate Court. The first was that three documents were admitted which had been rejected by the first Court as out of time, and the second was that the Judge has directed the Plaintiff to add three persons as Defendants before proceeding with the case.

Now, curiously enough neither of these points has any substance in it. It is clearly found by the learned Judge in the Court of Appeal below that the documents were not out of time and his finding of fact entirely disposes of the question and shows that the Subordinate Judge very improperly rejected these papers on one excuse on the 25th April 1911 and on another and wholly different excuse on the 26th April when a second attempt was made to file them. We need not go into details which are fully set out in the judgment of the lower Appellate Court.

As regards the second point we do not think that a somewhat confused sentence in the penultimate paragraph of the judgment was intended to mean that the burden of adding these Defendants should be thrown upon the Plaintiff. In another passage in the judgment the Judge clearly directed that they should be added and the case should proceed. We are clearly of opinion that Mr. Macleod was a necessary party. It is contended before us that the alleged landlord set up by the persons whom the Plaintiff seeks to eject need not be made a party to the suit, and certain judgments of the Judicial Committee are relied upon in which it is held that it is not necessary for the Plaintiff in a suit for ejectment to make any one a party who is not in possession merely be-

cause the Defendant sets him up as his landlord. But these cases can easily be distinguished from the present case where it is found as a fact that there was a transfer of the tenancy right from the Defendants to Mr. Macleod and as a fact that Mr. Macleod was rightly or wrongly admitted to the Defendants' possession as tenants and that the Defendants are holding under him as sub-tenants by paying him rent. Under the circumstances it is clearly not only necessary but to the interest of the Plaintiff to get rid of Mr. Macleod.

As regards the other two persons Gobordhan and Jatu whom the Defendants put forward as their co-sharers the adding of co-sharers as parties when a retrial is necessary is a matter of discretion with the Court, and it is certainly to the interests of the Plaintiff as well as to the interest of every one else that there should be some finality in this litigation and that all the co-sharers should be added.

This brings us to a reconsideration of the very first objection that the remand was incompetent in the form in which it is made. With all respect for the decision of the learned Judges in the case of *Nabin Chandra Tripati* v. *Pran Krishna De* (1), it may be pointed out that that decision differs from several previous cases by which we are bound and as the learned Judges declined to refer the question to a Full Bench, because they were of opinion that it did not directly arise, the case being disposed of an another ground, it is not therefore an authority for the very general proposition that there is no other possible case of remand which is not included in Or. XLI. Now this very matter of amendment of a plaint in an appellate Court with necessary addition of parties is on the face of it a case which cannot possibly fall under Or. XLI, r. 23 or r. 25. It is not a decision on a preliminary point, therefore it may be said that the whole case cannot be remanded, but it is not a case in which certain issues can be framed and certain additional evidence can be taken under rule 25, for new parties having been added and the plaint having been amended the added Defendants as well as the original Defendants have a right to file fresh written statements and to have the whole case reopened. It seems to have been overlooked that in the new Code of Civil Procedure the legistature has given this power of amendment to the Court of appeal; and it is a necessary outcome of that power that the Court must have the power of remanding the whole case when an amendment of plaint is granted in appeal and when parties are added. There is a general provision in sec. 107, C. C. P., for a remand. The consideration which we have just pointed out must lead to the conclusion that that section is not governed or limited by Or. XLI alone, but it is subject to such conditions and limitations as may be prescribed in the Rules and Orders; and the amendment of a plaint and addition of parties in a Court of Appeal is one of the conditions prescribed in the Rules and Orders. Sec. 107, therefore, is just as much subject to that condition as it is to the conditions laid down in Or. XLI.

We therefore hold *firstly* that this remand was not improperly made, *secondly*, that if it had been irregularly made it did not prejudice anybody, *thirdly*, that the District Judge would have been grossly wanting in his duty had he not admitted those three documents and lastly that Mr. Macleod is a necessary party and that the Judge exercised a wise discretion in adding the alleged co-sharers Gobordhan and Jatu.

(1) I. L. R 41 Cal. 108 (1913).

MIAH UZIR ALI SARDAR *v.* SAVAI BEHARA.

The result is the appeal is dismissed with costs : three gold mohurs.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2724 OF 1912.

MOOKERJEE, J. NEWBOULD, J. 1915, Heard, 26 and 29, March. Judgment, 29, March.	DINA NATH NAG and ors., Defendants, Appellants, *v.* SASI MOHON DEY TARAFDAR, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885, sec 182—Homestead land, if means land capable of being used but not actually used as homestead—Homestead land if must be held by raiyat of same village and under same landlord—Agricultural purpose, storage of corn if

There is nothing in the language of sec. 182 of the Bengal Tenancy Act to justify its restriction to cases where the homestead and the holding are situated in one village and are held under one landlord.

The section is not applicable where it is established that the land is not used by the raiyat as his homestead, and it is not sufficient for the raiyat to show that the character of the land is such as would justify its use as a homestead.

The provisions of the Bengal Tenancy Act are applicable to all lands used for agricultural purposes and are not restricted to such lands alone as are actually under cultivation.

Land taken with a view to gather and store thereon crops raised in adjacent lands actually cultivated by the raiyat is land used for agricultural purposes.

This was an appeal from a decision of Babu Annoda Kumar Sen, Subordinate Judge, Mymensingh, dated 9th July 1912, affirming that of Babu Umes Chandra Sen, Munsif, Tangail, dated 5th March 1912.

The facts of the case will appear from the judgment.

Babus Nil Madhab Bose and *Mukunda Nath Roy* for the Appellants.

Babu Ram Chandra Majumdar and *Dr. Naresh Chandra Sen Gupta* for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendants in an action in ejectment. The Plaintiff seeks to eject the Defendants on the ground that they were tenants of the disputed land and that their tenancy has been terminated by service of notice to quit under the provisions of the Transfer of Property Act. The Courts below have decreed the suit. Upon appeal to this Court, the Defendants have contended that they are raiyats and cannot be ejected except in conformity with the provisions of the Bengal Tenancy Act. This contention is based on a two-fold ground; namely, first, that the disputed land is the homestead of the Defendants, governed by the provisions of sec. 182 of the Bengal Tenancy Act; and secondly, that if the land is not their homestead, it is held by them as raiyats and for agricultural purposes. It may be premised here that the Defendants hold as raiyats parcels of land in the neighbourhood; those parcels, however, lie in a different village and are held by them under a landlord other than the Plaintiff. The previous history of the land in dispute has not been very successfully investigated. We are told that it was used as a homestead by one Ram Kanai Seal; but no information is available as to whether he was a raiyat or not. In 1904, he transferred the land to the Defendants.

Since then, the land has been used by the Defendants, not as their homestead, but only to gather and store the crops raised by them in the neighbouring fields. The Plaintiff-Respondent asserts that the holding of Ram Kanai Seal was non-transferable and that the Defendants did not acquire a valid title by their purchase; this may be assumed to be correct for the purpose of the present argument. The position consequently is that the Defendants are tenants in respect of the disputed land, as after their purchase rent was accepted from them by one of two joint landlords; and, the land in suit represents only a half share of the entire holding. What, then, is the status of the Defendants?

The first branch of their contention is that this is homestead land governed by the provisions of sec. 182 of the Bengal Tenancy Act. That section is in these terms: "When a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat." With regard to this section, it has been ruled by this Court in the cases of *Kripanath* v. *Sheikh Amir* (1), *Pratap Chandra* v. *Biswesswar Pramanick* (2). *Golam Mowla* v. *Abdul Sowar* (3) and *Harihar Chatterjee* v. *Dinu Bera* (4), that in order to make sec. 182 applicable, it is not essential that the homestead should be in the same village or be held under the same landlord as the holding of the raiyat. This position has not been controverted by the Respondent and has been made the foundation of an argument by the Appellants that even though the land is not used as a homestead by the raiyat, sec. 182 applies on proof that the land is capable of use as a homestead. The argument in substance is that we should read "any homestead" for the expression 'his homestead' and "any holding" for 'his holding' to justify the conclusions adopted in the cases mentioned. In our opinion, there is no foundation for this contention. To substitute for the expressions "his homestead" and "his holding," the phrases "any homestead" and "any holding," respectively, would obviously be to undertake legislation beyond the competence of a Court of Justice. The cases on which reliance has been placed were decided in view of the fact that there is nothing in the language of sec. 182 to justify its restriction to cases where the homestead and the holding are situated in one village and are held under one landlord. That this was the reasoning on which the principle in question was adopted is clear from the decision in *Harihar Chatterjee* v. *Dinu Bera* (4). We are further not prepared to accede to the contention of the Appellants that the expression "homestead" is used in sec. 182 as a generic term descriptive of a particular kind of land; on the other hand, we think, it denotes land on which a raiyat has his homestead, that is, land used by him for residential purposes. In our opinion, it is plain that sec. 182 is not applicable where it is established that the land is not used by the raiyat as his homestead; it is not sufficient to show that the character of the land is such as would justify its use as a homestead. The first branch of the contention of the Appellants entirely fails.

The second branch of the contention of

(1) 10 C. W. N. 944: s c. 4 C. L. J. 332 (1906).
(2) 9 C. W. N. 416 (1904).
(3) 18 C. L J. 255 (1893).
(4) 14 C. L. J. 170 (1911).

the Appellants is that the land in suit is held by them as raiyats. It is plain that the provisions of the Bengal Tenancy Act are applicable to all lands used for agricultural purposes, and are not restricted to such lands alone as are actually under cultivation. This view is supported by a long series of decision amongst which may be mentioned the cases of *Fitz-Patrick* v. *Wallace* (5), *Latifar Rahaman* v. *Forbes* (6) and *Hedayet Ali* v. *Kamalanund Singh* (7). In the case last mentioned, the question arose, whether land leased for grazing purposes was governed by the provisions of the Bengal Tenancy Act. It was pointed out that the Bengal Tenancy Act would be applicable, if it was found that the grazing was in relation to cultivation, which is the primary purpose for which a raiyat acquires a right to hold land. In the case before us, the Defendants are raiyats in respect of lands in the vicinity of the land in suit, which they have taken with a view to gather and store thereon the crops raised on the adjacent lands actually cultivated by them. This gathering and storage of crops raised by them is clearly a purpose ancillary to cultivation. Where, as here, land has been let out for a purpose like this, it is impossible to hold that the provisions of the Bengal Tenancy Act do not apply; the inference is thus irresistible that the Defendants are raiyats also in respect of the disputed land. On behalf of the Respondents, it has been strenuously contended, however, that there is nothing to indicate that the land was actually let out for this purpose. But we have the undeniable fact that ever since the Defendants came into occupation of this land, they have used it for this purpose without protest by their landlord. The landlord is, in fact, in an inextricable difficulty. If it is his case that the land was let out as a homestead to raiyats, though no doubt they are raiyats in respect of other lands in a different village under other landlords, the provisions of sec. 182 are applicable. If, on the other hand, the land was let out, as it apparently was, to raiyats for a purpose ancillary to cultivation, the grantees are raiyats in respect of the land. In either view, the Defendants are raiyats and can be ejected only in accordance with the provisions of the Bengal Tenancy Act. The Plaintiff has not shown that he is entitled to eject them under the Bengal Tenancy Act. His case, on the other hand, throughout has been that the tenancy of the Defendants is governed by the provisions of the Transfer of Property Act which, in the view we take, are inapplicable as is plain from sec. 117.

The result is that this appeal is allowed and the suit dismissed with costs in all the Courts.

N. G. *Appeal allowed.*

(5) 11 W. R. 231 (1869).
(6) 14 C. W. N. 372 (1909).
(7) 17 C. L. J. 411 (1912).

[CIVIL REVISIONAL JURISDICTION]

RULE NO. 728 OF 1915.

D. CHATTERJEE, J.
BEACHCROFT, J.
1916,
4, February.

PROMOTHA NATH RAY CHOWDHURY and others, Defendants, Petitioners,
v.
DINAMONI CHOWDHRANI, Plaintiff, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 22, r. 10 and Or. 43, r. 1, cl. 1—Suit by Hindu widow—Adoption pending suit—Widow allowed to prosecute suit, though divested, on strength of ante adoption agreement—Order, if appealable.

Where during the pendency of a suit brought by a Hindu widow, the Defendant

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REPORTS (*see* Index).

The Advocate-General of Bengal.

We are glad to notice that the vacancy in the Office of the Advocate-General of Bengal about which we complained in our last issue has been filled by the appointment of Sir S. P. Sinha to take charge of the office temporarily. We believe that this course has been adopted, very likely, because the Government of India and the Government of Bengal have not yet been able to decide as to whether the Advocate-General of Bengal should continue to be the legal adviser of the Government of India. The salary of the Advocate-General was raised from Rs. 3,000 to Rs. 4,000 after Bengal was partitioned and the Advocate-General had to advise two provincial Governments instead of one owing to the territorial division. But it having been always one of the ordinary duties of the Advocate-General of Bengal to advise, when necessary, the Government of India, his ordinary salary covered this work. Now the difficulty of the situation is apparently this. Bihar and Orissa having been separated from Bengal, this additional remuneration of Rs. 1,000 must go. Further if the Government of India has to appoint a separate legal adviser, they very likely expect that being relieved of such duties the salary of the Advocate-General of Bengal should be reduced on this account.

But assuming that the salary of the Advocate-General were reduced, will it be possible for the Government of India to save enough for appointing an efficient legal adviser to the Government of India with such savings? The Law Member of the Executive Council of the Viceroy and Governor-General is in a sense the legal adviser proper to the Government of India. But his duties in this respect relate more particularly to legislation than to professional business. But we presume, that he has ordinarily to advise the Government of India with regard to cases in which the prerogative powers of the Crown with regard to reprieve and the like have to be exercised by the Viceroy. If the Government of India is bent on economy, it can only effect an economy by making over to the Law Member the duties of advising with regard to the legal affairs of the Government of India. With the money saved by the proposed curtailment of the salary of the Advocate-General of Bengal, at the most a legal Under-Secretary may be given to him for making ready for him cases for opinion. The present Law Member is very familiar with Indian Law and if he may be relieved of his other duties to a certain extent it would be possible to reduce the salary of the Advocate-General of Bengal without incurring additional expenditure but otherwise not. The other alternative would be for the Government of India to seek advice of the Provincial Advocate-Generals on payment of fees. But that would hardly be more economical.

The Administrator-General and the Official Assignee.

We note with pleasure that Mr. G. E. Gray has been appointed Administrator-General and Official Trustee for Bengal from the commencement of the official year. Mr. Gray was a very popular member of the Bar and in his capacity of Official Assignee he has also been very popular with [illegible] and the public. Mr. G. F. Fenton [illegible] Mr. Gray has

for many years enjoyed the good opinion of the Bar and the conferment of the appointment of the Official Assignee on him by the Hon'ble the Chief Justice has given general satisfaction to the Bar. His capacity for work and strong common sense will, we are sure, enable him to do the work of administration with which he has been entrusted with ability and to the satisfaction of all concerned. We have reason to believe that before long the remuneration of the Official Assignee, which is at present paid by a commission of 5 per cent. on the assets of insolvent-debtors which come into his hands, will be fixed by legislation to a monthly salary. This would no doubt be a desirable change from the public point of view. But the administration of the office should continue under the supervision of the High Court and the appointment as now should rest with the Hon'ble the Chief Justice of the High Court.

Guardian ad litem of minor Defendants.

From a correspondence which appears in another column, it appears that the practice of appointing officers of the Court guardians *ad litem* of minor Defendants when the proposed natural guardian does not accept the appointment, leads to increase of costs to the ultimate prejudice of the minors whose interest this practice is intended to serve. We think that the evil of which our correspondent complains exists and calls for early remedy. The writer suggests two. One is, that the Courts be vested with authority to dispense with the consent, (or what amounts to the same thing with the appearance) of the proposed guardian after instituting a local inquiry through the President of the Punchayet with a view to satisfy themselves that such a course will not be to the prejudice of the minors. We are bound to say that this course does not commend itself to us. The alternative scheme, *viz.*, of appointing a special officer to represent infants has much to commend it and we generally agree with the reasons the writer adduces in support of it.

RELIGIOUS TOLERATION AND SECULARISM.

In connection with the case of *Secular Society*, (1915) 2 Ch. 447, the Journal of the Society of Comparative Legislation makes some very interesting comments which we thoroughly endorse. In this case a gift to a Secular Society formed for guiding human conduct and human welfare not by reference to supernatural belief but by natural knowledge, was assailed as being subversive of religion and morality, but the Court of Appeal refused to invalidate the gift on such grounds. The doctrine of the Secular Society is certainly opposed to the doctrine of the *Vedas*, the Bible or the *Quoran* but the Indian readers would hardly be prepared to regard it as subversive of religion or morality. The doctrine is identical with the teachings of the *Sankhya* School of Hindu philosophy. *Kapila*, the founder of the Sankhya philosophy did not ignore, much less deny the truth of revealed religion of the *Vedas* but laid it down that the most approved line of human conduct in this world is to relieve misery and the most potent means of doing it is by pursuit of positive or natural knowledge. Kapila assigned a superior place to knowledge acquired by perception, observation, and experiment, co-ordinated by the laws of reasoning both deductive and inductive as the foundation of knowledge. Concerning the *Vedas* it said that it is *Sruti*, *i.e.*, something heard or transmitted to us by traditions and therefore as a means of knowledge it may be assigned a secondary place for the purposes of his enquiry. It would be a heresy to say that the author of Sankhya regarded *Sruti*, (*i.e.*, the *Vedas*) as mere hearsay evidence in the legal sense. On the contrary he was disposed to accept the *Sruti* as evidence of truth because he regarded the witnesses to revealed religion, as competent witnesses. His object was the acquisition of knowledge (which according to him should be *mathematically precise*—for that is the meaning of the expression *Sankhya*) by the study of nature and natural laws with a view to relieve distress or misery in this world. The great Buddha adopted this philosophy and made a religion of it. Budhism eventually became absorbed in Hinduism. So what has been called secularism in English legal terminology is even to-day the religion of nearly one-third or more of the human population in the world. Even in Europe he will be a bold man who would call the doctrines of Buddha as subversive of morality or religion.

Buddhism was never suppressed in India by pillory or burning at the stakes or other forms of persecution, but in reality it was superseded by subjecting the doctrines of *Sankhya* philosophy to higher flights of thought and more severe tests of logic by *Sankara*, the greatest thinker that the world has yet produced. He subjected natural phenomena to the closest

logical analysis and demonstrated to the world that the one immutable reality behind them all is *Spirit* and that all phenomena of nature observed by us are mere manifestations or *maya*. He thus established the unity of the so-called material world and of the mind in that *Spirit* and demonstrated that the ultimate goal of everything sentient or material is union with this Divine *Spirit*. Since then *Vedantism* has been the very backbone of all schools and shades of religious thought and the one fountain-head from which all religious teachers in India have drawn their inspiration. It brought into harmony secularism and spiritualism by showing that *truth* was but one, ever-persisting, immutable, unchanged and unchanging but in common with *Sankhya* doctrines taught that it could only be attained by pursuit of knowledge. So the most approved Hindu view is that we are all in quest of that truth, the Divine Spirit, and if our goal is the same, it matters little if our modes of enquiry are different, for religious toleration and liberty of thought have always been a cardinal doctrine of all shades of Hindu faith. The sentiments of St. Augustine which we quote below from our contemporary will appeal to every Indian as essentially a Hindu sentiment.

"*Gifts in Aid of Secularism*.—St. Augustine was once watching some children at play on the seashore making sand castles and channels to conduct the water into their little moats and ponds. "Is not this," he said to himself, "just what I am doing—trying to confine the great ocean of truth within the limits of dogmas and definitions?" It is this feeling—that truth is something larger and deeper than any expression which man can give it in creeds and formularies—which has created the modern spirit of religious toleration so strange to our ancestors and still deplored by many well-meaning people. The arguments and authorities for the old view were marshalled with great force and persistency by counsel in the recent case of *In re Bowman, Secular Society* v. *Bowman* (1915) 2 Ch. 447. There a testator gave all his residuary real and personal estate "upon trust for the Secular Society, Limited, of 2, Newcastle Street, Farrington Street, London." The Secular Society is a company registered under the Companies Acts as a company limited by guarantee, and its objects, as defined by its memorandum of association, were inter alia, "To promote in such ways as may from time to time be determined the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action." These objects were—it was urged—inconsistent with Christianity, and subversive of all religion and morality, and made the gift illegal and void on grounds of public policy. But the Court of Appeal refused to adopt this view. Lord Justice Pickford admitted, indeed, that the denial of religion, though not in terms an object of the Society, was involved in its memorandum as stated above, and that it was impossible to adopt such tenets without inferentially denying the Divine government of the world and the principles of religion. In old times such sentiments would undoubtedly have sent their adherents to the pillory or the stake; but the public policy of the seventeenth century is not the public policy of to-day, still less is it the public policy of the fifteenth century. To-day we recognise that truth is our highest quest, and that public policy is not served by persecuting or penalising those who honestly, although mistakenly, as some of us think, would propagate their own views."

IN WHAT LAND OCCUPANCY RIGHT MAY BE ACQUIRED?

(*Continued from page xcviii.*)

PROPRIETOR'S PRIVATE LAND.—The right of occupancy cannot ordinarily be acquired in land held by the proprietor of an estate or tenure-holder as his private land, known in Bengal as *khamar*, *nij* or *nij-jote*, and in Bihar as *ziraet*, *nij*, *sir* or *kamat*, and in Orissa as *majhas* and by other names, Act VIII of 1885, sec. 116.

DISTINCTION BETWEEN RAIYATI AND NON-RAIYATI LANDS.—There is a distinction long and deeply ingrained in the mind of the agricultural population of Bengal—the distinction between that portion of the land which, under whatever circumstances it was acquired or appropriated, and by whatever denomination it was known, whether as *sir*, *khamar* or *ziraet*, was recognised as being in a special and exclusive sense the *private property* of the Zemindar, as distinguished from all the rest of the cultivated or cultivable area, which may be called *raiyati* land, and in respect of which the Zemindar's rights were merely to receive a share of the produce or equivalent in money. (Selection from record of Government of Bengal, 52-53). [illegible] regard to the efforts made by landlords to [illegible] the country under

the existing law, to get into their own hands as large an amount of the *raiyati* land as possible and convert it into *khamar* land, it has been thought necessary to make it clear . . . that the existing stock of *khamar* lands cannot hereafter be increased . . . and that all land which is not *khamar* shall be deemed to be *raiyati* land and that all land shall be presumed to be *raiyati* land till the contrary is proved, *Ibid*, 189; See *Ajodhya* v. *Ram*, 13 C. W. N. 661; *Herbert* v. *Chatter*, 13 C. W. N. [illegible]. These lands were let out occasionally on rent in specie, but more generally at half the produce or even a smaller share. The letting, in fact, did not, according to ancient theory, create the relationship of landlord and tenant between the proprietor and cultivator, neither did it create in favour of the latter any interest in the land so let out. It was really cultivation by hired labour, a share of the produce being taken by the labourer as remuneration or wages, Sarada Charan Mitra's Land Law of Bengal, 321. The principle of the Rent Acts of 1859, 1869 and 1885 is that the proprietor is entitled to hold and cultivate such land by hired labour in any year he pleases. The mere occupation for a number of years by a raiyat does not make the land *raiyati* and deprive the landlord of the right of re-entry at the end of any agricultural year. The raiyat cannot acquire a right of occupancy or even the status of a non-occupancy raiyat simply by occupation and payment of rent, as he may with respect to ordinary *raiyati* lands, *Ibid*, 322-323; Act VIII of 1885, sec. 116. But notwithstanding that a piece of land was originally the private land of the proprietor, he may by his conduct, waive his right to hold it as *non-raiyati* and make it *raiyati*, *Ibid*, 323. The Rent Acts provide that if any such land has been held under a lease for a term of years or from year to year, the raiyat does not acquire therein the right of occupancy, Act X of 1859, sec. 6; Act VIII B. C. 1869; Act VIII of 1885, sec. 116. See also *Bhugwan* v. *Jugmohan*, 20 W. R. 308; *Ashraf* v. *Ram*, 23 W. R. 288; *Damodar* v. *Dalgliesh*, 13 C. L. J. 512 P. C. But if such land be let out to a raiyat but not for a term of years or from year to year, it is impressed with the character of ordinary *raiyati* land and occupancy rights could be acquired in it by twelve years' continuous possession, *Gourharee* v. *Biharee*, 12 W. R. 278; 3 B. L. R. App. 138. See also *Rafiuddin* v. *Lewar*, 17 C. L. J. 585. The acquisition of occupancy rights by a tenant in an alleged *kamat* or *nirat* land cannot be prevented, unless the landlord proves that when the holding was first created, it was held under a lease for a term or from year to year. If it was not so initially let out, the execution of a *kabuliyat* for a term by the tenant during the continuance of the tenancy does not affect his status or bar the application of the provisions of Chap. V, *Masudan* v. *Gudar*, 1 C. L. J. 456. A tenant of *kamat* land does not acquire a right of occupancy by holding it even after the expiry of his lease, *Kalihar* v. *Rupan*, 12 C. W. N. 439. Unless the proprietor takes the precaution indicated by the concluding words of sec. 116 of the Bengal Tenancy Act, that is, " when any such land is held under a lease for a term of years or under a lease from year to year " or in other words he lets it out for a term, he cannot prevent the accrual of the occupancy right in such land.

Tenure-holder's private lands.—The Bengal Tenancy Act provides for the private lands of the *proprietors* only, *i.e.*, of persons owning an estate or part of an estate, Act VIII of 1885, sec. 3 (2). The right to have *khamar* lands belongs only to proprietors within the meaning of the Act. Tenure-holders, such as *putnidars* or *ijardars*, have, as such, no such right, Rampini's *Bengal Tenancy Act*, 4th Ed., 403; Finucane and Ameer Ali's *Bengal Tenancy Act*, 1st Ed., 457. But it may be pointed out that the Rent Acts of 1859 and 1869 spoke of " proprietors of an estate or tenure " and they evidently meant tenure-holders who succeeded in obtaining leases of the entire villages including *raiyati* as well as *non-raiyati* lands, *e.g.*, *putnidar*, *ijardars*, *thiccadars*. The character of a piece of land should not change by the mere transfer by the proprietor of his right by way of a *putni* or other leases of similar nature. And we are not justified in holding that only persons who are " proprietors " within the meaning of the Bengal Tenancy Act are entitled to have private lands, Sarada Charan Mitra's *Land Law of Bengal*, 324. If therefore a tenure-holder has private lands the rules governing the accrual of occupancy right in such lands of the Zemindar govern and if he has not, or in other words such lands become, on the grant of the lease, *raiyati* lands, occupancy right will arise therein in a way similar to that by which such right arises in ordinary *raiyati* lands.

Chowkidari Chakran Lands.—Service tenures (*chakran*) are found in some parts of the country being a remnant of the old system under which public officers and the servants of

the village were paid by grants in land instead of by money salaries. Somewhat similar are the *ghatwali* tenures of Beerbhum and elsewhere, originally granted for keeping mountain passes against the Marhatta and other invaders, Field's Introduction to the Bengal Regulations 40-41. Regarding them it should be noted that a service tenure created for the *performance of services, private or personal to the Zemindar*, may be resumed by the Zemindar, when the services are no longer required or the grantee refuses to perform them, *Radha* v *Badhu*, I L. R. 22 Cal 938, *Bhimapayi* v *Ram*, I L R 22 Bom. 422, *Ansar* v. *Grey*, 22 C L J 403. In such a case, the holding of land for service, though the service may be called rent in the broad sense of the word, creates no right of occupancy or any other statutory right recognised by the law, *Hurro Gobind* v *Ramratno*, I L R 4 Cal 67. But when the grant is for *services of a public nature*, in other words, when lands are held upon a grant subject to a burden of service and not merely in lieu of wages, as long as the holders—the grantees—are able and willing to perform the services, the Zemindar has no right to put an end to the tenure, whether the services are required or not, *Venkata* v *Sobhandri*, 10 C W N 161 s c 3 C L J 1 P C Having regard to the language of sec 6 of Act X of 1859 it was held that a right of occupancy might be acquired even in the *chowkidari chakran* lands by tenants, who had cultivated or held such lands for twelve years, and this conclusion is not affected even if we assume that the tenants were originally merely tenants-at-will, *Ram* v *Ram*, I L. R 31 Cal 1021 referring to *Thacoorani Dassi's* case, B. L. R 202, 3 W R (Act X) 29; *Hyder* v *Bhoopendro*, 15 W R 231 But the judgment in that case was based on the law as to the acquisition of the right of occupancy as it stood under Act X of 1859, unc ntrolled in any way by any consideration of the incidents which are peculiar to the service tenures The Bengal Tenancy Act does not lay down any rule of law with respect to the acquisition of occupancy right in lands held under the service tenure, but it has expressly provided that nothing in it shall *affect any incident* of a service tenure, (Act VIII of 1885, sec. 181), though these incidents are nowhere specified. Under it therefore no right of occupancy can be acquired in lands held under the service tenure such as *chowkidari chakran* lands, *Mrittunjoy* v. *Kanailal*, 11 C. W. N. 46: s. c. 5 C. L. J. 53 "The main reason is," as pointed out by Doss, J, that such rights, if permitted, would have the effect of permanently intercepting very substantial portion of the usufruct of the land, the enjoyment of the whole of which, however, is, by the very constitution of the tenure, deemed essential for the subsistence of the holder of the office and for the efficient discharge of the duties incident thereto," *Babu* v. *Purna*, 10 C L J 602 The growth of such rights would, therefore, seem to be inconsistent with the nature of service tenures But custom or local usage might grow up in any local area as to the recognition of occupancy rights and such custom might be binding, *Mohesh* v *Pran*, 1 C L J 138 But the restriction on the growth of occupancy or non occupancy rights in *ghatwali* lands is for the benefit of the *ghatwal* When, therefore, the Zemindar unlawfully dispossesses the *ghatwal* and settles the land with a raiyat, the latter acquires non-occupancy and occupancy rights against his landlord The Zemindar's position is not improved if upon resumption of the *ghatwali* lands by Government, they are subsequently settled with them, *Babu* v *Purna*, 10 C L J 602 A "*raiyati*" interest can be acquired in *chakran* lands, which had been resumed by Government and transferred to the Zemindar, *Bipin* v *Tincowri*, 15 C W N 976 s c 13 C L J 271

LAND ACQUIRED OR CANTONMENT LAND—Lands acquired under the Land Acquisition Act, 1894, and the Cantonments Act, 1889, become the property of the Government or the local body or Railway Company for which they are acquired It often happens that such lands are temporarily not required by the Government, or the local body or the Railway Company And formerly if they were temporarily sublet to agricultural tenants occupancy rights might accrue and these had to be re-acquired again on payment of compensation when lands were again required for public purpose. This consideration deterred them from temporarily subletting such lands when this course might be followed with advantage. Notes on the clauses of the Bill of 1906 for amending Bengal Tenancy Act On this ground an amendment has been made in the law, the effect of which is to bar the acquisition of occupancy and even non-occupancy rights in such lands, Act I of 1907 B. C sec. 116.

LAND IN CALCUTTA [illegible] held by the Cal-

cutta High Court that occupancy rights might accrue in those areas which had been included within the town of Calcutta, subsequent to the passing of the Bengal Tenancy Act, 1885, *Biraj* v. *Gopeswar*, I. L. R. 27 Cal. 202. It was considered undesirable that the Act should have any application to the town of Calcutta as it is now constituted or as it may hereafter be constituted under any future extension or modification of its boundaries. Hence the law has been amended, See Explanation to sec. 1, Act VIII of 1885 added by Act I of 1907 B. C. But existing rights have been saved, sub-sec. (2) added to sec. 19 of Act VIII of 1885 by Act I of 1907 B. C.

(To be continued.)

RADHAROMON MOOKERJEE, M.A., B.L.

Correspondence.

REPRESENTATION OF MINORS.

TO THE EDITOR, "CALCUTTA WEEKLY NOTES."

Under the present Civil Procedure Code Or. 32, r. 4 (3), (4), *express* consent on the part of the person proposed as guardian *ad litem* of the minor Defendant, appears to be imperative, in default of which the Court has to appoint one of its own officers as guardian. This principle is further enforced by the terms of the authorised notice issued under Or. 32, r. 3. It has to be noted, however, that r. 131 A. Ch. I, p. 58, Vol. 1, H. C.'s Gen. Rules and Cir. Orders, appears to give the Court a discretionary power to dispense with express consent in certain circumstances. It runs to the effect ". . . . A Court cannot appoint a person to be a guardian *ad litem* of a minor Defendant unless it has ascertained definitely that he consents. The *practice would seem to be* to require the Plaintiff to declare this in the affidavit made by him under r. 3 (3), (*i.e.*, of Or. 32 of the Code); etc., etc." As the italics will show, the wording of the Circular Order is of a non-committal character and, I apprehend, advisedly so, but all the same it appears to be somewhat misleading. For the authorities reported in 15 C. L. J. p. 3; 16 C. L. J. p. 318, etc., lay down that in the absence of an actual consent by the proposed guardian, there can be no effective representation by him and the Court is bound to appoint one of its own officers as guardian of the minor, in default of which the entire proceedings in the suit, so far as the minor is concerned, will be treated as nullity. On general grounds also it does not seem to be advisable to encourage th making of a sworn declaration by the Plainti regarding the state of mind of a person in th opposite camp, for such declarations will ver soon sink into a matter of empty form, beside exposing the Plaintiff to the risk of prosecutio for false affidavit at the hands of an enemy.

So it follows that short of actual consent o the part of the person notified under Or. 32, r. 3 the Court has got to appoint one of its officer as guardian. But this is very expensive i suits of small value, for the officer will want t make a local inquiry to satisfy himself, whethe the suit should be defended or not. In th great majority of cases the inquiry brings n result, nor is it, likely that it should Besides, it not infrequently happens that th officer who was guardian in the original suit has been transferred at the execution, an then another officer has to be appointed in hi place, to the re-duplication of the same proce dure with all its attendant costs. In this wa the costs incurred on this head often exceed th claim itself, to the undoubted hardship of th Plaintiff who has to find the money immediate ly, but to the real detriment of the minor wh has ultimately to pay, and whose interests th measure is intended or supposed to serve.

A remedy seems to be urgently called for i these circumstances. It is respectfully sug gested that the Courts may be vested with th discretion to dispense with express consent o the part of the proposed guardian, at least i certain classes of suits. In doing so the Court may, over and above the service of the notic under Or. 32, r. 3, in the usual course, tak further precautions, such as addressing inquiric by post to the recipient of the notice, or an other persons that they think fit, including perhaps, the President Panchayet of the Unio in which the minor lives. As systematic at tempt is being made to organise these Union as real units of administration, the Presiden Panchayet may be made statutorily responsibl for furnishing information to the Civil Courts i these and other matters. The postage costs fo such correspondence will be nominal. Afte reasonably satisfying themselves in these ways the Courts may be allowed to appoint any on of the persons enumerated in Or. 32, r. 3 (4) according to the rule of precedence therein lai down, as guardian *ad litem* of the minor, even though his express consent be not forthcoming This will do no harm, for in the great majorit of cases nothing is practically gained by the

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ppointment of a Court officer as guardian *ad em.* If in view of the rulings, however, it s too much to expect any relaxation of the present provisions on the subject, another alternative course suggests itself. This is to appoint an officer on consolidated pay and travelling allowance to act as the official guardian *ad em* of minors at each suitable centre. The dditional cost may be recouped by levying a w scale of charges, fixed *ad valorem* or on any ther principle, on all plaints in which there e minor defendants. If the scale of charges e fixed wih judgment and discrimination, it ill bring real relief to the parties, and at the me time the receipts may be sufficient to make e office self-supporting. Even if there be deficit, it should not, in the interests of the dministration of justice, be grudged. Moreover, some further equivalent for the additional utlay that may be necessary, may be found by o-ordinating, as may be easily and very usefully done, with the new office, the duty of hecking the service of processes locally—a anch of work which is all but neglected owing o the generally overworked condition of the Jazirs.

"AREM."

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL FOR ENGLAND AND WALES. Before LORD CHIEF JUSTICE, SANKEY and LOW, JJ. *King v. Williams* alias *Embleton*, Appellant. 31st January 1916.

Appeal against sentence only—Court entitled to question validity of conviction—Crown Counsel expected to be instructed on whole case.

The Appellant Williams appealed against a sentence of four years' penal servitude passed against him on his being convicted of burglary at the Dorset Sessions.

The Appellant appeared in person.

Mr. Randolff Glen appeared for the Crown.

The LORD CHIEF JUSTICE on taking up the appeal observed that although the Appellant had appealed only against sentence, the Court thought it necessary to examine the validity of the conviction.

Mr. Glen for the Crown said that he had been instructed on the question of sentence only. The Lord Chief Justice said that when Counsel appeared in the Court of Criminal Appeal on appeals against sentence, the Court would assume that they were instructed upon all the facts of the case. It was necessary that they should be, so that they could inform the Court of all the circumstances leading to the imposition of the sentence.

The appeal was then adjourned for a week for the Crown Counsel to get instructions.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CHITTY and WALMSLEY, JJ. CRIMINAL REVISION CASE NO. 1620 OF 1915. JANGLI SINGH AND ORS., Petitioners *v.* THE KING-EMPEROR, Opposite Party. 21st January 1916.

Penal Code secs. 147 and 325/149—Separate sentences, illegal—Enhancement of sentence, when aggregate sentence not excessive.

This was a Rule granted against an order of Mr. N. K. Dutt, Sessions Judge of Munghyr, dated 25th October 1915, confirming in appeal the order of Babu Haripada Bhuttacharjee, Deputy Magistrate of Munghyr, dated 17th September 1915, convicting Petitioners under secs. 147 and 325/149, I. P. C., and sentencing some to rigorous imprisonment for one year and six months respectively, and others for nine months and three months respectively. They were further ordered to execute bonds to keep the peace for one year to the extent of Rs. 100 each with a surety for Rs. 100.

Their Lordships delivered the following Judgment :—

According to the rulings of this Court, the separate sentences passed on the Petitioners under secs. 147 and 325/149, I. P. C., should not have been passed. They, therefore, cannot be allowed to stand. It does not follow that the Petitioners are to get off more lightly because of that error in passing the sentences by the Courts below. We do not think that the aggregate sentences passed upon them under those sections were at all excessive. We, accordingly, acting under our powers conferred by sec. 439, Cr. P. C., direct that the separate sentences under sec. 325/149 be set aside. But we enhance the sentences under sec. 147, I. P. C., to make up for the deficiency; that is to say, on those Petitioners who have received separate

147.

sentences of one year and six months the sentences will be enhanced to eighteen months' rigorous imprisonment under sec. 147, I. P. C., and on those Petitioners who have received sentences of nine months and three months, the sentences under sec. 147, I. P. C., will be enhanced twelve months. The orders under sec. 106, Cr. P. C., will stand.

Mr. Caspersz and *Babu Harihar Prosad Sinha* for the Petitioners.

Mr. Sultan Ahmad for the Crown.

CIVIL APPELLATE JURISDICTION. Before D. CHATTERJEE and NEWBOULD, JJ. APPEAL FROM APPELLATE DECREE No. 1180 OF 1914. SRIMATI SUSILA BALA DEBI, Plaintiff, Appellant *v.* SRIMATI NITHARMANI DASI AND ORS., Defendants, Respondents. 12th August 1915.

Bengal Tenancy Act—Decree for rent accrued prior to sale of landlord's interest but obtained after sale—Rent decree or money decree—Transferability of occupancy-right.

The facts of the case material to this report are these :—

There is a certain tenancy of some 64 bighas odd which belongs to Kisori Lal Ghosh. Under Kisori Lal Ghosh there was a certain tenant by name Sarba Mangala Debi. Kisori Lal brought a suit for rent in 1906 against Sarba Mangala Debi for the rent due on her tenancy and obtained a decree in 1906. In execution of this decree the property was sold on the 5th December 1906 and was purchased at the execution sale by Susila Bala Debi, the present Plaintiff. It appeared that under Sarba Mangala Debi there was a certain *jote* of 10 bighas odd. The name of the tenant was Nitharmani Dasi the Defendant No. 1 in the present suit. Nitharmani Dasi on the 8th February 1901 mortgaged her interest to one Barada Sundari Debi the Defendant No. 2 in the present suit. After Sarba Mangala Debi had lost her interest in the land in suit, she brought a suit for rent against Defendant No. 1. This rent was due and had accrued prior to December 1906 the date of the Plaintiff's purchase. This suit was decreed and in December 1907 she executed the decree and sold the *jote* and it was purchased by Defendant No. 3 Golam Nabi Khan on the 3rd August 1909. On these facts the Plaintiff sued for *khas* possession of the lands in suit.

Both the Courts below found that the interest of the Defendant No. 1 is that of an occupancy raiyat and that the decree obtained by Sarba Mangala is a rent decree and dismissed the suit with costs.

Hence the Plaintiff has preferred this second appeal.

Babu Baidyanath Dutt (with him *Babu Tarakeshwar Pal Chowdhuri*) appeared for the Appellant and contended that the question whether the decree obtained by Sarba Mangala is a rent-decree or a money-decree has been concluded by the Privy Council decision of *Forbes* v. *Maharaj Bahadur Sing*, I. L. R. 41 Cal. 926 P. C. The decree is a money-decree and nothing passed to the Defendant No. 3 because the interest of Defendant No. 1 is that of an occupancy raiyat and is not transferable by custom in this part of the country.

Babu Kshitis Chandra Chakrabarti for Defendant No. 3, Respondent contended that the Privy Council case was clearly distinguishable. The suit in that case was brought for a declaration that the decree obtained by the landlord whose interest had been sold away was not a rent-decree and for an injunction that the sale could not be held under the provisions of the Bengal Tenancy Act upon the basis of that decree. But in the present case the decree was drawn up in conformity with the provisions of the Bengal Tenancy Act.

[CHATTERJEE, J.—It is a rent-decree in form but not in substance.]

My client is a stranger execution-purchaser. Sale has been rightly or wrongly held under the provisions of the Bengal Tenancy Act. See *Malkarjun* v. *Narahari*, 5 C. W. N. 10 P. C. The second point is that the question whether occupancy-right is transferable or not has not been gone into in the present case.

[CHATTERJEE, J.—Who is to raise this point?]

The Plaintiff ought to raise it.

Held, that the decree obtained by a landlord whose interest has passed away prior to the date of the decree is a money-decree and that the occupancy-right in this part of the country is not transferable.

Appeal decreed.

PROMOTHA NATH RAY *v.* DINAMONI CHOWDHRANI.

objected that by an adoption made since the institution of the suit, the Plaintiff had divested herself of the estate of her husband and so could no longer prosecute the suit, but the Court overruled the objection in the view that Plaintiff was entitled to prosecute the suit under an ante-*adoption agreement with the natural father of the adopted son :*

Held : *That the order was not one under r. 10 of Or. 22 of the Civil Procedure Code and was not appealable under Or. 43, r. 1, cl. 1.*

This was a Rule granted on the 23rd July 1915 against an order of Mr. C. Bartley, District Judge of Mymensingh, dated the 23rd May 1915 dismissing an appeal preferred against an order of Babu S. P. Bakshi, Subordinate Judge of that place, dated the 15th March 1915.

Plaintiff instituted Suit No. 18 of 1912 in the 3rd Subordinate Judge's Court, Mymensingh, for a certain share of some lands alleging that it appertained to her zemindari which she alleged she held in the rights of a Hindu widow by inheritance from her deceased husband. After the institution of the suit she adopted a minor son to her husband on the 3rd August 1914.

Thereupon the Defendants objected that she could not proceed with the suit as she was divested of her estate by adoption. On her behalf it was urged that she was entitled to possess the property by virtue of an *ante*-adoption agreement with the natural father of the adopted son and had the right to maintain and prosecute the suit. The Subordinate Judge after hearing both sides passed order, dated the 15th March 1915, to the effect that the suit was maintainable if the plaint was amended by adding the words "she now holds the estate by virtue of an agreement though there has been an adoption." The plaint was accordingly amended on the 26th March 1915.

The Petitioner appealed against that order but the District Judge dismissed the appeal holding that no appeal lay against that order; the Petitioner obtained the present Rule.

Mr. B. Chuckerbutty (with *Babu Jogesh Chandra Ray*, *Dr. Naresh Chandra Sen Gupta* and *Babu Surendra Mohan Ghose*) for the Petitioner.—Though the Petitioner was divested of her estate by adoption she still claimed the right to continue the suit on the basis of another title, *viz.*, under the deed of agreement with the father of the adopted son. Therefore the order of the Subordinate Judge on her application came under Or. 21, r. 10. Hence an appeal lay under Or. 43, r. 1, cl. 1. Under the deed she was only manager and could not prosecute the suit in her own name.

Sir S. P. Sinha (with *Babus Basanta Kumar Bose* and *Asita Ranjan Ghose*) for the Opposite Party.— As there was no application to be permitted to proceed with the suit the order did not come under Or. 21, r. 10. It is an enabling section. It contemplates a case where during the pendency of a suit an interest devolves on the person. There is no application by a person on whom an interest has devolved during the pendency of the case. Therefore the order does not come under Or. 21, r. 1, hence no appeal lay to the District Judge under Or. 43, r. 1, cl. 1.

THE JUDGMENT OF THE COURT was as follows :—

Or. 22, r. 10 of the Civil Procedure Code has application to cases in which during the pendency of a suit, the interest is assigned, created or devolves and an application is made for the leave of the Court for the continuance of the suit in

favour of or against a person in whose favour such an assignment, creation or devolution has operated. Against the order made by the Court on such application there is an appeal provided by Or. 43, r. 1, cl. (*c*). In this case the Plaintiff did not make any application for being allowed to continue the suit in consequence of any assignment, creation or devolution of interest in her favour: she contests the suit on the ground that there was no devolution of any interest but that the interest which she possessed had been maintained in consequence of a certain agreement with the father of the son she had adopted pending the suit.

We have nothing to do with the merits of the question that arises upon the adoption or agreement. All that we have to see in this case is whether the order was one under Or. 22, r. 10. We think it was not and therefore the appeal to the District Judge did not lie and this Rule is discharged with costs, hearing fee, five gold mohurs.

N. G. *Rule discharged.*

[CIVIL APPELLATE JURISDICTION.]

Appeal from Original Civil Jurisdiction.

No. 61 of 1915

Sanderson, C. J.
Woodroffe, J.
Mookerjee, J.

1916,

Heard,
31, January, 1 & 2, February.

Judgment,
2, February.

In Re Gobordhan Seal, an Insolvent: Sm. Lakhi Priya Dassi, Appellant,
v.
Sm. Rai Kessori Dassi and anr., Respondents.

Presidency Towns Insolvency Act (III of 1909), sec. 57—Transfer by insolvent prior to insolvency to wife—Benami transaction—Transfer by wife to another after husband's adjudication.

A husband transferred his share in his family dwelling-house to his wife without consideration on the 11th November 1911. On the 27th of February 1912 he was adjudicated insolvent and his wife on the 12th of October 1912 transferred the property which had been so conveyed to her to the Appellant.

Held *-That even assuming that the Appellant had purchased the property for valuable consideration and without notice of the adjudication of the insolvent, the transfer to the Appellant subsequent to adjudication was void under sec. 57 of the Presidency Towns Insolvency Act inasmuch as the transfer by the husband to the wife prior to his insolvency was found to be fictitious or* benami *and the consequence was that the property had vested in the Official Assignee prior to the transfer to the Appellant.*

Per Mookerjee, J. *-No title by estoppel accrued to the Appellant as against the Official Assignee.*

The Official Assignee to what extent representative of insolvent considered.

In re Slobodinsky (1) *and* In re Hart (2) *distinguished.*

On the 9th November 1911 one Gobordhan Seal transferred his 3rd share in his family dwelling-house which was his only substantial property in favour of his wife Surbosundary Dasi. On the 27th February 1912 Gobordhan Seal was adjudicated an insolvent on his own petition. Subsequently on the 12th October 1912, Surbosundary transferred the said property to Lukhi Priya Dassi the Appellant. An application was made by Rai Kessori Dassi the Respondent, who was the only substantial creditor of the insolvent Gobordhan Seal for a declaration that the said transfers were void and inoperative as against the Official Assignee.

(1) [1903] 2 K. B. 517, 524.
(2) [1912] 3 K. B. 6.

IN RE GOBORDHAN SEAL *v.* SM. RAI KESSORI DASSI.

Mr. Justice Chaudhuri held in the Court of first instance that the sale by the wife to the insolvent was a fictitious sale and also that the transfer by Surbosundary in favour of Lukhi Priya was a fictitious one and accordingly he held that both the transfers were void against the Official Assignee.

Against that order the present appeal was preferred by the Appellant.

Mr. Langford James (with him *Mr. S. K. Chakravarty*) for the Appellant. Under sec. 57 of the Insolvency Act which corresponds with sec. 49 of the English Act, this application ought to have been made by the Official Assignee. A creditor cannot apply. As regards the second conveyance, supposing a purchaser knows that there was a voluntary transfer but he does not know of the insolvency or he knows of the insolvency but he does not know that the transfer was voluntary, in either of these cases a transfer after insolvency is indistinguishable from a transfer before insolvency. "Void" in sec. 57 means voidable. *In re Slobodinsky* (1), *In re Hart* (2), *In re Vansittart* (18), *In re Brall* (19), *In re Carter and Kenderdine's Contract* (20), *Re National Provincial Bank of England* (27) and *In re Branson* (21).

Mr. B. K. Lahiri (with him *Mr. K. N. Majumdar*) for the Respondent Rai Kessori. The conveyance in favour of the wife is clearly fictitious. If that is so, the conveyance from the wife in favour of the Appellant after the date of the adjudication order cannot avail the Appellant, even though the transaction be absolutely *bonâ fide* and for valuable consideration. On reference to the Appellant's evidence, however, it is quite clear that even if not fictitious, the latter conveyance is an attempt to defeat and delay the creditor and will not be protected as being against the policy of the bankruptcy laws. The evidence shows that the Appellant had knowledge of the title. If she has means of knowledge, she must be affected by that knowledge. *Tomkins* v. *Saffery* (28). In this case the husband made a transfer of the property *benami* in the name of his wife. So that the real title to the property remained with the insolvent up to the date of the order of adjudication. Upon adjudication the property vested in the Official Assignee. Sec. 17 Insolvency Act. Therefore no protection is given to the transaction taking place after the order of adjudication. It will be allowing a person without any title to the property to deal with it. See *Exp. Rabbidge* (22) and *In re Brall* (19). See proviso to sec. 57 of the Insolvency Act. In the cases cited by Mr. James the transactions which received protection were all before the order of adjudication.

Hart's case (2) only extends the principle in *Carter's* case (20) and protects a purchaser for value from the donee under a voluntary settlement before the receiving order but after the committal of an act of bankruptcy but without notice of it. Sec. 49 of the English Act does not protect transactions which are not in the ordinary course of business but for the purpose of doing that which in law constitutes an act of bankruptcy. *Re Sharp Exp. Gundry* v. *Johnston* (29). No

(1) [1903] 2 K. B 517, 524.
(2) [1912] 3 K. B 6.
(18) [1893] 2 Q B. 377.
(19) [1893] 2 Q. B. 381.
(20) [1897] 1 Ch. 776.
(21) [1914] 3 K. B 1086.
(27) [1895] 1 Ch. 196 (1594).
(2) [1912] 3 K. B 6.
(19) [1893] 2 Q B. 381 at p. 384.
(20) [1897] 1 Ch 776.
(22) L. R. 8 Ch. D. 367 (1878).
(28) L. R. 3 A. C. 213 at pp. 226, 227, 231 (1877).
(29) 83 L. T. 416 (1900).

transaction which is contrary to the policy of the bankruptcy law will be protected. *In re Badham* (23).

No transfer by the insolvent is void *ab initio* but is void only if insolvency supervenes, *i.e.*, from the time the title of the trustee has accrued. It follows therefore that every equity which has been acquired before the beginning of the bankruptcy is to be respected.

The Judgment of the Court was as follows :—

Sanderson, C. J.—This was a petition by Sreemutty Rai Kessori Dassi that certain transfers should be set aside and should be held to be void as against the Official Assignee.

The Petitioner was the mother-in-law of the insolvent, and the transfers in question were, *first* of all, a conveyance by the insolvent to his wife which was dated the 9th of November 1911, and, *secondly*, a conveyance from the insolvent's wife dated the 12th of October 1812 to the Appellant who is the sister-in-law of the insolvent, she being the wife of the insolvent's brother.

Now, apparently the mother-in-law, the Petitioner, filed a suit against the insolvent in the Small Cause Court for Rs. 1,942 on the 7th of September 1911. The proceedings in that suit occupied a considerable time, as far as I understand, and the judgment was not in fact obtained until the 23rd of February 1912. On the 27th of February 1912, the insolvent against whom the judgment was obtained filed his petition, and he was adjudicated an insolvent on the same date. In the meantime the insolvent had, as I have already stated, on the 9th of November 1911, purported to convey his share in the property in question to his wife.

Now, the learned Judge who heard this petition, after hearing the evidence came to the conclusion that that conveyance was a fictitious one, to use his own words (at page 94, he says) "Taking all the evidence into consideration, I am of opinion that the sale by the Insolvent to the wife was a fictitious sale." I understand him to mean by that, that the transaction was intended to be nothing more than a blind, that the insolvent never intended to pass the property to his wife, that he intended to retain the property and through his wife to retain control over it, and in that sense it was a fictitious transaction. On the face of it, it was a conveyance to the wife, but in fact it was no conveyance at all.

On the evidence, I think the learned Judge was quite justified in coming to that conclusion. Therefore, the position was this: that on the 27th of February when immediately before the adjudication, the property in his share of the premises in question remained in him, because, as I have already said this so-called sale was entirely a fictitious transaction. The result was that the property vested in the Official Assignee as soon as the adjudication took place.

What happened afterwards is that on the 12th of October 1912, the insolvent's wife purported to sell the one-third share in the premises to the Appellant, the sister-in-law of the insolvent. Now, the learned Judge has held that that transaction also was a fictitious transaction. I am not prepared to go as far as that upon the evidence : . . . However, for the purpose of my judgment I will assume that it was not a fictitious transaction and that it was a *bonâ fide* purchase by the Appellant. But even assuming that conveyance to be a *bonâ fide* conveyance and assuming that the purchaser had no notice—I am only assuming that in her

(23) 10 Morrel 252 10 ; 69 L. T. 356 (1893).

favour—I am bound to say that I think there are facts which would give rise to very serious consideration as to whether the Appellant, the purchaser, who was the sister-in-law of the insolvent, did not know all about the circumstances under which the first transaction took place—I say even upon the above-mentioned assumption I still think that the conveyance of 12th October 1912 cannot be upheld as against the Official Assignee and for this reason: Inasmuch as the first transaction, namely, that of the 9th of November 1911, has been rightly held to be a fictitious transaction and nothing more than a fictitious transaction, the property vested in the Official Assignee. Sec. 57 of the Presidency Towns Insolvency Act provides:—

"Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency (*a*) any payment by the insolvent to any of his creditors; (*b*) any payment or delivery to the insolvent; (*c*) any transfer by the insolvent for valuable consideration; or (*d*) any contract or dealing by or with the insolvent for valuable consideration:

Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor."

Therefore, in order to make any of the above-mentioned transactions with the insolvent which takes place after the presentation of an Insolvency petition by or against the debtor, valid, two things are necessary: (1) The transaction must take place before the date of the order of adjudication, and (2) the person with whom the transaction takes place must have no notice of the petition.

Now, I will assume that the lady in question had no notice, but it is quite clear that the transaction in this case, namely, of the 12th of October 1912 took place after the order of adjudication: and, therefore, in my opinion, it cannot be held to be a valid conveyance as against the Official Assignee, because it must be taken in this case that the transaction of the 12th October 1912 was in effect a transaction between the insolvent himself and the Appellant.

Now, the cases which Mr. James has quoted do not seem to me to be really relevant to this question: provided that it is once recognized that the first transaction, namely, of the 9th of November 1911, was nothing more than a fictitious transaction, and the second transaction must be regarded as between the insolvent himself and the Appellant on the other.

The case upon which Mr. James has placed the greatest reliance is *In re Slobodinsky* (1), and the judgment of Mr. Justice Wright at page 524. The conveyance in that case was by Slobodinsky to a Company. Mr. Justice Wright in the first instance had to consider the effect of that conveyance, just as we have to consider the effect of the conveyance to the wife. The learned Judge in this case has held that the transaction was a fictitious transaction, and I agree with him. Now, what Mr. Justice Wright held in that case was that the conveyance to the Company was a fraudulent conveyance liable to be set aside on certain events happening; still, it was a conveyance by which it was intended by the debtor to pass the property, and a conveyance which would pass property to the Company until the

(1) [1903] 2 K. B. 517, 524.

conveyance was set aside. He says, "This having been a fraudulent conveyance or transfer of the debtor's property so far as he was concerned, how does the law stand? One case which the trustee might make might be that the Company was an entirely sham Company, that it was really the debtor himself, and that the conveyance to the Company ought not to stand inasmuch as it was in substance a coveyance to himself. I am not, however, prepared to go that length and to say that I think this was entirely a sham Company. It seems to me that Milinsky's business was a genuine one, and the *bonâ fide* transfer of his business to the Company and his presence on the board are elements that go some way to show that there was an independent Company. There are also some *bonâ fide* shareholders who hold some 665 shares. I think there was some prospect of the success of the Company, and that it was *not a mere fiction*."

If he had held that it was a mere fiction, I gather from his judgment that it would not be necessary for him to consider the other points which he did in that case. It has been held in the present case that the conveyance which purported to be made by the insolvent to his wife was a *mere fiction*, and therefore that distinguishes the present case from *Slobodinsky's* case (1) on which so much reliance has been placed.

Another case, *In re Hart*; *Ex parte Green* (2), that was cited raises a different question. The facts, broadly speaking, were these: A certain gentleman Mr. Hart, who was a Director of a Company transferred, as far as we know perfectly *bonâ fide*, some shares of the Company to his daughter Miss. Hart, on the 14th of October 1909. On the 13th of April 1910, his daughter sold these shares to Miss. Lomas, for good consideration, and Miss. Lomas had no notice of the act of bankruptcy committed by Mr. Hart. But in the meantime Mr. Hart had on the 31st of March 1910 committed an act of bankruptcy, and there was a receiving order on the 22nd April 1910.

I draw attention to that date because that date was not only after the voluntary setlement by Hart to his daughter, but it was after the sale by the daughter to the Appellant. There was a great distinction between that case and the present. In *Hart's case* (2) there was a voluntary settlement which passed the property or was intended to pass the property to his daughter, and the transaction which passed the property to the claimant Miss. Lomas was between Miss. Lomas on the one hand and Miss. Hart on the other. In the present case the transaction must be taken to have been between the claimant, Mr. James' client, on the one hand, and the insolvent on the other hand, because the conveyance of the 9th of November 1911 was nothing more than a fictitious transaction, the property remaining in the insolvent until the adjudication.

For these reasons, I do not think this case is covered by those two decisions. I think it is clear that inasmuch as the conveyance of the 12th of October 1912 was not made until after the adjudication of insolvency which took place on the 27th of February 1912, that transfer ought to be set aside as against the Official Assignee.

I have only one word to add and that is this: Mr. James says that it is very hard upon the purchaser: It may be; but on the other hand, one has to remember that this estate is in insolvency, and there are creditors, and the rights of the creditors have to be considered just as much as the

(1) [1903] 2 K. B. 517, 5. 4.
(2) [1912] 3 K B. 6.

rights of the purchaser of this particular property : and, it seems to me that if we were to hold the contrary to the above conclusion we might as well have no Insolvency laws at all, because all that would be necessary for the insolvent to do would be to imitate the conduct of the insolvent in this case, and he would then be able to defeat the claims of any creditor or creditors whom he wished to damage.

For these reasons, I think this appeal should be dismissed with costs.

WOODROFFE, J.—The conveyance by the insolvent to his wife was clearly a *benami*. It may be a question whether the judgment under appeal can be supported in so far as it holds that the sale to Srimati Lakhi Priya was fictitious in the sense of *benami*. There are grounds for thinking that it was an arrangement made in pursuance of the original *benami* with a view to defeat and delay the creditor, the Respondent. It is not necessary, however, to determine this question as the second conveyance which was really that of the insolvent having taken place after the adjudication cannot stand. It was sought to be effected after the title to the insolvent's property had vested in the Official Assignee. I am myself not disposed to think that the party who took under this conveyance was unaware either of the previous *benami* or of the insolvency, for it is to be observed that the parties are all related to one another and not strangers. There is, therefore, in my opinion, no hard case here as alleged. But in any case the conveyance is not protected having been made after the adjudication.

I agree therefore that the appeal should be dismissed with costs.

MOOKERJEE, J.—This is an appeal from a determination by Mr. Justice Chaudhuri that the title claimed by the Appellant cannot prevail as against the Official Assignee. The disputed property is the share of the insolvent in his dwelling-house. On the 9th November 1911 he executed a conveyance in favour of his wife in respect of this share. On the 12th October 1912, the wife executed a conveyance in respect of the same property to the present Appellant. In the interval, there had been dealings with the property by the wife who on the 16th May 1912 executed a mortgage, and on the 7th June following executed a deed of further charge thereon; these incumbrances were discharged on the 12th October 1912. The adjudication in insolvency was made on the 27th February 1912.

The case for the Appellant is that she acquired a good title to the property, because she acquired it in good faith and for consideration from the wife of the original owner, who had effectively divested himself of all interest therein before his adjudication as an insolvent. Mr. Justice Chaudhuri has found upon the evidence that the conveyance of the 9th November 1911 and the 12th October 1912 were both fictitious transactions. The correctness of the finding as to the true nature of the first of these deeds is, I think, unimpeachable. No consideration passed from the wife to the husband at the time when the conveyance was executed and registered. The deed was, besides, executed at a time when the transferor was in a state of considerable pecuniary embarrassment. Indeed, a suit had already been instituted against him on the 7th September 1911 by his mother-in-law in the Calcutta Small Cause Court for recovery of a large sum of money; she subsequently obtained a decree against him on the 25th February 1912, and now impeaches the title of the Appellant as a nominal transferee. As regards the conveyance of the 12th October 1912,

however, I am not prepared, upon the record as it stands, to adopt the conclusion of the Trial Judge. The evidence makes it plain that some consideration was paid by the purchaser to the vendor on the basis of this conveyance, and the money was apparently applied, partly in discharge of the debt due to the encumbrancer Norendra Krishna Mitra, and partly in payment to one Kali Kumar Pyne, who sold a house to the wife of the insolvent on the 14th October 1912. There is nothing to indicate that the transactions with Norendra Krishna Mitra and Kali Kumar Pyne were not perfectly genuine. The question consequently arises, in what way is the position of the Appellant affected by the fact that the lady who transferred the disputed property to her was the holder of a nominal conveyance from her husband.

Mr. Langford James has contended that the position of the wife under the nominal conveyance of the 9th November 1911 is analogous to that of a person who accepts a voluntary settlement under the law of England. In my opinion, this view cannot possibly be sustained. It is well-settled that when there is a fictitious transaction with regard to a property, no title passes, notwithstanding the execution and registration of the documents; the transaction may fittingly be described as essentially a mask of the real ownership. In this case, notwithstanding the execution of the conveyance by the insolvent in favour of his wife, he continued to be the owner of the property; he never intended to divest, and, consequently, never did, in fact or in law, divest himself of the ownership thereof. There is ample authority for the position that a *benamidar* is in no sense an owner of the property. For instance, the Judicial Committee observed in the case of *Soorjee Koonwar v. The Government* (3) that the real owner may sue the ostensible owner to establish his title and to recover possession. This view can be maintained only on the hypothesis that the title has never passed from the real owner under the conveyance executed by him. Conversely, it was held by the Judicial Committee in the case of *Ramanugra Narain* v. *Maha Sundar Koonwr* (4) that if the holder of the deed attempts to enforce his apparent title against the real owner, the latter may establish the real nature of the transaction and thus successfully defend himself against an unfounded claim. It has further been ruled by the Judicial Committee that the creditors of the real owner may seize the property in satisfaction of their claim against him on the assumption that he has never divested himself of his title thereto—[*Musadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Shoostry* (5) and *Abdool Hye* v. *Mir Mohamed Muzaffer Hossein* (6)]. Conversely, it has been ruled that if the creditors of the nominal owner attempt to seize the property as his the real owner is competent to intervene and stop the execution. [*Tara Soondaree Debee* v. *Oojul Monee Dossee* (7)]. The true position, thus, is that notwithstanding the execution of the conveyance of the 9th November 1911, the husband still continued to be in fact the owner of the property. What then was the legal effect of the adjudication order passed on the 27th February 1912? The property, by operation of law, vested in the Official Assignee. Consequently, when we turn to the conveyance of the 12th October 1912, executed by the wife in favour of the Appellant, the inference be-

(3) 14 M. I. A. 112 (1871).
(4) 12 B. L. R. 483 (1873).
(5 6 M. I. A. 27 (1854).
(6) L. R. 11 I. A. 10 (1883).

comes irresistible that she did not acquire any title, as she took her conveyance from a person who herself had no title whatsoever. It may be conceded, as repeatedly ruled by the Judicial Committee [*Ram Coomar Koondoo* v. *John* (8), *Mir Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (9) and *Luchmun Chunder* v. *Kalli Churn* (10)], that if the property had still continued with the husband, the Appellant might have established a good title by estoppel against him on proof that she was a *bonâ fide* purchaser for value without notice of his secret title. It is not suggested that there was anything in the conduct of the Official Assignee himself which would make the equitable doctrine of estoppel applicable against him; consequently, there is no room for application of the class of cases of the type of *Troughton* v. *Gitley* (11), *Re Rawbone's Trusts* (12), *Tucker* v. *Hernaman* (13), *Engelback* v. *Nixon* (14), *Wadling* v. *Oliphant* (15), *Ex parte Bolland* (16) and *Exp. Cooper* (17). Consequently, the only question we are called upon to consider is, whether the title by estoppel which might have been claimable against the owner by reason of his conduct, may, after his adjudication be claimed equally as against the Official Assignee by a person whose title has accrued after the adjudication order. In my opinion, the answer must be in the negative. If the contention of the Appellant were to prevail, the fundamental policy of the bankruptcy laws would be defeated. The policy is that as soon an adjudication order has been made, the entire estate of the insolvent should vest in the Official Assignee for the benefit of his creditors. In a limited sense, the Official Assignee may be deemed the representative of the insolvent; but he cannot, for all purposes, be regarded as his successor in interest; for the property is vested in him with a view to paralyse the hand of the insolvent who becomes by operation of law incompetent to deal with the estate to the detriment of his creditors. If the Appellant were to succeed in her contention, the result would follow that although the insolvent himself could not possibly convey a good title to her after the adjudication order, yet it was open to him, through the medium of his nominal transferee, to effectuate the same fraudulent purpose. It would be lamentable if the beneficent object of the bankruptcy laws were permitted to be circumvented by so transparent a device.

The contention of the Appellant is, I may add, in no way assisted by the cases discussed in the course of argument, namely, *In re Vansittart* (18), *In re Brall* (19), *In re Carter and Kenderdine's Contract* (20), *In re Slobodinsky* (1), *In re Hart* (2) and *In re Branson* (21). These decisions are distinguishable on two obvious grounds. In the first place, the persons who claimed protection there as against the trustee in bankruptcy derived their title from a person who had acquired a real title from the insolvent under a voluntary settlement. In the case before us, the person from whom the Appellant claims title was at no time, in law or in fact,

(8) 11 B. L. R. 46 (P. C.) (1872).
(9) L. R 22 I. A. 129 (1895)
(10) 19 W. R. 292 (1873).
(11) Ambler 629, 630 (1766).
(12) 3 K and J. 476; 112 R. R. 243 (1857).
(13) 13 DeG. M. & G. 395; 102 R. R 159 (1853).
(14) L. R. 10 C. P. 615 (1875).
(15) 1 Q. B. D. 145 (1875).
(16) 9 Ch. D. 312 (1878).
(17) 39 L. T. 260 (1878).
(1) [1908] 2 K. B. 517, 524.
(2) [1912] 3 K. B. 6.
(18) [1893] 2 Q. B. 377.
(19) [1893] 2 Q. B. 381.
(20) [1897] 1 Ch. 776.
(21) [1914] 3 K. B. 1056.

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the owner of the disputed property. In the second place, the title of the persons, who were afforded protection, had accrued before the receiving order was made. In the case before us, the title of the Appellant accrued after the adjudication order had been made, and was in essence a title derived from the insolvent himself.

Finally sec. 57 of the Presidency Towns Insolvency Act, to which reference has been made, does not avail the Appellant, in the absence of both the elements requisite to make that provision applicable. In the first place, the title of the Appellant was not acquired before the order of adjudication was made. In the second place, it is not shown that the title was acquired without notice. It is reasonably plain, in all the circumstances disclosed in the evidence, that the Appellant was aware of the circumstances of the insolvent and cannot be deemed a purchaser without notice; and there can be no question that unless she is a purchaser in good faith, she cannot be afforded protection in insolvency proceedings [*Exp. Rabbidge* (22), *In re Badham* (23), *Shears* v. *Goddard* (24), *In re Jukes* (25) and *In re Dunkley & Son* (26)].

On these grounds I hold that the order made by Mr. Justice Chaudhuri must be affirmed and this appeal dismissed with costs.

K. N. M. *Appeal dismissed.*

(22) L. R. 8 Ch. D. 367 (1878)
(23) 10 Morrel 252; 69 L. T 356 (893.
(24) [1896] 1 Q. B. 406.
(25) [1902] 2 K B 58.
(26) [1905] 2 K. B. 683.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 58 OF 1915.

SANDERSON, C. J. WOODROFFE, J. MOOKERJEE, J. 1916, 4, January.	A. K. A. A. K. GHUZNAVI, Defendant, Appellant, *v.* THE NATIONAL BANK OF INDIA LTD., Plaintiff, Respondent

The Indian Contract Act (IX of 1872), sec 139—Discharge of surety by act of creditor detrimental to surety—Banker, deposit with—Banker must allow specific direction of depositor even if he be indebted—Debtor, specific appropriation by, to be observed by creditor.

The Defendant's brother had an account at the Plaintiff Bank which being considerably over-drawn the Bank called for additional security and the Defendant gave a guarantee to the Bank agreeing to pay to them on a specified date to the extent of a specified amount all money then due to the Bank from his brother on current account or otherwise howsoever including all interest, charges and other expenses which the Bank might charge. After the date of payment mentioned in the agreement of guarantee and when there remained due to the Bank a large sum so guaranteed the Defendant's brother opened a separate account with the Bank by depositing a certain amount on condition that the Bank would allow him to draw this sum by cheques and not take it in payment of the amount due to them on the guaranteed over-draft account, but that any profits of the business carried on by him with the money deposited on the second account would be paid to the credit of the over-drawn account. The Bank did not inform the Defendant of the opening of this new account and certain sums were transferred from this account to the previous over-drawn account purporting to be

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profits as aforesaid. After this second account came to an end the Bank claimed from the Defendant payment of the balance on the over-drawn account and a copy of the account of the Defendant's brother was supplied to the Defendant showing the amount due to the Bank on account of principal and interest as also the second account opened by the Defendant's brother. The Defendant without disputing his liability assured payment of the money due from his brother.

Held—*That on the facts of the case the Defendant was not discharged from his liability to the Bank in consequence of the arrangement made by the Bank with his brother in opening the second account.*

That the Defendant was not entitled to have the account reopened and the Bank were entitled to interest after the date mentioned in the agreement of guarantee for payment, at the rate usual on the account but not at any higher rate.

Per SANDERSON, C. J.—*That in opening the second account the Bank did not act inconsistently with the right of the Defendant as surety within the meaning of sec. 139 of the Contract Act under which in order to discharge the surety it must be shown that not only has the creditor omitted to do some act which his duty to the surety required him to do but also that the eventual remedy of the surety himself has thereby been impaired, which was not shown to be the case here.*

That it was not within the power of the Bank to appropriate the amount in the second account to the previous over-drawn account inasmuch as the depositor deposited that amount on condition that he was allowed to draw against it.

That the rule in CLAYTON'S *case* (1) *applies only to the items in one current account and when there is no specific appropriation by the debtor; but in the present case there was a specific appropriation by the depositor when he opened the new account and there were in fact two accounts and not one and the rule in* CLAYTON'S *case* (1) *did not apply.*

That it was no duty of the Bank to communicate with the Defendant with reference to the opening of the new account which was not contrary to the nature of the Defendant's engagement but in accordance with the arrangement made by the Defendant with the Bank.

Per MOOKERJEE, J.—*That in the absence of special agreement a guarantor has no right to control the appropriation by Customer or Banker of moneys paid in subject to the qualification that the Banker is bound to deal with the accounts in the ordinary way of business. Any specific direction regarding the appropriation of a deposit must be observed by the Bank. In the present case the agreement between the Bank and the depositor made it impossible for the Bank to apply the deposit in reduction of the over-draft on the first account; consequently the fact that the deposit was not so applied did not justify the contention that the Bank were at fault and the surety must be deemed discharged; there was thus no room for the application of the rule in* CLAYTON'S *case* (1).

That the Bank did not fail in their duty to the Defendant when they carried on transactions with his brother under the second account without any intimation to him. The true rule is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted and that if there is any alteration which is not obviously either unsubstantial or for the benefit of the surety he is to be the sole Judge

(1) 1 Mer. 572 (1816).

(1) 1 Mer. 572 (1816).

whether he remains liable. This is substantially in accord with sec. 139 of the Indian Contract Act.

This was an appeal against a decree of Mr. Justice Chaudhuri, dated 11th June 1915, passed in the exercise of Original Civil Jurisdiction.

The facts of the case as also the argument at the Bar fully appear from the Judgments of the Court.

Messrs. Langford James and *N. Sirkar* for the Appellant.

Messrs. Avetoom and *Pankridge* for the Respondent.

The JUDGMENTS OF THE COURT were as follows :—

SANDERSON, C. J.—This was an action by the Bank for the recovery of Rs. 25,454-12-9 alleged to be due from the Defendant A. K. Ghuznavi upon a contract in writing, dated the 10th June 1913.

It appears that the Defendant's brother A. H. Ghuznavi, trading under the name of A. H. Ghuznavi & Co., as jute baler and shipper, had an account at the Bank : advances were made by the Bank to A. H. Ghuznavi & Co., against shipping documents in relation to jute in course of shipment : the form of over-draft being known here as "advances against shipping lien," the rate of interest charged being 1 per cent. over Bank of Bengal rate with a minimum of 5 per cent.

During the course of business it was discovered that certain Dock Receipts and Bills of Lading, which had been handed to the Bank by A. H. Ghuznavi & Co., were spurious, and consequently a considerable amount of the over-draft was unsecured.

Certain securities were pledged with the Bank by A. H. Ghuznavi & Co., but they were insufficient to cover the amount due and the Bank called for additional security.

The result was that after certain interviews between the Bank and the Defendant, the Defendant gave the Bank a letter which was to the following effect :—"In consideration of your having agreed at my request to extend the time for payment of the moneys over-drawn to Messrs. A. H. Ghuznavi & Co., upon their current account with you, I, the undersigned A. K. A. A. K. Ghuznavi, hereby agree with you as follows :—"I will pay to you on the 30th September 1913 to the extent of Rs. 300,000 all money then due to you from Messrs. A. H. Ghuznavi & Co., on current account or otherwise howsoever including all interest, charges and other expenses which you may charge against Messrs. A. H. Ghuznavi & Co.

No possession of any guarantee from any other person or of any other security shall determine, prejudice or lessen my liability hereunder."

Between the 10th June 1913 and 30th September 1913, the date specified for payment in the letter, memoranda shewing the state of the account were frequently sent to the Defendant, and according to the evidence of Mr. Stewart, who was at that time Sub-Manager of the Calcutta Branch of the Bank and whose evidence is uncontradicted, the Defendant was in the habit of calling on the Bank whenever he was in Calcutta during that period and seeing Mr. Stewart. He asked the Bank not to press his brother or to foreclose, and he wanted his brother to continue doing his business.

On the 10th June 1913 the over-draft was Rs. 5,41,653-2-0, and on the 30th September 1913 the over-draft including interest was Rs. 86,343-5-0. During the above-mentioned period the account had not been drawn upon by A. H. Ghuznavi & Co., but the over-draft had been reduced by payments by A. H. Ghuznavi & Co. and by crediting to the account the pro-

ceeds of sales of the securities lodged with the Bank.

Mr. Stewart did not see the Defendant after the 30th September 1913, and it appears that he learnt from the newspapers that the Defendant had gone to Mecca and that he did not return to Calcutta until February 1914.

On October 16th, 1913, A. H. Ghuznavi went to the Bank and wanted to open an account to enable him to continue his business. He had Rs. 20,000 which he wished to deposit provided the Bank would allow him to draw against this sum by cheques : that is to say, the Bank were not to take it in payment of the amount due to them.

Consequently a No. 2 account was opened by the Bank to enable A. H. Ghuznavi & Co. to continue his baling business, the Bank stipulating that any profits on such business should be paid to the credit of the over-drawn account, and agreeing to take A. H. Ghuznavi's word for the actual amount of profits.

Apparently A. H. Ghuznavi continued his business and No. 2 account was used, as far as it can be seen from the evidence, as a current operative account from the 16th October 1913 until the end of the year in the ordinary course of business.

Certain sums were transferred from the No. 2 account to No. 1 account purporting to be profits of the business according to the statement of A. H. Ghuznavi & Co,

Such payments reduced the balance on the over-drawn account.

As far as Mr. Stewart could say, the Defendant was not aware of this arrangement made between the Bank and A. H. Ghuznavi.

On December 31st, 1913, there was standing to the credit of A. H. Ghuznavi & Co., on the No. 2 account Rs. 40-13-2 only, and for all practical purposes, as far as this case is concerned, that account may be said to have come to an end shortly afterwards.

Subsequently the Bank claimed from the Defendant payment of the balance on the over-drawn No. 1 account and a copy of the account of A. H. Ghuznavi & Co. was at the request of the Defendant sent to him. This appears from the letter of the 23rd March 1914, so that an examination of the account in March 1914 must have shown the Defendant that a No. 2 account had been in existence in November and December 1913 and that considerable sums of money had been transferred from such account to the over-drawn account.

In spite of this the Defendant in his letters of April and June 1914 to the Bank did not dispute his liability, but on the contrary assured the Bank that he would see that what was owing from his brother should be fully paid.

The Defendant now alleges that his position was that of a surety and that in consequence of the arrangement made by the Bank with A. H. Ghuznavi & Co., in October 1913 and their subsequent transactions with him, he, the Defendant, has been discharged from his liability to the Bank.

The points urged before this Court were that the matter was governed by sec. 139 of the Contract Act which runs as follows :—"If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

The first ground was that it was to be implied from the letter of 10th June 1913 and the way in which the Bank dealt with the over-drawn account that A. H.

Ghuznavi was to pay off his over-draft, and consequently the Bank were acting contrary to such implied agreement when they allowed A. H. Ghuznavi to use the Rs. 20,000 for opening the No. 2 account and to draw against it instead of applying it for the payment of over-draft on the No. 1 account, and that consequently the Bank had done an act inconsistent with the rights of the surety within the meaning of sec. 139 of the Contract Act.

In my judgment that argument will not assist the Defendant.

The answer to it is that it was not within the power of the Bank to appropriate that sum to the over-drawn account: A. H. Ghuznavi, as I read the evidence, would only deposit the sum on the condition that the No. 2 account was opened and he was allowed to draw against it for the purpose of continuing his business, and the Bank, if they took that money at all, could only take it on that condition, and could not appropriate it to the over-draft on the No. 1 account.

It was further argued, though not very strenuously by learned Counsel for the Defendant that the two accounts should be treated as one account and that if that course were adopted, and inasmuch as some Rs. 60,000 had been paid into the said account in October 1913, the over-draft now sued for would have been wiped off by such payments, reliance being placed upon the rule in *Clayton's* case (1).

The answer to that argument is, that the rule in *Clayton's* case (1) applies only to the items in one current account and when there is no specific appropriation by the debtor. In this case there was in fact a specific appropriation by A. H. Ghuznavi when he insisted on a new account being opened with the Rs. 20,000 and his being allowed to draw against that sum: and there were in fact not one account, but two accounts.

The main ground, however, which was relied upon was that it was the duty of the Bank to the Defendant to inform him of the transaction between the Bank and the Defendant's brother in October 1913, and, inasmuch as they did not do so, the Defendant is released and reliance was placed upon the cases of *Pokak* v. *Everett* (2), *Holme* v. *Brunskill* (3) and *Rees* v. *Berrington* (4).

In my judgment in this case there was no duty to communicate with the Defendant with reference to the opening of the No. 2 account in October. In my opinion this was not contrary to the nature of the Defendant's engagement, to use the words of Lord Loughborough: On the contrary I think it is clear from the evidence that it was in accordance with the arrangement made by the Defendant with the Bank: In his interviews during the period between June and September 1913 he had expressed his wish that his brother should be allowed to continue his business, obviously in the hope that by so doing A. H. Ghuznavi would be able to pay his debt to the Bank and that the Defendant would not be called upon in respect thereof.

I do not see how the Defendant's brother, having regard to the nature of his business, could continue his business without having a banking account upon which he could draw in the ordinary course of his business, and, when the Defendant intimated that he wished his brother to be allowed to continue his business, he must have contemplated some such arrangement as was in fact made by the Bank, and, therefore, it may be said that

(1) 1 Mer. 572 (1816).

(2) 1 Q B D 669 (1876)
(3) 3 Q. B. D. 495, 505 (1878).
(4) 2 Ves. Jun. 540; 3 R. R. 3 (1795).

he impliedly consented to such an arrangement being made.

It was argued by Mr. Langford James that having regard to the letter of 10th June 1913 and the way in which No. 1 account was treated by the Bank, that the "carrying on of business" contemplated by the Defendant was merely the realising of the securities held by the Bank and the receiving of payments from the debtor for the liquidation of his debt; but this to my mind is an unreasonable inference to draw from the uncontradicted evidence of Mr. Stewart, and it was evidently not so understood by the Bank.

This would be alone sufficient to decide the case on this point against the Defendant, but it must be remembered that under sec. 139 of the Contract Act of 1872 in order to discharge the surety it must be shown that not only has the creditor omitted to do some act which it is duty to the surety required him to do, but also that the eventual remedy of the surety himself has thereby been impaired.

Even if my judgment on the abovementioned matter is not correct, I do not think that it has been shewn in this case that the eventual remedy of the Defendant against his brother has been impaired, and, therefore, in my judgment this part of the defence fails and the learned Judge's judgment should be upheld.

The next point argued was that interest after the 30th September 1913 could not be recovered. Upon this point it is necessary to see how the matter stands upon the correspondence between the parties.

By the letter of 10th June 1913 the Defendant agreed to pay to the Bank "on the 30th September 1913 to the extent of Rs. 300,000 all money then due from A. H. Ghuznavi & Co., on current account or otherwise, including all interest, charges and other expenses which you may charge against A. H. Ghuznavi & Co." The rate charged upon the account was 1 per cent. over Bank of Bengal rate with a minimum of 5 per cent.

After September 30th correspondence passed, the Bank on one side asking the Defendant for payment and the Defendant asking for time.

On the 30th September 1913 the Manager of the Bank wrote as follows:—

"We beg to advise that after crediting the proceeds of £1,386 remittance from London of which we informed you privately yesterday, the account of Messrs. A. H. Ghuznavi & Co., after adding interest to date, is debit Rs. 86,343-5. In terms of your guarantee, dated 10th June 1913 we shall be glad to receive payment of this amount to-day."

On the 1st of October he wrote again reminding the Defendant of that fact and asking for payment.

On the 26th of February the Bank again wrote setting out the amount that was due and saying that Mr. A. H. Ghuznavi had apparently come to the end of his resources and they were unable to obtain payment from him, and then wrote saying "all the shares in our hands have been sold with the exception of 50 Dunbar Mill ordinary shares and 22 Goosery Mill ordinary shares which are practically worthless, and we must therefore ask you to pay us the amount due with interest to date in terms of your guarantee."

On the 5th of March the Bank again wrote asking for payment, saying, "As we have received no reply, we presume you have not received our letter and beg to enclose a copy thereof. Nothing further has been paid to the account of Messrs. A. H. Ghuznavi & Co., and we shall therefore be glad if you will send us

a remittance in liquidation of the account in terms of your guarantee."

On the 21st the Bank again wrote saying, "The settlement of the account is a matter of the utmost importance and we must ask you to give it your immediate attention. Failing a prompt settlement, it will be necessary for us to place the matters in the hands of the Bank's Solicitors."

On the 23rd they wrote again saying—"As desired in your letter of the 22nd instant, we beg to hand you herewith a copy of the firm's account from June last to date showing a balance of Rs. 24,948-9-9 still due to us exclusive of interest from 1st January 1914." This to my mind clearly shows that the Bank were charging interest upon the account.

On the 4th of April the Defendant wrote a letter to which I have already referred. In the Paper Book it was dated the 4th of March: It was agreed that it was the 4th of April. This is a long letter which I do not intend to read all through. Towards the end of it he said "When I still assure you that I shall see that what is now owing to you from my brother is fully paid up. I trust you will not be wanting in that consideration which is so ordinarily extended. Please let me know whether the different shares belonging to my brother, which you hold, have now all been sold up and credited to the account."

I think that correspondence, the Bank, on the one hand, showing by their letters and by the copies of the accounts which they sent that they were charging interest upon the account and the Defendant taking no objection to it, amounted, in my opinion, to an agreement to pay what was then owing in consideration of time being given by the Bank.

On the 15th of April, there was a further letter sent by the Bank which is significant, because at the bottom of that letter they set out the amount of the debit—it is at page 37 of the Paper Book—as Rs. 24,948-9-9 and interest up to the 20th of April making the total Rs. 25,561-1-9. That to my mind, clearly set out that interest was being claimed by the Bank, and there was no objection raised by the Defendant in any shape or form.

Then on the 7th of June the Defendant writes again a letter in which he points out that it will be much better for the Bank to allow his brother further time. He says, "In the first place the recovery of your balance by means of a suit will take four times more time than is actually necessary to recover it in a friendly way by showing some little further consideration. In the second place my brother tells me that after receiving my letter he has begun making some payments to you and has promised to make weekly payments. The whole thing really depends on his being able to proceed with his business which he hopes to do by the 15th of July as arrangements are almost complete and he will be able to make you substantial payments. At any rate you could wait till August to see whether his expectations turn out to be correct, if in the meantime he goes on making you some payments. I would, therefore, again ask you to be so kind as to wait till then and also to instruct your Solicitors accordingly."

The Defendant in my judgment must have known that the interest on the overdraft was running on, even if it had not been expressly drawn to his attention as it was in the letters, *e.g.*, 23rd March 1914 and 15th April 1914, and when he asked for forbearance and time and gave his undertaking to see the Bank paid, in my opinion, he must be taken to have agreed

to pay the usual interest charged by the Bank until the balance was paid.

On the 16th July 1914 the Bank wrote a letter which is at page 10 of the paper book, and after claiming payment of the amount due, demanded interest at the rate of 2 per cent. over the Bank rate, and after that date there appears to have been no further correspondence. I do not think that interest can be charged at any but the rate which was usual on the account, *viz.*, 1 per cent. over Bengal Bank rate, and if it has been charged at 2 per cent. over the Bank rate, the account must be adjusted.

As regards the last point that the whole account should be reopened, I think that no sufficient ground has been shown by the Defendant for reopening the accounts, and I agree with the judgment of the learned Judge on this part of the case.

In my judgment the appeal should be dismissed with costs. The learned Counsel for the Bank having stated that he was prepared to take judgment for the amount due on the 16th July 1914, *viz.*, Rs. 25,178-2-9, the decree will be varied by substituting the above-mentioned sum for the amount of Rs. 25,151-12-9 mentioned in the decree.

WOODROFFE, J.– The agreement of guarantee of 10th June 1913 on which the Plaintiff Bank sues is admitted, but the Defendant's liability thereunder is said to have been discharged by dealings prejudicial to him between the creditor and debtor. The Defendant, *secondly*, denies his liability to pay interest after date of the agreement, and lastly in the event of these two issues being decided against him, then he asks that an account be taken of what is due by him. The guarantee was given by the Defendant for his brother's debts to the Plaintiff Bank which at its date amounted to over 5 lakhs of rupees because it was discovered that documents given by A. H. Ghuznavi, his brother, to the Bank were forged with the result that A. H. Ghuznavi's over-draft was largely unsecured. The Defendant Appellant in consideration of favourable treatment by the Bank towards his brother agreed to pay the Bank on the 30th September 1913 to the extent of 3 lakhs all money then due by his brother on current account including all interest, charges and other expenses. The manager, Mr. Stewart, says that the Appellant asked him not to press his brother and not to foreclose but to allow him to continue doing business. There is no question that the amount then due was Rs. 863,435 including interest. A demand for payment of this sum elicited no response from the Appellant. He was repeatedly written to, given information of the state of account and asked for payment, but sent no reply until several months had passed, when he at length asked for further time, assuring the Bank that they need not have any anxiety for he would see that the amount due by his brother was fully paid up. During this time, owing to several credits, the amount of the debt of A. H. Ghuznavi was reduced to Rs. 25,151-12-9, the amount claimed in the plaint. During this period also there took place the act which is the chief subject-matter of this appeal. The Appellant did not pay up the sum due and his brother on 16th October 1913 asked the Bank to open a separate account called account No. 2, to enable him to continue his business. He had then Rs. 20,000 which he wished to deposit provided only the Bank would allow him to withdraw it by cheques, that is to say, it was not to be taken in payment of the amount due on the former account called account No.

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1. The Bank agreed to open No. 2 account to be kept separate from No. 1 account—the original over-draft account. The Bank, however, took the money with the stipulation on its part that any profits made on account No. 2 should go to the credit of account No. 1. This was done and the debit balance reduced. It is admitted that the Bank did not advise the Appellant of this arrangement which the latter claims discharged him of all liability under the agreement.

It is to be noted on these facts that no complaint is made against the Bank in respect of any matter prior to the 30th September 1913. The Bank did nothing which increased or affected the liability of the surety to pay the sum mentioned on the date stated. This is, therefore, not a case where during the pendency of the agreement, and before it had matured, the creditor does something which increases the surety's liability or impairs his rights. Had the Bank sued the surety on the 1st October for recovery of the sum agreed to be paid on the preceding day, no question as to the latter's liability could have arisen. But the surety did not pay though repeatedly pressed to do so. The rights of the Bank having thus fully matured to the payment of both principal and interest, what, if any, were their duties to the guarantor? They were entitled to close the account against him and claim what was due on it. They were on the other hand bound to credit any subsequent payments made by the debtor for the purpose of clearing his debt. It is not denied that they did this, that is, the Bank credited the payments made to it for that purpose. It is not and could not be argued that if the debtor had money and refused to pay it to the Bank in discharge of his debt, that this would make the Bank liable. What is said is that the debtor has Rs. 20,000 which he might have paid towards his debt, but did not, refusing to make it over to the Bank except upon the express condition that the sum so received by them was not to be employed in reduction of the debt on account No. 1, but only the profits arising from account No. 2 opened with the sum mentioned. It is said that the Bank injured the guarantor's rights by acceding to this request and opening a second account. It is obvious that the first account was not thereby directly affected, for the second was a separate account. What is said is that if the debtor had paid the Rs. 20,000 to credit of the first account instead of opening a second account, the first account would have been reduced by the difference between that sum and the profits earned in the second account, *viz.*, some Rs. 18,000. But the debtor was not desirous of paying this sum of Rs. 20,000 in discharge of his debt, nor could the Bank compel him to do so. They might have refused to open this second account and the debtor might have taken his money elsewhere. This would not have benefited the guarantor in any way. On the contrary what they did was, so far as it went, for his benefit. For they stipulated that the sum earned in the second account should be credited to the discharge of the first account, and in this way the debt, and therefore the Appellants guarantor's liability, was actually reduced. To the extent of such reduction he has been benefited by what has been done. A suggestion is, however, made that if the Bank had communicated its transaction to the guarantor who went to Arabia, the latter would have done better for himself than merely getting the profits on account No. 2, for he might have insisted that his brother should not continue his business in this way but should pay the Rs. 20,000

towards payment of his debt under account No. 1, and that if he refused he could have enforced his wishes by legal means taken against his brother. This suggestion is, I think, without any reality. I do not believe that the Appellant would have done anything of the kind, and think that the contention is an after-thought with a view to defeat a claim which has already been delayed. The Defendant has not given his evidence to say what he would have done, or in what way he has been damnified, nor was any suggestion made on this head to Mr. Stewart in cross-examination. On the contrary the unrebutted evidence is that the Appellant wished that his brother should continue his business which he could not have done if all the available sums were appropriated by the Bank towards the discharge of the debt due on account No. 1. Apart from this, the objection, when examined, is that the Bank did not refuse to open account No. 2 and did not do what they could not have compelled the debtor to do, *viz.*, insist upon his paying the Rs. 20,000 to credit of account No. 1 and so further reduce the amount payable by the Appellant. In opening the new account the Bank in fact stipulated that the profits arising therefrom should go to the credit of the first account which was in fact reduced in this way. The objection now taken is put forward here in Court for the first time. On the 4th March 1914 the Appellant wrote to the Bank, "I shall assure you that I will see that what is now owing to you from my brother is fully paid up."

It is suggested that this meant that he would see that his brother paid and not that he would pay. This is not the way in which it was understood by the Bank who were thus asked for time and who on the 15th April 1914 wrote "We note your assurance that you will see that the amount due to us by your brother is fully paid—we wish, however, the matter settled now, etc." In my opinion upon the facts the surety is not discharged.

As regards interest, the Appellant's contention in substance is that though if he had done what he agreed to do, *viz.*, pay what was due for principal and interest on the 30th September, he would have had to pay interest, yet because he did not but was given time by the Bank he is not to pay interest at all as the sum due on the 30th September has been wiped out by appropriation of the Bank, and the agreement does not provide for interest subsequent thereto. In effect the Appellant asks us to penalise the Bank for its indulgence towards him. It would have been better if the Bank had expressly provided against this contingency—not impossibly it did not occur to them that the Appellant would take the kind of objections which have been argued before us. However this may be, that contention fails. The Bank was entitled to interest on the 30th September, and if necessary I would declare that the Appellant do pay such interest crediting subsequent payments to principal only. But this is not necessary as I agree with Chaudhuri, J., that the Appellant is liable for interest and if not he would be liable for the same amount as and by way of damages. The Bank cannot be reasonably made to suffer for the Appellant's default. The sixth and only ground of appeal touching interest does not raise the point argued. As regards the rate of interest I agree with the Chief Justice.

The Appellant further says that he would like to have particulars of the claim and that therefore an account should be taken.

The Bank has put forward their claim

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as a correct statement of account and the Defendant has not impugned it. He was informed from time to time of the state of the account and never at any time disputed its correctness. The present request for information appears to be dictated more by a desire to gain time than to know how the account is made up.

On June 7th, 1914, the Appellant wrote to the Bank's manager when asking for further time—"The recovery of your balance by means of a suit will take four times more time than is actually necessary to recover it in a friendly way." There is no reason why this should be so if the matter is not purposely delayed. In my opinion the Appellant has failed to establish that the judgment of Chaudhuri, J., is wrong and I would dismiss the appeal with costs.

Mookerjee, J.—This is an appeal by A. K. Ghuznavi, the Defendant, in an action for recovery of money due on a contract of guarantee. The brother of the Appellant, A. H. Ghuznavi, who carried on business in Calcutta as a jute baler and shipper under the name of A. H. Ghuznavi & Co., had a current account with the Plaintiff-Respondent, the National Bank of India. In 1913 the Bank discovered that securities which had been put in by A. H. Ghuznavi to cover advances made by them, were spurious and that a large over-draft was consequently unsecured. The Bank thereupon required him to supplement the securities he had already pledged. The Defendant, who wanted that his brother should continue the business, interviewed the Manager of the Bank, requested him not to foreclose and offered to hold himself responsible, should the Bank allow his brother to continue. The Bank accepted the offer and the terms of the agreement were set out in a document as follows :—

"In consideration of your having agreed, at my request to extend the time for payment of the money over-drawn by Messrs. A. H. Ghuznavi & Co., upon their current account with you, I, the undersigned Abdul Karim Abu Ahamed Khan Ghuznavi hereby agree with you as follows :—

I will pay to you on the 30th September 1913, to the extent of Rs. 3,00,000, all money then due to you from Messrs. A. H. Ghuznavi & Co., on current account or otherwise howsoever, including all interest, charges and other expenses which you may charge against Messrs. A. H. Ghuznavi & Co.

No possession of any guarantee from any other person or of any other security shall determine, prejudice or lessen my liability hereunder"

On the 10th June 1913, when this guarantee was given by the Defendant for the benefit of his brother, the over-draft by the latter on the Bank stood at Rs. 5,41,653-2. Thereafter, various payments were made by A. H. Ghuznavi from time to time, and sums were also realised by the Bank by the sale of securities held by them. There was practically no fresh over-draft, and on the 30th September 1913 the sum due, inclusive of interest, had been reduced to Rs. 86,313-5. It is plain that, under the agreement of guarantee, the Defendant did, on that date, become liable to the Bank to the extent of the sum just mentioned. Notwithstanding protracted negotiations, the Bank failed to recover anything from the Defendant, and on the 12th November 1914, they instituted this suit for recovery of Rs. 25,454-12-9. In claiming this sum the Bank have allowed credit for various payments made by A. H. Ghuznavi & Co., since the 30th September 1913, in reduction of the over-draft, but they have also

charged interest on the sum overdue. The Defendant resisted the claim substantially on the ground that the guarantee was discharged, *first*, because the Bank, without his consent, on the 16th October 1913, opened another account with his brother, who then deposited in cash a sum of Rs. 20,000, and *secondly*, because the Bank failed in their duty towards him as surety, as they did not intimate to him the transactions with his brother which commenced on the 16th October 1913, and went on apparently to the 3rd March 1914. These contentions have, in my opinion, been rightly overruled by Mr. Justice Chaudhuri.

In support of the first branch of the argument, reference has been made on behalf of the Appellant to the decision in *Re Sherry* (5); but that case, when carefully analysed, does not assist his contention. It is well-settled that, in the absence of special agreement, a guarantor has no right to control the appropriation, by customer or Banker of moneys paid in, subject to the qualification that the Banker is bound to deal with the accounts in the ordinary way of business, [*Kirby* v. *Marlborough* (6) and *Lysaght* v. *Walker* (7)]. Thus payments in may be appropriated to a pre-existing debt which is not covered by the security and of which the surety had no knowledge [*Williams* v. *Rawlinson* (8)]. On the termination of the guarantee, the account may be closed and a new one opened to which all payments in may be carried; though the Banker is not entitled where an account is guaranteed to a limited extent, to split that account during the continuance of that guarantee and attribute all payments in to the unsecured balance. [*Bechervaise* v. *Lewis* (9) and *Exp. Hanson* (10)]. It is perfectly intelligible that so long as an account is unbroken, a surety should not be prejudiced by any departure from the rule of appropriation of items in order of date, as enunciated in *Clayton's* case (1), unless his consent to such departure is expressed or can be implied from the character of his engagement. [*Cory Brothers* v. *Mecca* (11)]. But I cannot appreciate how, after the liability of the Defendant under the contract of guarantee had become fixed on the 30th September 1913, he can maintain that the guarantee was discharged merely because a new account was opened by the Bank with the principal debtor on the 16th October 1913; there is clearly no room for the application of the doctrine that it is contrary to ordinary business and good faith to open a new account during the currency of the guaranteed one and carry all payments into the new account;—a principle based on the self-evident position that the real rights of the surety cannot be prejudiced by the method of book-keeping, for as Lindley, M. R. said in *Mutton* v. *Peat* (12) it is immaterial "how the bankers may have manipulated their books or how many accounts they may have kept." If this is borne in mind, the observation of Cotton, L. J., in *Re Sherry* (5) as to the effect of an attempt by a Bank to make a new account before the guarantee terminates, whereon Mr. Langford James strongly relied, proves valueless for the purpose of his argument. [See also *City Discount Co.* v. *McLean* (13), *York Banking Co.* v.

(5) 25 Ch. D 692 (1884)
(6) 2 M. & S. 18 (1813).
(7) 5 Bligh N S. 1 (1831).
(8) 3 Bing. 71 (1825).
(1) 1 Mer. 572 (1816).
(5) 25 Ch. D. 692 (1884).
(9) L. R. 7 C. P 372 (1872).
(10) 18 Ves. 282, (1811).
(11) [1897] A. C. 286, 295.
(12) [1900] 2 Ch. 79, 85.
(13) L. R. 9 C. P. 692 (1874).

Bainbridge (14) and *Browning* v. *Baldwin* (15)]. We must further bear in mind the fundamental fact that A. H. Ghuznavi offered to open the second account with the Bank, only on condition that he would be permitted to draw upon it for the purposes of his business, in other words, that his deposit would not be applied in reduction of the over-draft on the first account. The position then was that if the Bank accepted the condition, they could not apply the deposit contrary to their engagement; if they refused to accept the deposit subject to the condition imposed, A. H. Ghuznavi would not have opened a second account. In either event, the surety could not by any possibility be prejudiced. It is an elementary rule that any specific direction regarding the appropriation of a deposit must be observed by the Bank. In the case before us, the agreement between the Bank and the depositor made it impossible for the Bank to apply the deposit in reduction of the over-draft on the first account; consequently, the fact that the deposit was not so applied, does not justify the contention that the Bank were at fault, and the surety must be deemed discharged; there was thus no room for the application of the rule in *Clayton's* case (1). As an illustration, reference may be made to *Wilson* v. *Dawson* (16); there a buyer of cattle, who was indebted to a Bank as principal upon a note that had matured, deposited an amount greater than the note, under special agreement that the deposit would be applied only in payment of cheques drawn by him in favour of sellers of cattle. This arrangement was made without the assent of the surety who had guaranteed the promissory note; yet it was ruled that the surety was not released by the failure of the Bank to apply the deposit in discharge of the note.

In support of the second branch of the argument of the Appellant, reliance has been placed upon *Rees* v. *Berrington* (4), *Polak* v. *Everett* (2) and *Holme* v. *Brunskill* (3), and particular stress has been laid upon a passage in the judgment of Loughborough, L. C., in the case first mentioned: "it is the clearest and most evident equity not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." On this the argument is sought to be founded that the Bank failed in their duty to the Appellant when they carried on transactions with his brother under the second account without any intimation to him. This contention is, I think, wholly unsubstantial. In the first place, the statement of the rule in *Rees* v. *Berrington* (4) must be taken subject to the qualification formulated by Brett, L. J., in *Holme* v. *Brunskill* (3). The true rule is, as Chitty, J., observes in *Bolton* v. *Sammon* (17), that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if there is any alteration, which is not obviously either unsubstantial or for the benefit of

(1) 1 Mer. 572 (1816).
(14) 43 L. T. 732 (1880).
(15) 40 L. T. 248 (1879).
(16) 52 Ind. 513.
(2) 1 Q. B. D. 669 (1876).
(3) 3 Q. B. D. 495 (505) (1878).
(4) 2 Ves. Jun. 540; 3 R. R. 8 (1795).
(17) [1891] 2 Ch. 48, 54.

the surety, he is to be the sole judge whether he will remain liable. This is substantially in accord with sec. 139 of the Indian Contract Act, which provides that if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired the surety is discharged. The rule thus enunciated fits in with the statement of Story (Equity Jurisprudence, sec. 325) adopted by the Court of Exchequer in *Watts* v. *Shuttleworth* (18). Reference may also be made to the rule enunciated in Sec. 133 of the Indian Contract Act which embodies a familiar principle relating to the discharge of a surety by variance in terms of the contract, recognised in a long line of decisions, amongst others, in *Bonar* v. *Macdonald* (19), *Ward* v. *National Bank of New Zealand* (20) and *Taylor* v. *Bank of New South Wales* (21). The judgment of the Judicial Committee delivered by Sir Robert Coolier in *Ward* v. *National Bank of New Zealand* (20), is specially instructive and approves of the decisions in *Polak* v. *Everett* (2) and *Holme* v. *Brunskill* (3). In the second place, it is clear to my mind that what the Bank did when they opened the second account with A. H. Ghuznavi was exactly in conformity with what had been the intention of the Appellant; his desire throughout was that the Bank should not foreclose, that his brother should carry on the business, and should have facilities for that purpose. This has been precisely the result of the opening of the second account, and the Appellant himself has been to some extent benefited thereby, as monies taken from the second account have, from time to time, been placed to the credit of the first account for the reduction of the over-draft therein. There is no reality in the contention that if the Appellant had been apprised in time of the transactions in the second account, he might have taken effective measures to protect himself against his brother. I feel no doubt that the Defendant would never have taken any action of the kind now suggested; this is plainly shown by his conduct after he had become aware of the transactions in the second account. He not only never protested but he actually took time repeatedly to satisfy the dues of the Bank. Assume that this does not affect his legal rights, but his conduct affords valuable evidence of his true intentions. In my opinion, the argument of the Appellant fails in both its branches; this is clearly not a case where we can say that the Bank had the means of satisfying the over-draft, either actually or potentially in their control or within their possession, and yet, to the prejudice of the surety, did not choose to avail themselves thereof; nor can we say that the Bank entered into fresh transactions with the debtor which constituted a variation of the original contract or in any way impaired the eventual remedy of the surety against the principal debtor. The claim of the Bank must consequently be sustained.

There remain two subordinate questions which require a brief examination: *first*, is the Appellant entitled to have the accounts opened; *secondly*, is he liable for interest after the 30th September 1913, and, if so, at what rate. I think the contention that the Appellant is entitled to an account, is, in the circumstances of

(2) 1 Q. B. D. 669 (1876)
(3) 3 Q. B. D. 495 (1878).
(18) 5 H. & N. 235; 120 R. R. 559 (1860); 7 H. & N. 353; 126 R. R. 471 (1861).
(19) 3 H. L. C. 226, 238 (1850).
(20) 8 A. C. 755, 763 (1883).
(21) 11 A. C. 596, 603 (1886).

this case, illusory. The Appellant was informed from time to time as to how the accounts stood as between the Bank and his brother; he never disputed the correctness of the accounts; in fact, he never even expressed a desire to test them. The suggestion of the Respondent that this question has now been raised with a view to gain time, is, I think, not quite groundless, and receives support from the fact that no serious attempt has been made to challenge any specific items in the account before us or even to indicate that there are any entries which require explanation or investigation. No ground, in my opinion, has been made out to justify an order for enquiry into the accounts. As regards the claim for interest, it is contended that there was no agreement to pay interest after the 30th September 1913, and that the elements necessary to support a claim under the Interest Act of 1839 have not been established. This may be conceded; but it is plain that the Bank can rightly claim interest by way of damages for the detention of the money due to them. Authority for this position may be found in the decision of the Judicial Committee in *Lala Chhajmal* v. *Brij Bhukhan* (22), and in a long line of cases reviewed in *Mahamaya* v. *Ram Khelawan* (23) and *Ramjiban* v. *Dhikhu* (24), which show that the strict rule of the English Common Law, as enunciated in *London C. & D. Ry. Co.* v. *South Eastern Ry. Co.* (25), has not been followed in this country. I think also that this is pre-eminently a case where interest should be allowed; the Defendant repeatedly obtained time from the Bank; his conduct may well be deemed to imply an undertaking to pay interest, for no commercial man would agree to an extension of time, unless he understood that the sum overdue would carry interest during the extended time. As regards the rate, I think, the Bank can reasonably claim only what was originally agreed upon between them and the debtor, and not the higher rate demanded from the Appellant in their letter of the 16th July 1914. No contract was made for payment of interest at the higher rate and none can be implied from the conduct of the parties. The decree, consequently, requires to be varied in this respect.

Subject to the variation indicated, the decree must be affirmed, and with costs, as the appeal has substantially failed.

Babu Hem Ch. Banerjee, Solicitor, for the Appellant.

Messrs. Sanderson & Co., Solicitors, for the Respondent.

S. C. M. *Appeal dismissed.*

(22) L. R. 22 I. A. 199 : s. c. I. L. R. 17 All. 511 (1895).
(23) 15 C. L. J. 684 (1911).
(24) 16 C. L. J. 270 (1912).
(25) [1893] A. C. 429.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3695 OF 1913.

D. CHATTERJEE, J.
BEACHCROFT, J.
1916,
Heard, 5, 6 and 7, January.
Judgment, 31, January.

ANANDA KUMAR BHATTACHARJI, Plaintiff, Appellant,
v.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Defendant, Respondent.

Land revenue, assessment with, of land claimed as* lakheraj—*Government's right to assess if may be barred by limitation—Reg. II (Bengal) of 1805, sec. 2, sub-sec. (2)—Assam Regulation I of 1886, sec. 28, provisos 2 and 4.

Where the right of Government to assess certain lands claimed as lakheraj *with land revenue appeared to have accrued either in 1793 or 1842, the case being governed by sub-sec. 2 of sec. 2 of (Bengal) Regulation II of 1805 until it was repealed, so far as*

ANANDA KUMAR BHATTACHARJI v. THE SECRY. OF STATE FOR INDIA IN COUNCIL.

regards Assam, by sec. 28 of Assam Regulation I of 1886 :

Held—*That at the end of 60 years, calculated from either of the above dates, Government's right to assess the land with land revenue was time-barred.*

Per D. CHATTERJEE, J.—*The proposition that the right to assess revenue is a Sovereign right and cannot be lost can have no application when there is a period of limitation provided by statute such as is contained in Reg. II of 1805.*

Per BEACHCROFT, J.—*Government can divest itself of the right to assess revenue and can make such regulations for the guidance of its officers as will have the same practical result as a renunciation of the right to assess revenue.*

Proviso 4 to sec. 28 of the Assam Regulation I of 1886 would seem intended to reproduce the rule of 60 years' limitation provided by sec. 2 of Regulation II of 1805. Its effect is to save the land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within the 60 years there was a cessation of the assessee's right to so hold it, and this is not affected by proviso 2 to the same section.

Per D. CHATTERJEE, J.—*The proviso excepts a particular class of lands from the operation of the enacting part of the section and no question of giving retrospective operation to the enactment arose in the case.*

QUEEN *v.* ST. MARRY WHITECHAPEL (2) *referred to.*

Cl. 2 of the proviso would authorise the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other excepting clauses of the proviso, and cl. 4 saved the lands in suit from assessment.

(2) 12 Q. B. 120, 127 (.846).

This was an appeal from a decision of P. K. Chatterji, Esq., Additional District Judge of Sylhet, dated the 10th July 1913, affirming a decision of Babu Kailash Chandra Sen, Subordinate Judge, 2nd Court at Sylhet, dated the 25th May 1912.

The facts of the case sufficiently appear from the judgment.

Babus Bepin Behary Ghosh and *Brojolal Chakerverty* for the Appellant.

The Advocate-General and *Babu Ram Charan Mitra* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

D. CHATTERJEE, J.—This was a suit for a declaration that the Plaintiff had a revenue-free title to the property in suit and the Defendant, the Secretary of State, had no right to assess revenue upon it. Both the Courts below have dismissed the suit and the Plaintiff appeals mainly on the grounds (1) that there is no evidence of any resumption decree having been passed in favour of the Government in 1842, and the findings based on the existence of such a decree are bad : (2) that assuming that there was such a decree or a resumption by the revenue authorities no action having been taken upon the same for more than 60 years the right of the Government is barred : (3) that the Plaintiff having held the property without payment of revenue for more than 60 years, no assessment can be made by reason of cl. 4 of the Proviso to sec. 28 of the Assam Land and Revenue Reg. I of 1886.

Before discussing these points I may shortly state the facts that are admitted or found. The disputed property which was formerly a tank and has now silted up was owned by certain Mohammedans who in 1806 sold it to the ancestor of the Plaintiff : the deed of sale does not state

that the property was *lakheraj* and there is no documentary evidence of a grant in *lakheraj* right. The Defendant admits that *kasba* Beniachong the *mehal* in which the disputed property is situate was excepted from the Permanent Settlement in 1793 as the then holders of the same claimed a *lakheraj* right. The Plaintiff admits that there was a measurement in 1839-40 with a view to resumption. The Defendant says there was a resumption suit in 1842 which was decided in favour of Government. Neither the decree nor an attested copy of the same is forthcoming, but there are recitals of a resumption case and decree in a number of papers including a *kabuliyat* by the father of the Plaintiff, but not in respect of the disputed land. These documents make out a resumption of the *mehal* in 1842, but it does not necessarily follow from that that the disputed land was included in the resumption. Next in point of time is the Thakbust Proceeding Ex. 3 produced and proved by the Plaintiff. Under the heading "Number Touji and name of *mehal*" we find the entry is "Non-settled resumed *mehal*," and under the heading "the *mehals* which have been enclosed by boundaries or plotted," we find No. 170 the disputed property, and under the heading of "Remarks" we find that the name of the Government was originally recorded as the owner in possession but was removed on the objection of the Plaintiff's ancestor whose name was recorded instead. It is contended by the learned Advocate-General that this document being filed by the Plaintiff it operates as an admission of the title of the Government in 1861. I do not see how this may be. The description of the *mehal* as a resumed *mehal* was made by the Thak Authorities, and not by the Plaintiff or his ancestor. It was not the business of the Thak Authorities to decide whether a particular piece of land was resumed or not: they took the name as it was given by the Government revenue authorities who succeeded in getting an entry as owner in possession but that entry was expunged on objection by the Plaintiff's ancestor. The enclosing by boundaries of the disputed plot also does not shew that it was resumed, for *lakheraj* lands were as a matter of fact enclosed by boundaries during the *thak*. Even if the description of the *mehal* as resumed *mehal* could apply to the disputed plot there is nothing in this to shew that it was resumed under a decree of the Civil Court. This is all the evidence that we have of a resumption decree as it is called. I do not see my way to adopt this view and I think the Appellant is right in contending that there is no evidence of a resumption decree in 1842 in respect of the disputed land.

There was, however, admittedly an attempt at resumption. The resumption *chitta* is clear evidence of that and we may take it there was a resumption by the revenue authorities, *i.e.*, to say, a decision by the Revenue Board that the land was assessable to revenue. Sec. 21, cl. 4, Reg. II of 1819 provides that upon such a decision by the Board the duty of the Collector would be to make an assessment after notice to parties. See also sec. 23, Reg. II of 1819. There is no provision in this Regulation as to the time within which this assessment was to be made. Now this Regulation was modified by sec. X of Reg. III of 1828 which directed the assessment to be made at once and that if the owner declined to pay he must be dispossessed. In the present case there was no immediate assessment and the owner was allowed to continue in possession. It is said that this was so

because the land was a tank and unfit for settlement. The learned Judge says this is clear from Exs. V & T. I do not see how this is so. Ex. T. describes No. 2532 as a tank and gives its boundaries and Ex. V does not mention 2532 at all. If Ex. T shows anything it shows that the property was a tank which would ordinarily be more valuable than waste land. Then again the learned Judge says the possession of the Plaintiff was permissive but that was never the case of the Defendant who only said that no assessment was made of tanks, *gopaths* and waste lands as unfit for settlement and as no one applied for them. The finding of the character of Plaintiff's possession, therefore, is against the case of the Defendant and is an inference which as far as I can see is not supported by evidence. On the other hand, if the Defendant had a right to dispossess the Plaintiff in 1842 and did not exercise its right the possession of the Plaintiff became adverse to the Defendant from that time. That possession continued for more than 60 years and the Defendant's right of recovery of possession is lost. It is said, however, that the right to assess revenue is a Sovereign right and cannot be lost. Reliance is placed in support of this view on the case of *Boddupaili Jugannadhan* v. *The Secretary of State* (1). With great respect to the learned Judges I do not feel at all pressed by the opinion expressed in that case in favour of a Sovereign right of assessment. The particular Madras Regulation XXV of 1802 which was the subject-matter of discussion expressly reserved the right of Government to continue or abolish exemptions from the payment of Revenue and no question of prerogative was pertinent. The unreported case relied on by the learned Judges goes perhaps a little further, but there it was stated that "no limitation is placed on the exercise of that right by any statute or law." That was probably so in Madras. In Bengal, however, we find that there is such a statute. Sub-sec. 2 of sec. 8 of Reg. II of 1805 is to the effect that "all claims on the part of Government whether for the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption or for the recovery of arrears of the public assessment or for any other public right whatever (the judicial cognizance of which may not have been otherwise limited by some special rule or provision in force) shall be heard, tried and determined, etc., if the same be regularly and duly preferred at any time within the period of 60 years from and after the origin of the cause of action."

The origin of the cause of action was in 1793 at the time of the Permanent Settlement when the predecessors-in-title of the Plaintiff claimed a *lakheraj* title and the Government had to abstain from making a settlement. If the proceedings of 1842 declared the land liable to assessment the Collector should have proceeded to assess at once but he did not. Whether we count 60 years from 1793 or from 1842 the claim of the Government is barred. This disposes of the second question.

The last question argued is that the assessment is barred by sec. 28 of Assam Regulation I of 1886. That section enacts that all land shall be liable to assessment except lands expressly exempted and lands for which a tax is levied under sec. 17: "Provided that nothing in this section shall authorize the assessment of any land which has been held revenue-free for sixty years continuously unless it

(1) I. L. R. 27 Mad. 16 (1903).

is shown that the right so to hold it has ceased to exist."

The land in this case has been admittedly held revenue-free for more than 60 years and the Bengal Regulations under which assessments were previously made being repealed by this Regulation as to Assam and the operation of this section being excluded by the said Proviso there would be no law under which the disputed land could be assessed.

The learned Judge, however, thinks that to apply this section to the present case would be to give a retrospective effect to it and that 60 years have not elapsed from 1886. It is true that all legislation must be considered as prospective unless anything to the contrary is expressly or by necessary implication provided. But a statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing: See *Queen* v. *St. Mary Whitechapel* (2). If the proviso is considered to be an enacting part of the section, which it apparently is not, it operates on the state of things that it finds existing on its promulgation. If it finds that a particular piece of land answers to the description contained in its wording it operates by excluding it from the operation of the enacting part.

But the matter may be looked at from another point of view. The proviso excepts a particular class of lands from the operation of the enacting part of the section. The enacting part, therefore, does not apply and no retrospective effect is given to any enactment.

In the next place it may be said that it does not take away or affect any vested right: it declares what the legal position of these lands was at its passing. The limitation Regulation had barred the right of assessment in such cases and it was thought proper to add this proviso just for the purpose of preventing misconception and dispute.

The second clause to the proviso might, at first sight, appear to authorise the assessment of the disputed lands as excepted from the Permanent Settlement.

In construing that clause, however, it must be remembered that the Regulation was originally passed for the Province of Assam where the Permanent Settlement came very late where it did come, and in many places it has not come even now, so that it cannot be said that the assessment of lands excepted from the Permanent Settlement in 1793 was contemplated in 1886 after more than 93 years. Cl. No. 2 of the proviso, therefore, would authorise the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other excepting clauses of the proviso, and in the present case cl. 4 has saved them.

In this view of the case I would allow the appeal and decree the suit with costs in all Courts in the following manner: that it be declared that the disputed land is not liable to be assessed with revenue and the Secretary of State be enjoined not to realise the sum claimed in the notice of December 1908. If the amount has been realised it will be refunded to the Plaintiff.

BEACHCROFT, J.—As regards the first point argued on behalf of the Appellant, I am not prepared to say that there is no evidence that the land was resumed in 1842. There is no doubt that there was evidence before the learned Judge that resumption proceedings were taken in respect of the whole of Baniachong, in which area was included the subject-matter of dispute, and that this particular piece of land, then a tank, figured in the resump-

(2) 12 Q B 120, 127 (1846).

tion Chitta. Then the learned Judge says "the Rubokari (Ex. V) shows besides that the Plaintiff or his father preferred no objection with regard to the disputed tank." It has not been suggested that this is an incorrect statement of the contents of the exhibit, nor has it been taken as a ground of appeal that the learned Judge has, in this passage, mis-stated the evidence. An extract from this exhibit has been printed. It mentions that objections were made in respect of some lands. But the whole exhibit has not been placed before us, and though in the portion printed there is no mention of this particular plot, there is no reason to suppose that the portion not printed, to some passage in which the learned Judge presumably refers, do not bear out his statement of their contents.

It was urged that as under sec. 65 of the Indian Evidence Act the only secondary evidence admissible of the contents of a public document is a certified copy there was no evidence of the contents of the resumption decree. But that rule is obviously subject to the rule that when the original has been destroyed or lost any secondary evidence may be given.

The appeal must however in my opinion succeed on the ground that the assessment complained of is barred by sec. 28 of the Assam Land and Revenue Regulation, 1886. It is argued for the Respondent that the right of Government to assess Land Revenue, which as is pointed out in the preambles to Regs. XIX and XXXVII of 1793 is based on the ancient law of the country, can never be barred. As to the proposition stated in those general terms it is not necessary to express an opinion. For it is clear that Government can divest itself of the right to assess revenue and can make such regulations for the guidance of its officers as will have the same practical result as a renunciation of the right to assess revenue. Now the Assam Land and Revenue Regulation has repealed the Bengal Regulations so far as they apply to territories to which the Regulation has been extended, so the only provisions for assessment of land revenue as extant in Sylhet are those to be found in the Regulation itself. Sec. 28 provides that all land shall be deemed liable to be assessed to revenue, subject to exceptions in favour of two classes of land, and subject also to certain provisos. Exemption is claimed under the 4th proviso which declares that nothing in the section shall "authorise the assessment of any land which has been held revenue-free for sixty years continuously unless it is shown that the right so to hold has ceased to exist." The learned Advocate-General argued that the words "held revenue-free" meant so held "as of right" but he was not prepared to argue that they could not mean merely "held without payment of revenue," apart from any question of the right so to hold the land. I think that if the former meaning had been intended it would have been expressed in definite terms, and that the meaning to be attached to the words is the alternative one suggested. The proviso then would seem intended to reproduce the rule of sixty years' limitation provided by sec. 2 of Regulation II of 1805. It is also definitely enacted that the proviso is made inapplicable if it be shown in the case of land so held that the right so to hold it has ceased to exist. The qualification is probably intended to save the land revenue in cases where at some time the land has been rightly held without payment of revenue within the sixty years. The effect of the proviso appears to be to save the land from assessment if the owner can prove sixty years possession without

payment of revenue, unless Government can prove that at some time within the sixty years there was a cessation of the assessee's right to so hold it. If it were sufficient for Government to show that at any time, even before the sixty years, the owner had no right to hold the land revenue-free or had lost the right, the practical effect of the proviso would be merely to raise a presumption in favour of freedom from assessment after sixty years' holding without payment of revenue. If that had been the intention, I think it would have been expressed in simpler language. It seems to be a case of an exception within an exception. So that if in fact there has never been a right to hold the land revenue-free the second exception will not apply and the holding of the land without payment of revenue for sixty years will bar the assessment.

I must confess that I express this opinion as to the meaning of the 4th proviso with considerable diffidence in view of the fact that the 2nd proviso contemplates cases of assessment of land which was not included in the assets of an estate at the time of the Permanent Settlement, but I do not see what other construction can be placed upon it.

The learned District Judge favoured the view that the proviso to sec. 28 could not have retrospective effect, in other words that it could not come into operation till the year 1946. This view was only faintly supported in this Court and does not commend itself to me. There does not appear to be any parallel between this case and the case relied on by the learned Judge.

In the present case the Appellant has held the land for more than sixty years without payment of rent: it is not shown that he lost the right within the sixty years preceding the suit, in fact it is not shown that he ever had the right to hold revenue-free. The result is that the Regulation does not authorise assessment in his case.

I therefore agree in allowing the appeal and decreeing the Plaintiff's suit.

N. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1775 OF 1913.

D. CHATTERJEE, J.
MULLICK, J.
1915,
Heard, 23, August.
Judgment, 2, September.

JOGENDRA NATH DEY and ors, Plaintiffs, Appellants,
v.
GOUR SINGH MURA, Defendant, Respondent.

Chota Nagpur Tenancy Act (VI B C. of 1908), secs. 81, 83, 87, 256—Dispute under sec. 83, jurisdiction of Settlement Officer, upon such dispute, to record entry that tenure mundari khuntkati—*Suit for rent instituted under Act X of 1859—Decree and purchase by landlord in execution after Chota Nagpur Tenancy Act brought into force and land recorded as above at Settlement—Title to tenure*

Under sec. 83 of the Chota Nagpur Tenancy Act, the Settlement Officer has jurisdiction to decide a dispute between landlord and tenant as to whether the latter was a mundari khuntkatidar *and to record an entry to the effect in the record-of-rights.*

Where pending a suit for rent brought under Act X of 1859, the Chota Nagpur Tenancy Act VI of 1908 B. C. came into operation, and the landlord in execution of the decree obtained in the suit put up the holding to sale and purchased it, but meanwhile in the course of settlement proceedings the land was recorded as the mundari khuntkati *of the Defendant.*

Held—*That although the new Act did not apply to the suit, it governed proceedings in execution instituted after the suit*

JOGENDRA NATH DEY *v.* GOUR SINGH MURA.

had terminated in a decree; and the entry that the land was the mundari khutkati *of the tenants being conclusive evidence under sec. 256 of the Act, the landlord acquired no title in the land.*

This was an appeal preferred on the 12th June 1913, against the decree of T. S. Macpherson, Esq., District Judge of Zilla Manbhoom-Sambalpur, dated the 8th March 1913, reversing the decree of Moulvi Ali Ahmed, Subordinate Judge at Purulia, dated the 28th of June 1912.

The facts of the case will appear from the judgment.

Babu Bepin Behary Ghosh for the Appellant.

Babus Mohendra Nath Roy and *Abani Bhusan Mukerjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

D. CHATTERJEE, J.—The ancestor of the Plaintiffs purchased *mouza* Urma in execution of a rent decree in 1880. The Defendant held some lands in the *mouza* and in 1905 he gave a *kabuliyat* to the Plaintiffs in respect of 23 plots of land at a consolidated rate of rent. He fell into arrears and on the 21st of December 1909, the Plaintiffs brought a suit for rent under Act X of 1859 and obtained a decree. In the meantime on the 22nd December 1909 the Chota Nagpur Tenancy Act was applied to the District of Manbhoom. Execution was taken out of the rent decree obtained by the Plaintiffs and the holding of the Defendant was sold on the 1st of August 1910 and purchased by the Plaintiffs who took delivery of possession from the Court in February 1911. In the meantime settlement proceedings were going on under a notification made in September 1909 (evidently under Chap. X of the Bengal Tenancy Act which then applied). The Chota Nagpur Tenancy Act having been applied from December 1909 the settlement operations were continued under this Act and the Plaintiffs applied for the record of their names as owners by purchase of these 23 plots of land. The Defendant set up a *mundari khuntkati* right and the Settlement Officer held in his favour and recorded him as the *mundari khuntkatidar* in March 1911, and the record-of-rights was finally published on the 17th November 1911.

The Plaintiffs brought this suit in September 1911 for declaration of title to and recovery of possession of the said 23 plots. The Court of first instance gave a decree to the Plaintiffs holding that the entry in the record-of-rights was without jurisdiction. The lower Appellate Court has reversed the decree of the first Court, holding that the lands were really the *mundari khuntkati* lands of the Defendant, that the Settlement Officer had perfect jurisdiction to make the entry that he did make and that as these rights are not transferable the Plaintiffs have acquired no right to the lands.

The rent suit of the Plaintiffs was brought under Act X of 1859 and the decree was obtained under that Act. The execution of the decree was evidently applied for after the new Act came into operation. The execution proceedings must therefore be governed by the new Act, *Debnarain Dutt* v. *Narendra Krishna* (1). The new Act could not certainly affect pending proceedings and it did not affect the suit: but the suit terminated with the decree and the application for execution although an application in the suit was a separate proceeding. That seems to be the result of the Full Bench case. Now under this Act, sec. 250 (1), a *mundari khuntkati* property is not saleable either by private sale or in execution. The pro-

(1) I. L. R. 16 Cal. 337 (1888).

perty in this case has been found to be a *mundari khuntkatidari* property first by the Settlement Officer and later by the lower Appellate Court which relies upon the record-of-rights as conclusive evidence under sec. 256. It is contended however that the Settlement Officer's order is without jurisdiction and the record-of-rights is therefore a nullity Under sec. 81 the Settlement Officer had to record (*a*) the name of the tenant or occupant (*b*) whether the tenant was a tenure-holder, *kuntkatidar*, etc. Now the Defendant was no doubt the occupant of the land at the time as found by the Courts below and the Settlement Officer was bound to record his name as the person in occupation Being in occupation he claimed to be a *mundari khuntkati* tenant and the landlord said he was not. There was a dispute under sec. 83 and the Settlement Officer decided in favour of the Defendant. The Settlement Officer was competent to decide a suit under sec 87 as to whether the relationship of landlord and tenant existed or whether the land was held rent-free There was no such suit in this case, but the provision for such a suit implies that the Settlement Officer has to decide such questions in making his record. I am not therefore prepared to say that the Settlement Officer had no jurisdiction to record the Defendant as a *mundari khuntkati* tenant. If the property was of this description it was not saleable and the sale that was held was ineffectual to pass any title.

As the Chota Nagpur Tenancy Act was extended to Manbhoom before the Plaintiff acquired any right by purchase they cannot complain that any vested right of theirs has been interfered with. In this view of the case I would dismiss the appeal. The Defendant is responsible for not taking the objection of his *mundari* right in proper time and I think each party should bear his own costs in all Courts.

MULLICK, J.—I agree.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2994 OF 1913.

HOLMWOOD, J. MULLICK, J. 1915, 16, December.	KARTICK CHANDRA DAS, Defendant, Appellant, v. SATYA NIDHI GHOSAL and ors., Plaintiffs, Respondents.

Remand order by Appellate Court without retaining case on file—Whole case is open before Court to which case remanded—Limitation of scope of appeal remanded by High Court.

In strict law a remand made by an Appellate Court without retaining the appeal in its own file necessarily reopens the whole case and the Court of Appeal to which the case is remanded is bound to hear the appeal upon the judgment of the Court of first instance and on nothing else.

But the High Court in the exercise of its powers of supervision under the Charter rightly assumes in certain cases authority to limit the scope of certain appeals remanded to the lower Court without keeping them on its own file. But whenever this is done it is absolutely essential that the High Court should lay down clearly without any possibility of mistake that it did intend to limit the scope of the appeal to certain specified questions.

This was an appeal preferred on the 5th September 1913, against the decree of Babu Sarada Prasad Bakshi, Officiating Subordinate Judge, 2nd Court at Alipore, of Zillah 24-Pergunnahs, dated the 30th June 1913, affirming the decree of Babu Mohar Lal De, Munsif, 3rd Court at Alipore, dated the 31st July 1909.

THE

Calcutta Weekly Notes.

Vol. XX.] MONDAY, APRIL 3, 1916. [No. 19.

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Report of Patna High Court Cases.

At the request of many of our subscribers in Bihar and Orissa, we have decided to publish the reports of decisions of the High Court of Judicature at Patna in our reports column in the same way as we publish the reports of appeals to the Judicial Committee of the Privy Council. We have engaged reporters in the Patna High Court who will obtain certified copies of judgments and take notes of argument in Court and then draw up the reports. The reports so drawn up will be edited by us and published in the current numbers of the *Calcutta Weekly Notes*.

Admission of appeal for consideration of sentence only, if proper.

In *King v. Williams* a short note of which appeared in our last issue the Lord Chief Justice sitting in the Court of Criminal Appeal made some important observations regarding the powers of the Appellate Court. He expressed the view that the Appellate Court is entitled to examine the validity of the conviction even when the prisoner had appealed against the sentence only. In this case the Appellant not having challenged the propriety of his conviction the Crown thought it sufficient to instruct counsel only on the question raised by the Appellant and on the Court being informed of this the Lord Chief Justice said that when counsel appeared in the Court of Criminal Appeals. The appeal on appeals against sentence the Court would assume that they were instructed upon all the facts of the case. It was necessary that they should be so that they could inform the Court of all the circumstances leading to the imposition of the sentence.

The procedure for the admission and disposal of appeals is governed in this country by the Code of Criminal Procedure and the question has arisen whether the Appellate Court at the time of admitting an appeal can limit it to the ground of sentence only. Sub-sec. 1 of sec. 421 of the Code lays down that on receiving the petition of appeal the Appellate Court shall peruse the same and if it considers that there is no sufficient ground for interfering it may dismiss the appeal summarily. Sec. 422 then provides that if the Appellate Court does not dismiss the appeal summarily it shall cause notice to be given to the Appellant or his pleader and to such officer as the Local Government may appoint in this behalf of the time and place at which such appeal will be heard. The Appellate Court shall then send for the record of the case and after perusing such record and hearing the Appellant and the Crown it may dismiss the appeal or acquit the accused or affirm the conviction but reduce the sentence.

Now it is perfectly clear that when an appeal is presented the Appellate Court has ample powers to dismiss the appeal summarily if on perusing the petition of appeal and the judgment of the lower Court it considers that there is no sufficient ground for interfering but when it is of opinion that although the conviction is right the sentence inflicted is unduly severe is it open to the Appellate Court to admit the appeal for hearing only on the question of sentence? In *Nafar Sheikh v. King Emperor*, 18 C. W. N. 147, it has been held by Mookerjee and Beachcroft, JJ., that a restrictive order for admission is clearly not contemplated by sec. 422 of the Code and must be deemed *ultra vires*. The appeal which has to be heard is the

whole appeal; consequently all the grounds taken in the petition of appeal are open for consideration at the final hearing and the Appellant cannot be restricted to any selected ground out of those specified in his petition. This is the most reasonable view to take for in giving summary powers to the Courts exercising Appellate Jurisdiction the legislature surely did not intend that there should be a judgment on the merits of the case at the preliminary hearing under sec. 421 of the Code but meant only to provide against the unnecessary swelling of the files of the Courts by an indiscriminate presentation of appeals in all cases made appealable under the law. The only thing proper for the Appellate Court under sec. 421 is to see whether *primâ facie* there is any ground for an examination of the case by itself but it is not in its power to record in effect a finding as to the merits of the case although it considers that interference is necessary though on another ground, namely, severity of sentence.

So in this country also it is the duty of counsel for the Crown appearing in a Court of Criminal Appeal to be prepared to argue the whole appeal irrespective of the ground to which it might have been limited at the time of admission. Looking at the matter from a practical point of view it seems to be impossible for a Court hearing an appeal to say that the sentence that has been passed by the Judge or Magistrate who had the witnesses before him is unwarranted without examining the entire facts and circumstances which led to the imposition of the sentence. In the face of the ruling referred to above the practice of admitting appeals on the ground of sentence alone does not seem to be sanctioned by law.

It is worthy of note that the decision of Mookerjee and Beachcroft, JJ., had the support of Sir Lawrence Jenkins and Mr. Justice Sharfuddin for in the case in question the appeal was admitted by the learned Judges presiding over the Criminal Bench at the time only for a consideration of the sentence but when it came on for final hearing before Sir Lawrence Jenkins and Mr. Justice Sharfuddin their Lordships extended the scope of the order of admission evidently taking the view that the restrictive order was *ultra vires* and ordered fresh notice to be issued on the Crown. The appeal was ultimately heard by Mookerjee and Beachcroft, JJ., who delivered judgment as noticed above.

The following notes on Indian cases which appeared in the January number of the *Journal of the Society of Comparative Legislation* will be found interesting.

Guardianship.—In British India there is much litigation arising out of the relationship of guardian and ward.

Disputes as to what is treated in India as the right, but which is of course the duty of guardianship, are frequent. For many years the Legislature has endeavoured to compel persons claiming such right to obtain the sanction of the Courts by an appointment as guardian or by a declaration of right to be guardian.

Act 8 of 1890 consolidated and amended the law relating to guardians and wards. Besides making provision for the appointment of guardians, it to some extent declared the rights and the duties of persons having the custody of infants or their estates by virtue of the personal law to which they were subject.

Sec. 25 of the Act gives to the Court power to order and enforce the return of the ward to the custody of his guardian. The Bombay High Court in *Dayabhai Raghanathdas* v. *Bai Parvati* (1915) I. L. R. [illegible] Bom. 438, has held that this section can be used in aid of a guardian who has no appointment from the Court but is the natural guardian of the minor according to Hindu law. This is a useful decision. In the towns of Calcutta, Madras, and Bombay the natural guardian can enforce his rights by an application under sec. 491 of the Code of Criminal Procedure; but that section has no application to cases outside those towns. The Bombay decision practically gives to natural guardians throughout India rights similar to those enjoyed by them in the Presidency towns.

Legal Transactions with Women.—A recent decision of the Judicial Committee [*Padarath* v. *Ram Narain Upadhia* (1915) L. R. 42 I. A. 163] illustrates one of the difficulties in which the Courts in India are placed when dealing with the affairs of ladies who, according to the custom of their country, are secluded in the *zenana*, female apartments of a house. Many decisions have shown that the greatest care must be taken to prevent them from being defrauded by dishonest relations or servants; but, as many of them possess considerable estates, transactions to which they must be parties are occasionally necessary. The Transfer of Property Act, sec. 59, requires deeds of mortgage for

sums over Rs. 100 to be attested by at least two witnesses. In the case in question, the lady was behind a curtain, the attesting witness saw her hand sign the document, and he recognised her voice. This was held to be sufficient.

In many cases where the witnesses remain outside the curtain, the difficulties of identification are insurmountable.

E. J. TREVELYAN.

IN WHAT LAND OCCUPANCY RIGHT MAY BE ACQUIRED?

(Continued from page cvi.)

LAND WITHIN MUNICIPALITY.—It seems that before Act I of 1907 B. C. right of occupancy might be acquired in urban areas, *Hussan* v. *Gobinda*, 9 C. W. N. 141. But the provisions of the Act, which are intended to apply to agricultural areas, are now considered to be unsuitable to such Municipalities or portions thereof as are mainly urban in character. Accordingly Government is given the power to withdraw, from the operation of the Act, such Municipal urban areas by notification, when it is satisfied that such withdrawal is expedient, Report of the Select Committee on the Bengal Tenancy Act Amendment Bill, 1906. Right of occupancy therefore can be acquired in agricultural lands within a Municipality unless it is excluded from the operation of the Bengal Tenancy Act by a Government Notification. Even after such notification rights already accrued are not affected.

IN WESTERN DUARS.—As neither Act X of 1859 nor the Bengal Tenancy Act applies to lands leased to tea-planters in the Western Duars for cultivation of tea or to lands leased in Jalpaiguri under the Waste Land Rules, it follows that occupancy-right cannot be acquired in such lands, except by contract. The tenants of the tea-planters in the tea gardens of the Western Duars are mere squatters or labourers, and it was intended by the notification extending the Act to Western Duars to debar them from the acquisition of occupancy-rights by mere length of occupation, Ameer Ali and Finucane's Bengal Tenancy Act, 1st Ed., p. 38.

WASTE LAND.—When a raiyat reclaims any waste land he can acquire occupancy-right under the 12 years' rule; but when a landlord reclaims any waste land, no raiyat can acquire the right in the same during a period of 30 years from the date when the raiyat is introduced, Act VIII of 1885, 178 (1) and (111).

UNDIVIDED SHARE.—Under the old Acts, a right of occupancy could be acquired in an individual share of land, *Jardine* v. *Sarut*, 3 C. L. R. 140; *Baidya* v. *Sudharam*, 8 C. W. N. 751. But under the Bengal Tenancy Act no such right can be acquired therein, *Hari* v. *Ranjit*, I. L. R. 25 Cal. 917; *Baidya* v. *Jheni*, 25 Cal. 217: see also *Haribole* v. *Tasimuddin*, 2 C. W. N. 680; *Ahadullah Sheikh* v. *Gagan Mollah*, 2 C. L. J. 10. For it is only in a raiyat's holding that the right can accrue, and the word "holding" has been defined as a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy," Act VIII of 1885, 3 (9). And a parcel of land is land defined by metes and bounds, *Parbaty* v. *Mathural*, 16 C. W. N. 879, and cannot include an undivided share.

RADHAROMON MOOKERJEE, Vakil, M.A. B.L.

CURRENT INDIAN CASES.

(CIVIL.)

Will—Private directions given by testator to an executor.

BAYA BAI SAKALKAR *v.* HARIDAS RANCHORDAS, 40 Bom. 1.

A testator in his Will provided as follows—In accordance with the directions I am going to give in private to trustee No. 1 out of the trustees appointed by me my trustees should entrust to Haridas Rs. 5,000 out of the money that may be received from my life policy and the shares of Tata & Co. also should be transferred to the person whose name will be disclosed by Haridas. The Plaintiff (the person in whose favour directions were in fact given to Haridas) brought a suit against the executors praying *inter alia* that Haridas might be ordered to disclose the secret trust and the bequest should be declared to be for the benefit of the Plaintiff.

Held—That Haridas was bound to disclose the Plaintiff's name and the evidence thereof was admissible.

Mahomedan Law—Acknowledgment of sonship.

MSMAN MYA *v.* VALLI MAHOMED, I. L. R. 40 Cal. 28.

A Mahomedan cannot legally acknowledge as his son a person who is shown to be the son of another man. An acknowledgment of sonship must be an acknowledgment not merely of sonship but of legitimate sonship.

Mahomedan Law—Widow's claim to dower.

Majid Mian *v.* Bibi Saheb Jan, I. L. R. 40 Cal. 34.

The right which the widow having a claim to dower acquires on obtaining possession of her husband's property is a substantial right which under certain circumstances would practically be a right in substitution of the claim for dower. The claim to dower is heritable and would devolve on the heirs of the widow. There is no reason why the right which is an incident of the claim to dower and is capable of being enjoyed as a substantive right in substitution of the claim to dower under certain circumstances should be treated as a merely personal right.

The right being a real one the widow can claim back the possession if it has been wrongfully disturbed by any body.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION. (Divisional Court).—Before Lush and Sankey, JJ. *Norman* v. *Mathews and anr.* 10th February 1916.

The power of Courts to try a suit in camera.

The Plaintiff, a journalist, sued the Director of Public Prosecutions in a County Court, for detinue of certain documents which had been seized on premises of the Independent Labour Party.

One of the complaints of the Plaintiff was that the Judge of the County Court had no jurisdiction to hear the summons *in camera*. *Scott* v. *Scott*, (1913) A. C. 482.

The learned Judges repelled the Plaintiff's contention. Mr. Justice Lush in the course of his Judgment said as follows :—

As to the power to hear *in camera*, in the particular circumstances of the case the County Court Judge was under a duty to follow the opinion which had been expressed by the Divisional Court ; but apart from that, it was clear that where it was necessary in the interests of justice that the public should be excluded there was an inherent power in a Court to hear matters *in camera*. *Scott* v. *Scott* (*sup.*).

If it were open to a Plaintiff to insist on a trial in open Court before a jury the very mischief which the regulation was intended to obviate might be brought about. On the question, therefore, whether there was a right to hear the matter *in camera* he saw no reason to differ from the County Court Judge. He did think it important that a Court should not lightly decide to hear cases *in camera* and should not decide to do so without being satisfied that there was a *primâ facie* case for departing from the ordinary method of administering justice. But if the materials before the Court showed that it was necessary for the proper administration of justice that a case should be heard *in camera* there could be no question that the Court had power so to hear it.

The Appellant appeared in person.

Mr. Branson for the Respondents.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

Civil Appellate Jurisdiction. Before D Chatterjee and Beachcroft, JJ. Appeal from Appellate Decree No. 2180 of 1914 Maijuddi Akan, Plaintiff, Appellan *v.* Tamijuddin and ors., Defendant Respondents. 6th March 1916.

Limitation- Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3 — Dispossession—Lease by co-sharer landlord.

The suit was for declaration of *karsha* righ in certain plots of land and for recovery o possession. The Defendants took *kabuliya* from some of the co-sharer landlords and on th basis of that *kabuliyat* they dispossessed th Plaintiff.

Held, that this was not a dispossession by th landlord. In order to constitute dispossessio by the landlord, it must be shown that th landlord had a hand in the dispossession.

Mr. A. K. Fazlal Huq for the Appellant.

No one appeared for the Respondents.

A. T. M. *Appeal dismissed.*

KARTICK CHANDRA DAS *v.* SATYA NIDHI GHOSAL.

The material facts will appear from the judgment.

Babu Sib Chandra Palit for the Appellant.

Dr. Rash Behary Ghosh and *Babus Mohini Mohan Chatterjee* and *Sarat Chandra Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal after remand from the judgment and decree of the learned Subordinate Judge of the 24-Pergunnahs who agreeing with the Court of first instance has decreed the Plaintiff's suit for ejectment of the Defendant. The Defendants claimed a permanent right in the land which is situated in Kidderpore, a suburb of Calcutta. They alleged that they had acquired such a right by long possession beyond the memory of man at a fixed rent and that their predecessors had erected permanent structures on the land. In the first appeal from the Munsif's judgment which was heard by another Subordinate Judge it was held that the *kabuliyat* set up by the Plaintiffs of the year 1301 was a forgery and that the Defendants were entitled to the presumption from long possession and from the existence of permanent structures, and he accordingly dismissed the Plaintiffs' suit. The Plaintiffs appealed to this Court and the appeal was heard by Jenkins, C. J., and Naliniranjan Chatterjee, J., who remanded the case reversing the decree of the lower Appellate Court and sending back the appeal for re-hearing in the light of the remarks they had made. Those remarks were chiefly two in number, firstly that the presumption which was made by the Subordinate Judge in the first Court offended a legal principle, inasmuch as if the original lessor was a *shebait* of *debuttar* he would not have acted in discharge of his duty as *shebait* by giving a rent for all times which would in future be wholly inadequate, and it was therefore necessary to make a further inquiry into the origin of the tenancy, whether at the origin of the tenancy the property had acquired a *debuttar* character, as upon this would depend the applicability of the presumption. There was a further suggestion that the weight to be attached to the word *bharatea* should also be considered by the learned Subordinate Judge.

In strict law a remand made by an Appellate Court without retaining the appeal in its own file necessarily reopens the whole case, and the Court of appeal to which the case was remanded is bound to hear the appeal upon the judgment of the Court of first instance and on nothing else. It is true that this Court in the exercise of its powers of supervision under the Charter has assumed, and we think rightly assumed, in certain cases authority to limit the scope of certain appeals remanded to the lower Courts without keeping them on its own file. But whenever this is done it is in our opinion absolutely essential that this Court should lay down clearly without any possibility of mistake that it did intend to limit the scope of the appeal to certain specified questions. We are therefore of opinion that the learned Subordinate Judge who has now re-heard the case was right in holding that the whole appeal was open to him for decision. The importance of this lies in the fact that the first Appellate Court found that the *kabuliyat* which is now found to be the real origin of the present tenancy was a forgery.

The Subordinate Judge on remand has found and has given very good reasons for finding that this *kabuliyat* must have been a genuine document. He therefore holds that there is no question that at the in-

ception of this tenancy in 1301 the lessor was the *shebait* of *debuttar* property. But he has gone further and has found that eliminating this *kabuliyat* as the origin of the tenancy there can be no presumption of a grant of a permanent tenancy, the earliest *dakhila* which is the first evidence of the existence of this tenancy being of the year 1246 and in this also the landlord signed as *shebait*. If the Appellants say that the tenancy originated before 1246 and that at that time the land was not *debuttar*, the learned Subordinate Judge says that that fact must, he thinks, be proved by evidence; but they have not been able to produce any evidence on the point. We come, therefore, to the fact that, at the point where the origin of the tenancy is lost in obscurity and where the presumption would arise if it ever arose, the tenancy was held under *shebaits* whose origin must also be considered to be lost in obscurity; and not only was it held under *shebaits* but it was expressly stated that the tenants were *bharatea* tenants. This was the second point which the learned Subordinate Judge was specially directed to devote his attention to in deciding the appeal, and his finding on this point is that the word *bharatea* which has been used from the earliest time to describe these tenants cannot be said to mean permanent tenants. The learned Judge, who is an officer of very great experience and very sound judgment and must be intimately acquainted with the use of such terms as *bharatea*, says "I have never seen the word *bharatea* used with reference to annual tenants with permanent rights; the word as ordinarily used signifies monthly tenants of houses or lands without any permanent right." Now this is not a question for the Judge as to the legal effect of the word. It is a question essentially for the Jury of the ordinary meaning of a word in common use, and the decision of the learned Subordinate Judge on the point is therefore final and not open to us to discuss in second appeal.

We think therefore that on all the points the appeal of the Defendant fails and must be dismissed with costs.

N. G. *Appeal dismissed.*

[FULL BENCH REFERENCE.]

IN

APPEAL FROM APPELLATE DECREE No. 2417 OF 1913.

SANDERSON, C. J.
WOODROFFE, J
MOOKERJEE, J.
HOLMWOOD, J.
D. CHATTERJEE, J.
1916,
7, February.

PURNA CHANDRA TRIVEDI and others, Plaintiffs, Appellants,
v.
CHANDRA MOHINI DASSI and others, Defendants, Respondents.

Occupancy-holding, not transferable—Purchaser of share, rights of, as to possession against landlord.

Plaintiffs Nos. 2 and 3 were tenants in respect of one-half only of an occupancy-holding which was not transferable and the Plaintiff No. 1 purchased their interest.

Held—*That the Plaintiff as purchaser of a share of an occupancy-holding was entitled to possession even as against the landlord who had no right to take possession of the property.*

This was a Reference to a Full Bench made by Richardson and Mullick, JJ., in Appeal from Appellate Decree No. 2417 of 1913 which was preferred against a decree passed on the 24th April 1913, by Mr. E. Panton, District Judge of Murshidabad in appeal, from the decree passed by Babu Durga Das Chuckerbutty, Munsif of Kandi, on the 28th June 1912.

PURNA CHANDRA TRIVEDI *v.* CHANDRA MOHINI DASSI.

The Order of Reference was as follows :—

The Plaintiff No. 1, in execution of a mortgage decree against the Plaintiffs Nos. 2 and 3, purchased their share of a non-transferable occupancy-holding. He then purchased the remainder of the holding by a private sale and sublet the holding to the Plaintiffs Nos. 2 and 3.

Subsequently the original Defendant No. 1, a co-sharer landlord, purchased the right, title and interest of the original tenants in execution of a decree for his share of the rent. Having secured possession, he obtained recognition as tenant from his co-sharers and sublet the land to the Defendants Nos. 2 to 6. He died during the course of the suit and is represented by the present Defendant No. 1.

The suit was brought by the Plaintiffs to recover possession from the Defendants.

There is no question of any fraud or collusion between the Plaintiffs Nos. 2 and 3, and the deceased Defendant No. 1, nor is it suggested that the decree for rent was not fairly obtained. The Plaintiffs Nos. 2 and 3, are in the same boat with the Plaintiff No. 1. If the point is material there is nothing to show that the deceased Defendant No. 1, had any notice or knowledge of the transactions between the Plaintiff No. 1, and the original tenants.

The sole question in controversy has been whether on the facts stated the title shown by the Plaintiffs is sufficient to justify a decree for possession in their favour. Both Courts below have concurred in answering this question in the negative and dismissing the suit. The Appellants before us are therefore the Plaintiffs. The main contention being between the Plaintiff No. 1, and the successor of the original Defendant No. 1, it will be convenient in what follows to speak of the Plaintiff No. 1, as the Plaintiff, and the original Defendant No. 1, as the Defendant.

It is common ground that what the Defendant purchased in execution of his decree was the right, title and interest of the original Defendants. That being premised, the arguments available on either side may be thus summarized.

The Plaintiff's case is in effect that the Defendant brought his suit for rent as a co-sharer landlord and must take the consequences. All he could sell in execution was merely the right, title and interest of the tenants. That was sold and bought and the Defendant could not afterwards claim to have purchased anything more than that nor could he enlarge his rights by obtaining recognition from his co-sharers. It followed that the Defendant bought subject to the rights which the Plaintiff had acquired as against the tenants.

For the defence it was conceded that the Defendant bought in the first instance subject to the Plaintiff's rights, but that, it was said, was not a complete answer to the Defendant's plea because it entirely left out of account the limitations or initial infirmity of the Plaintiff's title. No doubt according to the recent decision of the Full Bench in *Dayamoyi* v. *Anandu Mohan* (1), the Plaintiff's title was good against all the world except the landlords. But it was urged, the Defendant was a landlord, and in conjunction with his co-sharers he was at liberty to refuse to recognize that title. If in view of the provisions of cl. (2) of sec. 22, of the Tenancy Act it was necessary for the Defendant to obtain recognition as tenant from his co-sharers, it had been found that he had secured such recognition. He was perfectly at liberty to take that step and the result was the same as if

(1) I. L. R. 42 Cal. 172, 222; s. c 18 C. W. N. 971 (1914).

the purchaser at the execution sale had been the whole body of landlords or as if the whole body acting together had formally refused to recognize the Plaintiff as their tenants. There was no equity and no estoppel which the Plaintiff could call in aid. The question was; Upon the basis of strict legal right, which party had secured or got in the better title? The answer suggested was, the Defendant. The Plaintiff could not complain because he must be assumed to have known throughout that his title was worthless as against the landlords. It was from the outset a defeasible title. The Defendant was relying on the statutory right of the landlords to refuse to recognize the Plaintiff as their tenant. The fact of the Defendant's purchase did not deprive the landlords of that statutory right. They might have exercised it before the purchase and they could exercise it after the purchase. The purchase made no difference and created no obstacle. No equity could be set up for the purpose of defeating the right which the Legislature had conferred on the landlords and in a measure nullifying provisions which must be regarded as embodying the policy of the law. As the Full Bench had held the Plaintiff might have had the sale to the Defendant set aside by making a deposit under r. 89, Or. XXI of the Civil Procedure Code, but he had not taken that course and his present claim was untenable.

As to authority the cases relied upon on the Plaintiff's behalf were those of *Radha Kanta Chakrabarty* v. *Ramananda Shaha* (2) and *Ayenuddin Nasya* v. *Srish Chandra Banerji* (3). In the former case there was a difference of opinion between Chitty, and Coxe, JJ., and the case was referred to Digambar Chatterji, J., who delivered the final judgment. It may be within the bounds of possibility to distinguish that case on the ground that there the co-sharer landlord claimed under a voluntary or private sale, and not under a forced sale. Some distinction between sales of the one kind and sales of the other seems to have been adopted by Digambar Chatterjee, J., as the basis of his decision. He distinguished the previous case of *Bibi Asmat-unnessa* v. *Harendra Lal Biswas* (4), on the ground that in a forced sale the mortgagor does not co-operate with the purchaser for creating a title in derogation of the mortgage. The latter case in the respect indicated resembles the present case and it was therefore cited for the Defendant. As to *Ayenuddin Nasya's* case (3), there the co-sharer landlord does not appear to have obtained recognition from his co-sharers. The case was decided by Ghose, C. J., and Caspersz, J. Ghose, J., was also a party to the decision in another case cited for the defence, *Krishna Lal* v. *Bhairab Chandra* (5). The report is a short one but a reference to the original judgment shows that the report is substantially correct. The Defendant then had purchased a non-transferable occupancy-holding (upon which there was an outstanding mortgage) in execution of a money decree and had afterwards obtained settlement of the land from the landlord upon the payment of *nazarana*. It was held that he had a good defence to a suit by the mortgagee on the mortgage.

Upon the authorities, therefore, as they stand, the decision of the present case depends upon the validity of the distinction above adverted to. It appears to us however to be extremely difficult to distinguish in principle between those cases in

(2) 16 C. W. N. 475 (1912).
(3) 11 C. W. N. 76 (1906).
(4) 12 C. W. N. 721 (1908).
(5) 9 C. W. N. ccxlviii (1905).

which a co-sharer landlord has bought a holding by private sale and those cases in which he has bought at a forced sale held in execution of a money decree, whether the decree has been obtained by himself or by a third party. In both classes of cases, so far as the co-sharer landlord is concerned he is a voluntary purchaser of the right, title and interest of the tenants and if he cannot take advantage of the landlord's statutory right for the purpose of improving his position and getting in a larger title in the one case no reason occurs to us why he should not be similarly debarred in the other.

That being our view in regard to the authorities, we are of opinion that the difficulty of the subject-matter and the frequency with which controversies of this kind arise make it desirable that the present case should be referred to a Full Bench.

We accordingly direct that the following question be referred to a Full Bench.

Whether a co-sharer landlord who has purchased a non-transferable occupancy-holding in execution of a decree for his share of the rent is competent to question the validity of the title of a previous transferee of the holding from the tenant, such transfer not having been recognized by the landlord?

Babus Naresh Chandra Sinha and *Panchanan Ghosh* for the Appellant.

Babu Soroshi Churn Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case the reference to us by the two learned Judges, which is set out at page 4 of the Paper Book, is " whether a co-sharer landlord who has purchased a non-transferable occupancy-holding in execution of a decree for his share of the rent is competent to question the validity of the title of a previous transferee of the holding from the tenant, such transfer not having been recognised by the landlord."

In my judgment, and I think all my learned brothers agree, apparently there has been a misconception of the facts of this case, and when they are correctly appreciated, the point which is involved in this reference does not arise at all, because it now appears that the Plaintiffs Nos. 2 and 3 were tenants in respect of one-half only of an occupancy-holding which was not transferable and the Plaintiff No. 1 has purchased their interest. Therefore, the most the Plaintiff No. 1 has purchased is the one-half share only, and under those circumstances there are other people who are holders of the other half share, and who are entitled to be in possession of the property as against the landlord, and therefore the landlord had no right to take possession of the property. Consequently, the point which has been referred to us does not arise. The course which this Court thinks is the proper one is to remit this case to the District Judge in order that he may deal with the other points which may arise in the case. See page 9 of the Paper Book where the Munsif who tried the case says " The other points need no discussion after the above finding." There are evidently other points which may have to be decided, and the case is remanded for that purpose.

The Appellant will have the costs of this hearing and of the Division Bench.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—The question referred to the Full Bench for decision has been framed on a misconception of the actual facts of the case. The order of reference assumes that the first Plaintiff acquired the entire holding by the two transactions

upon which he relies, namely, *first*, a purchase at a sale in execution of a mortgage decree on the 10th March 1907, and *secondly*, another purchase under a conveyance on the 14th October 1907. But on an examination of the pleadings and the proceedings in the suit it is plain that, under these transactions, the first Plaintiff acquired only one-half share of the holding, and this accords also with the finding of the District Judge. In this view, the question referred to us does not arise, and the rights of the parties must be governed by the rules formulated by the Full Bench in *Dayamoyi* v. *Anandu Mohan Ray* (1). That decision shows that the Plaintiff, as purchaser of a share of an occupancy-holding, is entitled to possession even as against the landlord, inasmuch as the tenancy has not yet terminated and interposes a barrier between him and the landlord. Consequently, the Plaintiff is entitled to recover possession from the landlord who must be deemed to have wrongfully evicted him from the holding whereof he has purchased a share.

I must add, however, that on the materials before us we are not in a position to make a decree for possession in favour of the Plaintiff as there has not been, up to the present stage, any determination of the question raised in the fifth issue in these terms, "are the Plaintiffs entitled to get *khas* possession of the lands in suit." This issue was framed in these circumstances. The allegation of the Plaintiff was that his mortgagors and vendors were in exclusive occupation of specific lands described in the plaint as representing the half share which he subsequently acquired. This was not admitted by the contesting Defendant, who set up a case of joint possession of all the lands of the holding by the joint tenants. If the allegation of the Plaintiff turns out to be true, he will be entitled to a decree for exclusive possession of the land described in the plaint as representing his half share of the entire holding. If, on the other hand, it turns out that the predecessors in interest of the first Plaintiff were in possession, jointly with their co-sharers, of the lands of the co-tenancy, the Plaintiff will be entitled to a decree for joint possession of all the lands to the extent of his half share. These are matters which must obviously be investigated before a decree for possession can be framed in favour of the Plaintiff. But it must be clearly understood that in the determination of this question, the Court below must proceed on the basis of the finding accepted by us, namely, that the Plaintiff has by his purchase acquired a good title to a half share and a half share only of the occupancy-holding in dispute.

On these grounds, I agree that this appeal must be allowed with costs and the case remitted to the District Judge in order that the matter may be re-heard on the lines indicated above.

HOLMWOOD, J.—I agree with the judgments which have been delivered, and I have no objection to the case going back for the purpose of deciding the fifth issue and other questions which the learned Munsif held would arise in the suit, if the Plaintiffs established their right to obtain possession as against Defendant No. 1. But when the case goes back it ought not, in my opinion, to be open to the District Judge to re-hear the case upon the question of whether Plaintiffs Nos. 2 and 3 are tenants in respect of a portion of the holding or of the whole. Provided the remand is limited to the question which has been enunciated in the judgment of Mr.

(1) I. L. R. 42 Cal. 172, 222: s. c. 18 C. W. N. 971 (1914).

PURNA CHANDRA TRIVEDI *v.* CHANDRA MOHINI DASSI.

Justice Mookerjee I am in entire agreement.

D. CHATTERJEE, J.—I agree.

S. C. M.

[TESTAMENTARY AND INTESTATE JURISDICTION.]

REFERENCE UNDER SEC. 5 OF THE COURT FEES ACT.

MOOKERJEE, J. | 1915, | 19, July. | IN THE GOODS OF GEORGE HENRY QUINGBOROUGH, Deceased.

Court Fees Act (VII of 1879), sec. 19I, sub-sec. (1)—Sch. I, Art 11, Sch III—Estate of which gross value over Rs. 1,000 but deducting debts, net value less than that, if chargeable with death duty

The expression "amount or value of the property" in Art. 11 of Sch. I of the Court Fees Act signifies what is described as the "net total" in Annexure A in Sch. III, obtained by the deduction of the amount shown in Annexure B as not subject to duty from the gross valuation of the moveable and immoveable property left by the deceased.

Held, *therefore, that no fee was leviable under the Article upon the estate of the deceased the gross value of which was shown to be Rs. 1,244-11-0, and the amount of the debts Rs. 522 leaving a net balance of Rs. 722-11-0.*

COLLECTOR OF MALDAH *v.* NERODE KAMINI (7) *not followed.*

IN THE GOODS OF HARRIETT TEVIOT KERR (8) *referred to.*

This was a Reference by the Taxing Officer, Original Side of this Court, dated 17th June 1915, for a decision of the point raised in the case.

The Order of Reference which sets out the material facts was as follows :—

This is an application by the Administrator-General of Bengal for Letters of Administration as in case of intestacy.

The Applicant being the Administrator-General, no affidavit of valuation such as is required in the case of an ordinary applicant by sec. 19 (1) of the Court Fees Act, has been filed, but in his petition the Administrator-General has, in accordance with the practice, set out a list (Annexure A) of the assets of the estate and also a list (Annexure B) of the items not subject to duty.

From this it appears that the gross value of the estate as shown in Annexure A is over Rs. 1,000, *viz.*, Rs. 1,244-11, the value of the items in Annexure B being Rs. 522. The net value of the assets, therefore, is below Rs. 1,000, *viz.*, Rs. 722-11-0.

In para. 7 of his petition the Administrator-General submits that as the net assets of the estate are under Rs. 1,000 in value no duty is payable and I have been asked as Taxing Officer to grant a certificate that no duty is payable, or in the event of my being of opinion that I cannot do that, to refer the point under sec. 5 of the Court Fees Act to the final decision of the Chief Justice.

A similar question came up before the Board of Revenue in 1904, who referred the matter to the then Advocate-General, Mr. O'Kinealy, for opinion. That officer was of opinion that in such cases duty was payable notwithstanding the fact that the deduction of the debts brought the value of the estate below Rs .1,000. Thereafter the practice of the Court was in cases of this kind to charge duty upon the net value of the estate.

In 1913—*In the goods of Harriett Teviot Kerr* (8) a question arose as to the rate of, and the proper method of calculating, the duty in an estate, the gross value of which

(7) 17 C. W. N. 21 (1912).

(8) 18 C. W. N. 121 : s. c. 18 C. L. J. 308 (1913).

was Rs. 2,17,800 odd, the net value, after deduction of the items in Annexure B being Rs. 18,000 only. The question arose in the course of correspondence between me as Registrar and the Collector of Stamp Revenue. I then submitted the correspondence with a note to Mr. Justice Fletcher, and as his Lordship was of opinion that Mr. O'Kinealy's opinion above referred to was wrong, the Collector was informed that in future we should follow what had been our practice of deducting the amount of Annexure B from the amount of Annexure A and taking duty only on the difference when, and at the rate, payable on such difference—and that we should do this even in estates where the gross value was over, and the net under Rs. 1,000.

The Collector subsequently drew attention to the then recent case of the *Collector of Maldah* v. *Nerode Kamini Dassee* (7), which was a case in which the gross value was Rs. 1,985, the net value under Rs. 1,000 and it was there held that duty was payable.

No question, however, arose in that case as to the rate at which duty was to be charged on the net value, and as that was the principal point in *Teviot Kerr's* case (8), I at the request of the applicant referred it under sec. 5 of the Court Fees Act.

His Lordship the Chief Justice, appointed Mr .Justice Mookerjee to hear the Reference. His Lordship's decision will be found in 18 C. W. N. p. 121. When referring to the case in *Collector of Maldah* v. *Nerode Kamini Dassee* (7) his Lordship on p. 127 said,—"It is not necessary to decide on the present occasion whether this view (*i.e.*, that an estate is not exempted from duty in a case where the gross value is over Rs. 1,000, and the net value under), is well-founded. I reserve my opinion upon this matter with the remark that when it arises again it may require re-examination and further consideration." The point has come up on several occasions since then, and the office, considering itself bound by the ruling in *Collector of Maldah* v. *Nerode Kamini Dassee* (7) has taken duty—the parties not having cared to take the matter further, the estate being so small.

In the present case, however, the Administrator-General, having regard to the judgment of Mr. Justice Mookerjee in *Teviot Kerr's* case (8) and to the fact that since that ruling the Revenue Authorities have been refunding to him duty paid by him in cases where the net value of the assets was under Rs. 1,000 desires to be heard on the point and obtain a final decision. As the point in question is one of general importance, I, at the request of Messrs. Leslie and Hinds, Attorneys for the Administrator-General, refer it under sec. 5 of the Act to the final decision of his Lordship, the Chief Justice.

Mr. J. E. Bagram, Counsel, for the Administrator-General.

No one appeared for the Board of Revenue.

The JUDGMENT OF THE COURT was as follows :—

This is a reference under sec. 5 of the Court Fees Act, 1870, made by the Taxing Officer on the Original Side of this Court. The circumstances under which the reference has been made, are lucidly stated in the order of reference and need only be narrated here very concisely. An application has been made by the Administrator-General for Letters of Administra-

(7) 17 C. W. N. 21 (1912).
(8) 18 C. W. N. 121 : s. c. 18 C. L. J. 308 (1913).

(7) 17 C. W. N. 21 (1912)
(8) 18 C. W. N. 121 : s. c. 18 C. L. J. 308 (1913).

tion in respect of the estate of G. A. Quiningborough as in a case of intestacy. As the application has been made by the Administrator-General, no affidavit of valuation such as is required in the case of an ordinary application under sec. 19H of the Court Fees Act has been filed. But, in accordance with established practice the Administrator-General has set out in his petition a list of the estate, and in another list the debts payable out of the estate. The value of the estate in the first list is given as Rs. 1,244-11-0 and the amount of the debts in the second list at Rs. 522 leaving a balance of Rs. 722-11-0. The question for determination is whether the fee mentioned in Art. 11 of the first schedule to the Court Fees Act is payable in respect of the estate left by the deceased.

Art. 11 of the first schedule to the Court Fees Act provides for the payment of a fee on a Probate of a Will or Letters of Administration with or without Will annexed, when the amount or value of the property in respect of which the grant of Probate or Letters is made exceeds Rs. 1,000. The question thus arises, as to the true import of the expression, "amount or value of the property in respect of which the grant of Probate or Letters is made"; does it mean the gross value of the property or does it signify the net value obtained by the deduction of the debts and expenses from the gross value. Sir Richard Couch, C. J., held in the case of *In the goods of Ram Chandra Dass* (1) that in estimating the amount of the *ad valorem* fees chargeable under Art. 11 of the first schedule to the Court Fees Act, the fees must be paid in respect of the property without deducting the amount of the debts to be paid out of it. It cannot be reasonably disputed, I think, that this is a possible interpretation of Art. 11 taken by itself. But since this decision was given in 1872, the Court Fees Act has been twice amended, first, by Act XI of 1899 and next by Act VII of 1910. In my opinion, a substantial alteration in the law has been effected by these amendments and Art. 11 must now be interpreted in the light of sec. 19I which was inserted in the Court Fees Act by sec. 2 of Act XI of 1899. Sub-sec. 1 of sec. 19I requires the applicant for Probate or Letters of Administration to file in this Court a valuation of the property in the form set forth in the third Schedule and to pay on such valuation the fee mentioned in Art. 11. When we turn to the third Schedule, we find that the Petitioner is required to state in the prescribed form of valuation that he has truly set forth in Annexure B all the items which he is by law allowed to deduct. Annexure A is a statement of the valuation of the moveable and immoveable properties of the deceased. On the face of the form of valuation, it is thus patent that the Petitioner is required to state the value of the property and is allowed to deduct the amount shown in Annexure B as not subject to duty. When we turn to Annexure B we find that it is headed "Schedule of Debts, etc.," then follow five different items, as to each of which a statement of value has to be made. These are as follows:—(1) amount of debts due and owing from the deceased, payable by law out of the estate, (2) amount of funeral expenses, (3) amount of mortgage encumbrances, (4) property held in trust not beneficially or with a general power to confer a beneficial interest, (5) other property not subject to duty. Three positions are now perfectly plain; *first*, that each of the first four items constitutes property not subject to duty and that consequently the fee cannot be calculated on the gross value of the estate as also on the

(1) 18 W. R. 153; 9 B. L. R. 30 (1872).

debts and the difference taken; *secondly*, that unsecured debts are, for this purpose, placed on the same basis as mortgage encumbrances, *thirdly*, that the second paragraph of the Form of Valuation, read with the last clause of Annexure A and the first and last clauses of Annexure B, make manifest the legislative intent that the fee is payable only on the difference between the gross value of the estate and the amount of debts, as such difference alone constitutes property subject to duty. This has admittedly been always the law with regard to mortgage debts [*In the goods of Peter Innes* (2), *In the goods of Charles Maclean* (3) and *In the goods of Ram Chandra Lakshmanji* (4)] and I feel no doubt that this is the law also in respect of unsecured debts under the Court Fees Act as amended in 1899, whatever view might have been mentioned before that date. The essence of the matter is that when an estate is burdened with the payment of debts, the market value of the property is the value of the estate left after deduction of the amount of the debts [*Cooper* v. *Cooper* (5) and *Blake* v. *Bayne* (6)]. It is worthy of note that under the Law of England, in determining the value of an estate for the purpose of estate duty, allowance is made for debts and encumcrances. (Finance Act, 1894, Stat. 57, 58 Vict. C. 30, Sect. 7). I am not unmindful that a contrary opinion was adopted in the case of *Collector of Maldah* v. *Nerode Kamini* (7) but for reasons fully set out in my judgment in the case of *In the goods of Harriett Teviot Kerr* (8) I am unable to accept that view as a correct exposition of the true intent of the Legislature. That decision holds that the fee is to be paid on the net value of the property but the liability for assessment is to be determined with regard to the gross value of the estate, in other words, the fee is first determined on the gross value and is then reduced by the fee calculated on the amount of debts. This cannot be right, for debts, as already explained, are exempt from duty. I hold accordingly that for purposes of Art. 11 of the first Schedule to the Court Fees Act the expression "the amount or value of the property" signifies what is described as the "net total" in Annexure A in Sch. III obtained by the deduction of the amount shown in Annexure B as not subject to duty from the gross valuation of the moveable and immoveable property left by the deceased. In this view, fee cannot be levied in the case before me.

Messrs. Lesile and *Hinds*, Solicitors, for the Administrator-General.

Mr. C. H. Kesteven, Solicitor, for the Board of Revenue.

N. G.

(2) 16 W. R. 253; 8 B. L. R app. 43 (1871).
(3) 6 All. H C. R. 214 (1874).
(4) I. L. R. 1 Bom. 118 (1876).
(5) L. R. 7 H. L. 53 (1874).
(6) [1908] A. C. 371.
(7) 17 C. W. N. 21 (1912).
(8) 18 C. W. N. 121: s. c. 18 C. L. J. 808 (1913).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 43 OF 1915.

SANDERSON, C. J.
WOODROFFE, J.
MOOKERJEE, J.
1915,
Heard, 10 and 21, December.
Judgment, 21, December.

SM. MATHURA SUNDARI DASSI, Plaintiff, Appellant,
v.
HARAN CHANDRA SAHA and ors., Defendants, Respondents.

Letters Patent, 1865, sec. 15, order by Judge on the Original Side refusing to restore case dismissed for default if a judgment and if appealable—Civil Procedure Code (Act V of 1908), Or. XLIII, r. 1, if applies to appeal from one Judge of the

SM. MATHURA SUNDARI DASSI *v.* HARAN CHANDRA SAHA.

High Court to others—Sec. 104, scope and effect of—"Judgment," what is.

An order by a Judge on the Original Side of the High Court under r. 9, Or. IX of the Civil Procedure Code refusing to set aside an order of dismissal of a suit under r. 8 is a judgment within the meaning of sec. 15 of the Letters Patent and is appealable thereunder.

Per SANDERSON, C. J., *and* MOOKERJEE, J.—*Such an order is also appealable under cl. (c), r. 1, Or. XLIII of the Code of Civil Procedure which applies to an appeal from the decision of one Judge of the High Court to other Judges of the Court.*

Per MOOKERJEE, J.—*The law has been substantially altered since the decision of the Judicial Committee in* HURRISH CHANDRA CHOWDHRY *v.* KALI SUNDARI DEBIA (1) *was pronounced. The effect of sec. 104 of the Civil Procedure Code of 1908 which is materially different from sec. 588 of the Code of 1882 is not to take away a right of appeal given by cl. 15 of the Letters Patent but to create a right of appeal in cases even where cl. 15 of the Letters Patent is not applicable.*

GOBIND LAL *v.* SHIBA DAS (2) *doubted by* MOOKERJEE, J.

This was an appeal preferred against an order of Mr. Justice Imam, dated the 25th March 1915, refusing to set aside an order of dismissal for default of a suit made by him.

Mr. S. R. Das (with *Messrs. N. Goswami* and *B. C. Milter*) for the Appellant.

Mr. S. C. Bhur for the Respondent.

Messrs. N. Bhose and *Sarkar* for the infant Defendants-Respondents Nos. 9-10.

Mr. Jackson (with *Mr. M. N. Bose*) for the Shaha Respondents except 3-9.

(1) L. R. 10 I. A. 4 : s. c. I. L. R. 9 Cal. 482 (1882).
(2) I. L. R. 33 Cal. 1323 : s. c. 10 C. W. N. 986 (1906).

Mr. Jackson.—Before my friend proceeds to open the appeal I take a preliminary objection that no appeal lies in this case. Or. 9, r. 9 has no application to an appeal from one judge to a full Court and it is not a judgment within the meaning of cl. 15 of the Letters Patent. Refers to *Rangoon Botatoung Co., Ld.* v. *Collector of Rangoon* (7). The decree made in the present case was made by one Judge exercising Ordinary Original Jurisdiction.

[SANDERSON, C. J.—Then this is distinguishable from that case.]

Mr. Jackson.—In that case it is laid down that the right of appeal you must show by express words. Lord Macnaghten says, you must appeal to a particular Court. It is on my friend to show first there is an appeal here.

[SANDERSON, C. J.—Yes.]

Mr. Das, referred to secs. 117, 120, 129, Or. 49, r. 3, Or. 41, r. 35.

Mr. Jackson.—The Code has no application to appeals from one single Judge of the High Court to other Judges of the Court. *Hurrish Chandra* v. *Kali Sundari* (1). *Toolsi Money* v. *Sudevi Dasi* (8) and *Rughoo Bibee* v. *Noor Jehan* (15).

[WOODROFFE, J.—If we hold that this is a judgment within the meaning of cl. 15 of the Letters Patent the first objection does not arise.]

Mr. Jackson.—Yes, and I will deal with the latter objection. As to meaning of decree, see sec. 2 of the Code, sub-sec. 2, *Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (9). The words

(1) I. R. 10 I. A. 4 : s. c. I. L. R. 9 Cal. 482 (1882)
(7) L. R. 39 I. A. 197 : s. c. I. L. R. 40 Cal. 21 ; 16 C. W. N. 961 ; 16 C. L. J. 245 (1912).
(8) I. L. R. 26 Cal. 361 : s. c. 3 C. W. N. 347 (1899).
(9) 8 B. L. R. 433, 452, 453 (1872).
(15) 12 W. R. 459 ; s. c. 4 B. L. R. (A. C. J.) 10 (1869).

are exactly the same in Or. 9, rr. 8 and 9. In the present case the appeal is from both decree and order. *Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (9), *Toolsi Money* v. *Sudevi Dasi* (8) and *Brij Coomaree* v. *Ramrick Das* (4). Sec. 106, C. P. C., *Sabhapathi* v. *Narayanasami* (27), *Kishen* v. *Tiluk* (22), *Gobind Lal* v. *Shiba Das* (2), and *Aubhoy Churn* v. *Shamont* (17).

[Mookerjee, J.—See *Ramhari* v. *Madan Mohun* (16). They said an appeal lay; p. 343.]

Mr. Jackson.—It was only an order rejecting the review. It was a case where Beverley, J., had usurped jurisdiction in hearing the review.

Mr. Das replies.—There is express right of appeal given in the Code. Or. 43, r. 1, and sec. 104 modify sec. 558 of the Code of 1882. This section has given the right of appeal even if such orders do not come under cl. 15 of the Charter. Sec. 558 of the old Code did not apply to appeal from the Original Side of the High Court. The new Code has made it quite clear and has given an express right of appeal from the Original Side. Refers to the decision of Couch, C. J., in *Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (9). In my case the order refusing to restore the suit has barred my right of suit. By this appeal I am seeking to have that right ascertained. Or. 9, r. 9 bars a fresh suit in respect of the same cause of action. It is difficult to conceive if this is not a judgment what a judgment is. I can cite several cases but I cannot cite a reported case covering this particular case. My friend has not been able to cite any.

The Judgment of the Court was as follows:—

Sanderson, C. J.—With regard to the preliminary objection which was raised by Mr. Jackson, when that point was taken, the case was argued upon the assumption that the suit had been dismissed under Or. IX, r. 8, which deals with default of appearance, and, therefore, I propose, whatever may have been the real position, to deal with the argument which was presented to us by the learned Counsel upon the basis that the order by Mr. Justice Imam dismissing the suit was made under Or. IX, r. 8. That order was made on the 5th of February 1915. Then an application was made on the 25th of March of this year to set aside that order of dismissal. That was heard by the learned Judge and was refused, and the Plaintiff appealed from that order of refusal to restore the case and set aside the dismissal, and a preliminary point has been taken by the learned Counsel for the Defendant that no appeal lies from such an order.

It was argued by the learned Counsel for the Defendant, Mr. Jackson, *first* that the order in question was not a "judgment" within the meaning of cl. 15 of the Letters Patent; and *secondly* that if it is not within cl. 15 of the Letters Patent, the Civil Procedure Code has no application to an appeal from a Judge of the High Court to other Judges of that Court.

As to the first point, namely whether the order in question was a "judgment" within the meaning of cl. 15, personally I should not have had much doubt or hesitation in holding that the order was

(2) I. L. R. 33 Cal. 1323: s. c. 10 C. W. N. 956 (1906).
(4) 5 C. W. N. 781, 795 (1901).
(8) I. L. R. 26 Cal. 361: s. c. 3 C. W. N 347 (1899).
(9) 8 B. L. R. 433, 452, 453 (1872).
(16) I. L. R. 23 Cal. 339 (1895).
(17) I. L. R. 16 Cal. 788 (1889).
(22) I. L. R. 18 Cal. 182 (1890).
(27) I. L. R. 25 Mad. 555, 557 (1901).

a "judgment" within the meaning of that clause, if it had not been for some cases which were cited to us. It is quite true that the learned Judge had no discretion upon the question of the dismissal of the suit under Or. IX, r. 8. In fact, the rule expressly says, "where the Defendant appears and the Plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed." The learned Judge has no option and under such circumstances he must dismiss the suit. But when the application to set aside that dismissal is made, in my opinion, the Judge has a discretion, and he must exercise his judgment on the materials before him. The question on which he has then to exercise his judgment and his judicial discretion may, as in this case, be a matter of great importance: It is no less than whether the Plaintiff under the circumstances of the case shall be allowed to prosecute his suit or for all time be debarred from trying to enforce his claim. Cl. 15 obviously refers to "judgments," which in common parlance may be called orders. In my opinion, the decision so arrived at on such a question as above stated would be a "judgment" within the meaning of the word "judgment" in the Letters Patent. The judgments, however, in some of the cases which Mr. Jackson has cited to us throw some doubt upon the correctness of the above view. I do not refer to them all, though I have considered them: the most important are *Hurrish Chandra* v. *Kali Sundari* (1) and *Gobinda Lal* v. *Shiba Das* (2). I only pause to remark that the exact point which arises in this case has not been decided, as far as I know, in any reported case, and I am informed that many such appeals, as this, have been heard in the Court of appeal here, but it is said that in one unreported case the decision of this Court was that an appeal would not lie. The decision in the present case on the application of the Plaintiff does, in my opinion, decide a question which affects the rights of the Plaintiff. He alleges that he should be allowed to prosecute his claim. A refusal of the application debars him for all time. If he had put in a plaint which was ill-framed and that had been struck out by the learned Judge (according to the decision in one of the cases, he would have a right of appeal within the very terms of the judgment in that case—that was an illustration in the case in 10 Indian Appeals—yet when an order is made which debars his suit for all time, according to the argument of Mr. Jackson, he is not to have a right of appeal. I should be very loth to hold that this order is not a "judgment" within the meaning of cl. 15 of the Letters Patent. But it is not necessary in my judgment to give a definite opinion upon it, because I think, on the second point, the Code does give a right of appeal. By cl. 44 of the Letters Patent it is provided as follows: "And we do further ordain and declare, that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations." By the terms of sec. 117, the Code is made applicable to the High Court, and Or. XLIII, rule 1 gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the Defendant's case that Or. IX, r. 8 applies. That order is in effect a

(1) L. R. 10 I. A. 4: s. c. I. L. R 9 Cal. 482 (1882).

(2) I. L. R. 33 Cal. 1323: s. c. 10 C. W. N. 986 (1906).

part of the Civil Procedure Code. It seems to me strange that the Plaintiff should be subjected to Or. IX, r. 8 and be liable to have his suit dismissed for want of appearance, when he has had his suit dismissed under one of the rules of the Code and wants to call in aid another of the rules which—when his application for re-instatement has been refused—gives him a right of appeal against that refusal—he is met with the argument that he cannot call in aid the rule because there is no appeal from the learned Judge of the High Court under the Civil Procedure Code. I think this is not a true view or a reasonable construction to put upon the Code and the rules made under it. In my judgment, the Code and the rules do apply and the Plaintiff has a right of appeal.

Woodroffe, J.—I need not in this case consider the question whether sec. 101 of the Civil Procedure Code touches the right of appeal given by the Letters Patent, for, if the order appealed from is a judgment within the meaning of the Letters Patent the question does not arise. It has doubtless been held that an order dismissing an appeal for default is not a judgment [see *Mansab Ali* v. *Nihal Chand* (3)]. But we are not concerned here with an order under Or. IX, r. 8 only but with an application for restoration under Or. IX, r. 9. Whether or not as a question of jurisdiction an appeal lies under cl. 15 of the Letters Patent in a case in which an appeal is allowed under the Code I think it may be said that there are *primâ facie* grounds for holding that an appeal should be held to lie under the Letters Patent where it is allowed under the Code; for, the fact that the Legislature has in the Code allowed an appeal in a particular case affords to my mind *primâ facie* ground for supposing that that case is of a class which this Court considers appealable under its Letters Patent. This Court has further held that we should not adopt a narrow construction [see *Mussamut Brij Coomaree* v. *Ramrick Das* (4)]. Looking at the nature of the order appealed from, I think I should hold that it is appealable as a "judgment" under the Letters Patent. I do not consider the case of *Gobinda Lal* v. *Shib Das* (2), which was on another section, is any bar to my so holding.

Mookerjee, J.—This appeal is directed against an order under r. 9 of Or. IX, of the Civil Procedure Code, whereby Mr. Justice Imam has refused to set aside an order of dismissal of a suit made by him under r. 8.

As a preliminary objection has been taken to the competency of the appeal, it is incumbent upon the Appellant to establish that she has a right of appeal [*Meenakshi Naidu* v. *Subramanya Sastri* (5)], for as Lord Bramwell said in *Sandback Charity Trustees* v. *North Staffordshire Ry. Co.* (6) an appeal does not exist in the nature of things; a right of appeal from any decision of any tribunal must be given by express enactment—words quoted with approval by Lord Macnaghten in *Rangoon Botaloung Co., Ld.* v. *Collector of Rangoon* (7). She relies upon Or. XLIII, r. 1, cl. (*c*), C. P. C., as also upon cl. 15 of the Letters Patent. Or. XLIII, r. 1, cl. (*c*), provides that "an appeal shall lie from an order under Or. IX, r. 9, rejecting an application (in a case open to appeal) for an order to set aside the dismissal

(3) I. L. R. 15 All 359 (1893).

(2) I. L. R. 33 Cal. 1323 : s. c. 10 C. W. N. 966 (1906).

(4) 5 C W. N. 781, 795 (1901).

(5) L. R. 14 I. A. 160 : s. c. I. L. R. 11 Mad 26 (1887).

(6) 3 Q. B D. 1, 8 (1877).

(7) L. R. 39 I. A. 197 : s. c. I. L. R. 40 Cal. 21 ; 16 C. W. N. 96 ; 16 C. L. J. 245 (1912).

SM. MATHURA SUNDARI DASSI *v.* HARAN CHANDRA SAHA.

of a suit." The question, consequently, arises, whether Or. XLIII, r. 1, cl. (*c*), is applicable to an order under Or. IX, r 9, made by a Judge on the Original Side of this Court.

On behalf of the Appellant, reliance has been placed upon sec. 117 of the Code, which lays down that "Save as provided in this part or in part X or in Rules, the provisions of this Code shall apply to High Courts established under the Indian High Courts Act, 1861." The only provision in part IX, which may have any possible bearing, is that contained in sec. 120, which obviously does not touch the present question. The provision in part X, which deals with this matter, is contained in sec. 129; this also does not militate against the contention of the Appellant. The term "Rule," which finds a place in sec. 117, is defined in cl. 18 of sec. 2 of the Code to mean "a rule contained in the First Schedule or made under sec. 122 or sec. 125." Our attention has not been drawn to any such Rule which makes Or. XLIII, r. 1, cl. (*c*), inapplicable. On the other hand, Or. XLIX, r. 3, which excludes the operation of other Rules, lends support to the contention of the Appellant that Or. XLIII, r. 1, cl. (*c*), is applicable to the present appeal.

But it has been argued on behalf of the Respondents, on the authority of the decision of the Judicial Committee in *Hurrish Chandra Chowdhry* v. *Kali Sundari Debia* (1), that the Civil Procedure Code, in so far as it provides for appeals, does not apply to an appeal preferred from a decision of one Judge of a High Court to the Full Court. The true effect of the decision of the Judicial Committee was considered by this Court in *Toolsi Money Dassee* v. *Sudevi Dasi* (8), but it is not necessary for my present purpose to determine its bearing in all its implications, because, in my opinion, the law has been substantially altered since that decision was pronounced. Sec. 104 of the Code of 1908 is materially different from sec. 588 of the Code of 1882. It provides that an appeal shall lie from the orders mentioned in the first clause of that section, save as otherwise expressly provided in the body of the Code or by any law being in force, from which it follows that the effect of sec. 104 is not to take away a right of appeal under cl. 15 of the Letters Patent, but to create a right of appeal in cases even where cl. 15 of the Letters Patent is not applicable. I may here observe parenthetically that in the case of *Toolsi Money Dassee* v. *Sudevi Dasi* (8), Prinsep, J., felt pressed by the argument that if an appeal was deemed to have been allowed by the Code of Civil Procedure, there was no provision for the constitution of a Court to which such an appeal might be preferred. Sec. 106 of the Code, however, lays down that "where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made." Consequently, where a right of appeal has been so given, it would be the duty of this Court to constitute a Court of Appeal under sec. 13 of the Indian High Courts Act. I hold accordingly that this appeal is competent under cl. (*c*), r. 1, Or. XLIII of the Civil Procedure Code.

I am further of opinion that the appeal is competent also under cl. 15 of the Letters Patent. That clause allows an appeal from a "judgment," and, the controversy has consequently centred round this expression. Reference has been made

(1) L. R. 10 I. A. 4: s. c. I. L. R. 9 Cal. 482 ('882).

(8) I L. R. 26 Cal. 861: s. c. 3 C. W. N. 347 (1899).

SM. MATHURA SUNDARI DASSI *v.* HARAN CHANDRA SAHA.

to the now classical definition [*Brij Coomari* v. *Ramrick* (4)] first formulated by Couch, C. J., in the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (9); "judgment" in cl. 15 means a decision "affecting the merits of the question in dispute between the parties by determining some right or liability, which may be final, or may be only interlocutory, the former being where it determines the whole matter in controversy in the suit, the latter where it determines only a part of it leaving other matters to be determined." Substantially the same definition was adopted by Sargent, C. J., in *Bai Motivahu* v. *Ahmedbhai Habibhai* (10) and was later on applied by Couch, C. J., himself in *Hadjee Ismail Hadjee Hubbeeb* v *Hadjee Mahomed* (11), where he held that an appeal lies from an order refusing to set aside an order granting leave to a Plaintiff to sue under cl. 12 of the Letters Patent. Reference may also be made to the decision of this Court in *Kali Sundari Debia* v. *Harrish Chandra Chowdhry* (1) where an appeal was entertained against an order refusing to transmit for execution an order of His Majesty in Council. It must be remembered in connection with these decisions that they do not profess to give an exhaustive definition of the term "judgment," and other definitions of a very comprehensive scope have, from time to time, been attempted, for instance by Scott, C. J., in *Ahmed Bin Sheikh Essa Bin Khaliffa* v. *Ayeshabai* (12), by Bittleston, J., in *De Souza* v. *Coles* (13), and by White, C. J., in *Tuljaram Row* v. *Alagappa Chettiar* (14). In the opinion of Bittlestone, J., the term "judgment" includes "any decision or determination affecting the rights or the interest of any suitor or applicant," and that it is "impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." In the opinion of White, C. J., this is too wide, and the test is "not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made; if its effect, whatever it form may be, and whatever be the nature of the application which it is made, is to put an end to the suit or proceeding so far as the Court, before which the suit or proceeding is pending, is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment." But, whether we adopt the wider or the narrower view of the scope of the term "judgment" although I may add that I am not disposed, as Maclean, C. J., was not disposed [*Brij* v *Ramrick* (4)] to favour an attempt to place a narrow construction on the term "judgment,"—it is plain that the order in this case is a "judgment" within the definition formulated by Couch, C. J., in *Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (9). The order under appeal does affect the merits of the question in controversy between the parties by the determination of a right or liability. No doubt, it has been argued that the right or liability of the parties was determined by the dismissal of the suit and the position was not affected by the subsequent dismissal of the application to revive the suit. But this

(1) I. L. R. 6 Cal 594 (1881 : affirmed on P. C. L. R. 10 I. A. 1 : s c. I. L. R. 9 Cal. 245 (1882).
(4) 5 C. W. N. 781, 795 (1901).
(9) 8 B. L. R. 433, 452, 456 (1872).
(10) 9 Bom. H. C. R. 398 (1872).
(11) 13 B. L. R 91 (1874).
(12) 11 Bom. L. R 248 (1909).
(13) 3 Mad. H. C. R. 384 (1868).
(14) I. L. R. 35 Mad. 1 (1910).

clearly overlooks the fundamental point that the primary order of dismissal of the suit was liable to be revoked, as it was subject to a possible order of restoration under r. 9. The effect of the subsequent order is accordingly to give a character of finality to the primary order of dismissal, by a determination that the Applicant had failed to establish grounds in support of his alleged right to an order under r. 9 of Or. IX. Such determination is, in my opinion, a "judgment" within the meaning of cl. 15 of the Letters Patent.

I am not unmindful that the contrary view may receive an apparent support from some dicta in reported decisions, for instance, *Rughoo Bibee* v. *Noor Jehan* (15) and *Gobinda Lal* v. *Shiba Das* (2). As regards the former case, which ruled that an order dismissing an application for review is not a judgment, it is sufficient for our present purpose to observe that judicial opinion on this matter has not been uniform [*Ramhari* v. *Madan Mohan* (16), *Jubhoy Churn* v. *Shamont Lochan* (17) and *Mulji Verji* v. *Bangibasi Saha* (18)]. As regards the latter case, stress is laid upon the following passage in the judgment of Ghose, C. J., "an order which terminates a proceeding is a judgment within the meaning of cl. 15, but it must be a proceeding in the course of a suit or in relation thereto, and in which some question or other as to the right or liability of any party is raised, and not a proceeding in respect of a matter which had already come to termination by operation of law or otherwise." I feel bound to record my respectful dissent from this exposition of the

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[22] or gra *Amirunnissa* v. *Behary*
Lall (23) and *Mowla Buksh* v. *Kishen Pershad* (24)] an application for leave to appeal to His Majesty in Council, or for stay of execution [*Mohabir Prosad* v. *Adhikari Kunwar* (25) and *Chitto Sheik* v. *Muzzur Hossain* (26)] is not a "judgment," plainly stands on a different footing.

S. C. M. *Appeal allowed.*

(2) I. L. R. 33 Cal. 1323 : s. c. 10 C. W. N. 986 (1906).
(15) 12 W. R. 459 ; 4 B. L. R. (A. C. J.) 10 (1869).
(16) I. L. R. 23 Cal. 339 (1895).
(17) I. L. R. 16 Cal. 788 (1889).
(18) 9 C. W. N. 502 (1905).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2757 OF 1912.

MOOKERJEE, J.
RICHARDSON, J.
1915,
Heard, 24 and 25, March.
Judgment, 25, March.

HAR SHYAM CHOUDHURY, Defendant, Appellant,
v.
SHYAM AL SAHU, Plaintiff, Respondent.

Mortgage—Subrogation—Purchaser retaining

(19) 24 W R. 148 (1875).
(20) I. L. R. 7 Cal. 339 : s. c. 9 C. L. R. 166 (1881).
(21) I. L. R. 17 Cal. 455 (1890).
(22) I. L. R. 18 Cal. 182 (1890).
(23) 25 W. R. 529 (1876).
(24) I. L. R. 1 Cal. 102 : s. c. 24 W. R. 150 (1875).
(25) I. L. R. 21 Cal. 473 (1894).
(26) 2 Hyde 212 (1864).

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money to pay off later mortgage, on paying off mortgage, when may use latter as a shield—able grounds, application of doctrine of on—Contract, stranger when

The Respondent mortgagee ... brought this suit to enforce a mortgage executed in his favour in 1897. The property ... was the subject of two prior mortgages, one in 1888 and the other in 1895. ... mortgages ... the equity of redemption ... allowed ... on the two mortgages which only were ... conveyance. In the ... of 1888 there was a false recital that the mortgagor had paid off the mortgage of 1888 and that the mortgage-instrument of 1888 had been made over to the mortgagee. The Appellant on discovering the prior mortgage of 1888 satisfied that as also the mortgage of 1895. The Respondent, the mortgagee of 1897, then commenced the present action which the Appellant contested on the ground that he was entitled to priority to the extent of the mortgages of 1888 and 1895.

Held—*That the doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays a charge which he has undertaken or is bound to satisfy. If a person purchases a property subject to two mortgages, retains a portion of the purchase money for payment to the mortgagees but pays the first incumbrancer alone and not the second he cannot treat the first mortgage as kept alive for use as a shield against the second.*

That the Appellant was not entitled to priority on the basis of the payment made by him to satisfy the mortgage of 1895.

That if nothing else was known in the case except that there were the three mortgages ... and 1897, and that the Appellant had undertaken to pay the charges of 1895 and 1897 with money placed at his disposal by the mortgagor, the mere fact that he had satisfied the prior charge of 1888 would not entitle him to use that as a shield against the mortgagee of 1897.

But in this case as the acceptance of an instrument with an untrue recital by the mortgagee of 1897 enabled the mortgagor to commit a fraud upon the purchaser, the latter was entitled to priority in respect of the payment made by him to satisfy this mortgage.

That the mortgagee of 1897 had also no claim as against the purchaser on any contractual basis. He was in no sense privy to the agreement between the Appellant and his vendor and although a stranger to a contract may sometimes be entitled to claim the benefit of the performance thereof that doctrine cannot be allowed to be invoked to defeat the ends of justice.

This was an appeal from a decision of A. Mellor, Esq., District Judge of Darbhanga, dated the 2nd February 1912 modifying that of Babu Charu Chandra Mukerjee, Subordinate Judge of Darbhanga, dated the 21st April 1911.

The material facts will appear from the judgment.

Babu Norendra Kumar Bose for the Appellant.

Babu Lakshmi Narain Singh for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the fifth Defendant in a suit to enforce a mortgage security. The property in dispute has been the subject of three mortgage transactions. The

HAR SHYAM CHOUDHURY v. SHYAM AL SAHU.

first mortgage was on the 29th March 1888 for a sum of Rs. 700 which carried interest at the rate of 24 per cent. per annum; the second was on the 22nd July 1895 to secure a loan of Rs. 500 on interest, at 18 per cent. per annum, the third mortgage, now sought to be enforced, was created on the 27th December 1897, to secure a loan of Rs. 700 which bore interest at 18 per cent. per annum. On the 15th October 1901, the mortgagors transferred the equity of redemption to the Appellant for a sum of Rs. 2,238. The conveyance recited, that there were only two mortgages on the property, namely those of 1895 and 1897. The purchaser who was allowed to retain in his hands the entire consideration, agreed to apply the money in satisfaction of the dues on these two mortgages. He subsequently discovered that there was a prior mortgage on the property purchased by him, namely, the mortgage of 1888. He accordingly satisfied the mortgages of 1888 and 1895. The mortgagee of 1897 then commenced this action on the 21st June 1910 to recover his dues. The suit has been contested by the Appellant, the purchaser under the conveyance of 1901, who argues that he is entitled to priority to the extent of the mortgages of 1888 and 1895. The District Judge has overruled this contention and has made the usual mortgage decree in favour of the Plaintiff. On the present appeal by the purchaser of the equity of redemption, it has been urged that as he has satisfied the mortgages of 1888 and 1895, he is entitled to use them as shields against the mortgagee of 1897.

In so far as the mortgage of 1895 is concerned, it is plain that this contention cannot prevail. It was ruled by this Court in the case of *Surjaram Marwari* v. *Barhamdeo Prosad* (1) that the doctrine of subrogation does not apply when a person merely performs his own obligation or discharges and pays a charge which he has undertaken or is bound to satisfy. If a person purchases a property subject to two mortgages, retains a portion of the purchase money for payment of the first mortgage alone and pays off the first mortgage, he has not been subrogated to the rights of the first mortgagee as against the second mortgagee. This principle has been applied in the cases of *Lala Sarnam Singh* v. *Jagdeo Pewari* (2), *Sheobaran Singh* v. *Kesho Prasad* (3). The cases of *Tara Sundari Debi* v. *Kedar Lal Sahu* (4) and *Prayag Naram* v. *Chedi Rai* (5) are not in principle opposed to this view; they merely furnish illustrations of cases which, the Court thought (whether rightly or wrongly it is needless to discuss for our present purpose), fall outside the scope of the rule enunciated in *Surjaram Marwari* v. *Barhamdeo Prosad* (1). In respect of the mortgage of 1895, it is clear that the Appellant discharged an obligation which he had undertaken to fulfil, namely, to satisfy the mortgage, not with his own money, but with money which belonged to his vendors, and had been placed at his disposal for that specific purpose. If his vendor had satisfied the mortgage of 1895, as he might well have done it is plain that he, as mortgagor, could not have treated the mortgage satisfied by him, as available by way of defence against the mortgage of 1895. It follows consequently that the Appellant is not entitled to priority on the

(1) 2 C. L. J. 288 (1905).

(1) 2 C. L. J. 288 (1905).
(2) 6 C. L. J. 134 (1907).
(3) 14 C. L. J. 500 (1911).
(4) 14 C. W. N. 1089 (1910).
(5) 14 C. W. N. 1093n (1910).

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that the Plaintiff had been aware of the misuse of the land a long time before the institution of this suit—certainly more than two years before. He held that the suit was therefore barred under Art. 32 of Sch. 2 of the Limitation Act.

Plaintiff preferred this second appeal.

Babu Dwijendra Nath Mukherjee for the Appellant.

Moulvi A. K. Fazlul Huq for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SHARFUDDIN, J.—This is an appeal from the judgment and the decree of the Additional District Judge of 24-Parganas, dated the 12th May 1913, setting aside the judgment and decree of the Munsif of Basirhat, dated the 30th April 1912.

The Plaintiff's suit against the Respondent is for recovery of *khas* possession of certain lands by ejectment on the ground that his tenant, Defendant No. 2, in collusion with the Defendant No. 1, allowed the latter to encroach upon the lands of the tenancy at the time of the re-excavation of a tank and further on the ground that he made an exchange of some lands of the tenancy with the Defendant No. 1, in contravention of the terms of the *kabuliyat*. The present suit, it is alleged, was instituted on the refusal by the Defendant No. 2 to pay compensation.

The defence of the Defendant No. 2 is a denial of the allegations in the plaint and also that the suit is barred by limitation.

The Munsif gave a decree to the Plaintiff holding that the suit was not barred by limitation. The Defendant thereupon appealed to the District Judge, before whom it was contended on behalf of the Plaintiff that the Sch. 3, part I, cl. 1, of the Bengal Tenancy Act has no application to his suit inasmuch as the Defendant No. 2 was an under-tenant while the schedule applied only to tenure-holders and raiyats.

The lower Appellate Court held that the position of an under-tenant was in no way different from that of the tenant for the purposes of the limitation provided by the above clause of the Bengal Tenancy Act. Further the Court, on the condition of the Plaintiff to be [illegible] suit was barred by Art. 32, [illegible] Limitation Act. That Court, on this finding, allowed the appeal and dismissed the suit.

The Plaintiff now appealed to this Court. The question that requires our decision is whether the Plaintiff's suit is barred by limitation or not.

The present suit was instituted purely under sec. 5 of the Bengal Tenancy Act. This section provides that the suits for ejectment on the ground (*a*) that the tenant has used the land in a manner which renders it unfit for the purposes of the tenancy, or (*b*) that he has broken a condition on breach of which, under the terms of a contract between him and the landlord, liable to be ejected, is entertainable only on a notice on the tenant. It appears from the plaint itself that the Plaintiff treated his suit as coming under sec. 155 of the Act (see para. 6th of the plaint).

The difference between the two sub-secs. (*a*) and (*b*) is this. Under cl. (*a*) what is necessary is that the land should have been used in a manner which renders it unfit for the purposes of the tenancy, whether there is or is not any contract as to the manner of the use of the land. Cl. (*b*) refers to a breach of a condition mentioned in the contract. In either of these two cases the tenant is liable to be ejected. The Defendant No. 2 has done both.

What the Plaintiff's case is, is indicated in para. 4 of the plaint in which he says, after stating the misuse of the land of the

tenancy by the Defendant No. 2, that "This has caused great loss and mischief to the Plaintiff. The Defendant No. 2 took settlement of the land for his own agricultural purposes; but he has made it quite unfit for the purpose for which he took the *jote* settlement."

The finding of the lower Appellate Court is, that the land of the tenancy was misused by the Defendant No. 2 and [illegible] ing to that finding the lower [illegible] with regard observed that it had no doubt [illegible] Plaintiff knew of the misuse for more than two years before the time when he instituted the suit and his suit was therefore barred by limitation by Art. 32, Sch. 2 of the Limitation Act.

On behalf of the [illegible] appellant it was urged that Art. 143 was applicable. This Article provides that a suit for possession of immoveable property should be instituted within 12 years from the time when the forfeiture is incurred or condition broken or when the Plaintiff has become entitled by reason any forfeiture or breach of condition. I am of opinion that this article has no application to the present suit which is not for possession of immoveable property but which is against the Defendant No. 2 for ejectment who having a right to use the property for specific purposes perverted it to other purposes. For the latter class of cases the limitation is provided by Art. 32 of the Schedule. And the limitation so provided is two years from the time when the perversion first becomes known to the person injured thereby.

In the Full Bench case of *Sharoop Dass Mondal* v. *Joggassur Roy Chowdhry* (1) it was held that in a suit brought by a landlord against a tenant where the primary relief sought was a mandatory injunction directing the Defendant to fill up a tank excavated by him in contravention of the terms of the tenancy and to pay damages to the Plaintiff for his wrongful act, and where the secondary relief sought was ejectment, and where the defence (*inter alia*) was that the suit was barred by limitation, inasmuch as it was brought more than two years after the excavation of the tank, that Art. 32, Sch. 2 of Limitation Act (XV of 1877) applied to the case and the suit was barred by limitation.

The above is a clear authority on the subject. I am therefore of opinion that the Plaintiff's suit is barred by limitation and that the lower Appellate Court rightly dismissed it. The appeal is therefore dismissed with costs.

NEWBOULD, J.—I agree.

N. G. *Appeal dismissed.*

(1) I. L. R 26 Cal. 561: s. c 3 C. W N. 464 (1899).

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM ORDER

No. 90 OF 1915

WITH

RULE No. 179 OF 1915.

D. CHATTERJEE, J.
CHAPMAN, J.
1915,
30, March.

NIKHRANNESSA BIBI, Appellant.

Guardians and Wards Act (VIII of 1890), sec. 34 (d), 45 (b)—Guardian failing to pay full amount of purchase-money of property sold with permission, because purchaser retained a portion in discharge of old debt—Daily fine, order to pay, if legal.

Where a certificated guardian of minors obtained permission to sell a portion of their estate on the representation that the money (about Rs. 3,000) was wanted to repair their house, and submitted accounts showing that out of Rs. 5,000 obtained by the sale, Rs. 4,000 had been retained by the purchaser in payment of a sum of Rs. 4,000

NIKHRANNESSA BIBI.

which the guardian had borrowed from her to give the minors in marriage, and the Judge thereupon called upon the guardian to pay the said amount of Rs. 4,000 in Court within a specified time and directed that in failure to do so the guardian was to pay a fine of Rs. 5 per diem :

Held—*That the amount the guardian was called upon to pay was not an amount of balance due from the guardian as the same had not been paid to her, nor was it a balance due on accounts filed in compliance with a requisition under cl.* (d) *of sec. 34 of the Guardians and Wards Act and the order imposing a daily fine was* ultra vires.

This was an appeal preferred on the 26th February 1915 against the order of A. H. Cuming, Esq., District Judge, 24-Perganas, dated the 23rd February 1915.

The facts of the case material to this report will appear from the judgment.

Mr. Zahed and *Babu Satish Ch. Mukherjee* for the Petitioner, Appellant.

THE JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit under the Guardians and Wards Act. The Appellant who is the mother of her two minor sons was appointed a guardian under this Act. When the eldest son became 16 years of age she made an application to the District Judge at Alipore that she was going to get her two sons married at an expense of Rs. 4,000 and she wanted her application to be filed as of record, and this was done. She did not in this application say that Rs. 4,000 would be spent out of the minors' estate and that being so, it is not open to her now to say that she spent Rs. 4,000 out of the minors' estate. Thereafter she made an application to the learned Judge that a sum of about Rs. 3,000 was required for the repairs of the minors' house and something for paying their debts. She then applied for permission to sell certain property of the minors in the District of Patna yielding an annual income of Rs. 150, at a price of Rs. 4,000. Sanction was given and then she sold the shares of the minors as well as her own 8th share in the property to one Mussummut [illegible] for a consideration of Rs. 5,000. Out of this consideration money, however, Mussummut Idun from whom she had borrowed Rs. 4,000 for the purpose of marrying her sons, under a hand-note, deducted the amount due to her for principal and interest thereon and paid only the balance. She then drew up and filed an account with regard to the purchase-money showing how the shares of the minors in this Rs. 5,000 was disposed of. Upon this the learned Judge after examining the accounts suspected that there was foul play on the part of the guardian, the Court having been deceived into granting the permission to sell, on the representation that the money would be spent for the repairs of the minors' house. She was called upon to explain her conduct and she explained by saying that at first it had been arranged with the purchaser that the money would be paid, but that the purchaser ultimately refused to pay the full amount and deducted the amount due to her out of the purchase-money. She did not conceal this fact to the Court because she filed a *kobala* which mentioned the way in which the consideration was paid. The learned Judge, however, directed her to pay the balance of the money into Court within a certain time and upon her failing to pay the amount within the specified time he passed an order that until she did pay that amount she was to pay a fine of Rs. 5 per diem. Now this order could have been passed only under sec. 45 of the Guardians and Wards Act and the only

clause of that section which might authorise an action of this kind would be clause (*b*). This clause, however, does not seem to have any application to the facts that have transpired in this case. Clause (*b*) says "If a guardian appointed or declared by the Court fails to deliver to the Court, within the time allowed by or under cl. (*b*) of sec. 34, a statement required under that clause, or to exhibit accounts in compliance with a requisition under cl. (*c*) of that section or to pay into the Court the balance due from him on those accounts in compliance with a requisition under cl. (*c*) of that section, then only the Court can impose a fine upon the guardian. Now the amount of the consideration money was not paid to her and therefore, she could not be called upon to pay any amount of balance due from her nor could this balance be said to be a balance due on accounts filed in compliance with a requisition under cl. (*d*) of sec. 34. The order imposing fine, therefore, was clearly *ultra vires* and should be set aside.

There is then an order dismissing her from the guardianship of her minor sons. We must consider on the whole facts whether such an order is for the benefit of the minors. Simple illiteracy is no ground for disqualification for the appointment of a mother as a guardian of her sons. The estate in this case is not a very large one and if a stranger be appointed a guardian of the estate he would have to be paid a certain amount which would be an incumbrance on the estate of the minors. There is no charge of any other mis-management than this that the consideration money which should have been paid in cash was deducted by the purchaser in payment of debts due to her from the guardian. We do not think that this conduct of the guardian so far as it is disclosed in the record in this case shows such a disqualification for her being a guardian of the property of her minor sons as to dis-entitle her to remain their guardian any longer. In this view of the case we think that the order dismissing her from the guardianship of her minor sons should also be set aside.

There is, however, this to be said in favour of the order of the District Judge that the permission to make the sale in this case was obtained on the allegation that the amount of the purchase-money would be recorded in cash and utilised in the repair of the minors' house and that the conduct of the purchaser in refusing to pay in cash was not in accordance with what had been represented by the guardian to the Judge.

Under these circumstances the best order to pass is to order that the sale of the minors' property will not be confirmed unless the balance of the purchase-money is put in into Court within two months from this date.

The fine, if paid, will be refunded.

The Rule will stand discharged without costs.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 493 OF 1913.

JENKINS, C. J. N. R. CHATTERJEA, J. 1914, Heard, 25, 26, June and 2, July. Judgment, 7, July.	SATISH CHANDRA GHOSH, Defendant, Appellant, *v.* RAMESSARI DASSI and ors., Plaintiffs, Respondents.

Execution sale, when to be set aside when decree set aside—Decree-holder purchaser—Purchase by stranger from latter before decree set aside—Equity.

The Court as a matter of policy has a tender regard for honest purchasers at sales held in execution of its decree, though

SATISH CHANDRA GHOSH *v.* RAMESSARI DASSI.

the decree may be subsequently set aside, where those purchasers were not parties to the suit and the decree had not been passed without jurisdiction.

But the same measure of protection is not extended to purchasers who are themselves the decree-holders; nor can purchasers from such decree-holders claim that the Court owes them any duty or to be within the policy which prompts the extension of protection to strangers, since they have bought from one whose title is liable to be defeated.

SHEIK ISMAIL ROWTHER *v.* RAJAB ROWTHER (1) *dissented from.*

This was an appeal from a decree of Babu Asutosh Ghose, 1st Subordinate Judge of Zillah 24-Parganas, dated the 5th September 1913.

The facts of the case will appear from the judgment.

Babus Saral Ch. Roy Choudhury and *Bhudeb Ch. Roy* for the Appellant.

Babu Atul Krishna Roy for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

JENKINS, C. J.—The decision of this appeal admittedly turns on a point of law, and there is no contest as to the facts. Moreover, it has been agreed before us that the dispute should be decided by us notwithstanding any defects in procedure.

The question is whether the title of a purchaser from one who has bought at a sale in execution of his own decree is liable to be defeated where the decree has been subsequently set aside.

It was decided in *Sheik Ismail Rowther* v. *Rajab Rowther* (1) that where property sold in execution of a voidable decree is purchased by the decree-holder and by him sold for value to a third person, who has no notice of any defect in the decree, the equitable right to set aside such a decree cannot prevail against the rights of a subsequent purchaser for value without notice. If this decision be correct, then the present appeal must succeed.

But I find it difficult to reconcile this decision with what was said by the Privy Council in *Zain-ul-Abdin* v. *Ashgar Ali Khan* (2). There sales were attacked which were effected under decrees that were subsequently set aside. Of the purchasers some had bought in execution of a decree to which they were strangers. Some were decree-holders who had purchased at a sale in execution of their own decree, and some were subsequent purchasers from such decree-holders. Those in the 3rd of these categories were in precisely the same position as the Appellant in this case.

In delivering the opinion of the Privy Council, Sir Barnes Peacock said "some of the Defendants were decree-holders and some were persons who came in under them; but all the Defendants who are in that position may for the purpose of this judgment be classed under the head of the decree-holders. Others of the Defendants were not decree-holders, but merely purchasers under the execution and strangers to the decree upon which the execution issued." This passage is important and the rest of the opinion must be read in the light of the extended meaning it gives to the word "decree-holders." And when it is said that "a great distinction has been made between the case of *bonâ fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves," it has to be remembered who are included in the term

(1) I. L. R. 30 Mad. 295 (1906).

(2) I. R. 15 I. A. 12 : s. c. I. L. R. 10 All. 166 (1887).

decree-holders. It is on the strength of this distinction between those who are and those who are not decree-holders that the decision went in favour of the latter.

This appears to me to be the result of the language employed by their Lordships, and I am unable to accede to the argument that the result is so opposed to legal principles that we ought not to give complete effect to the language used.

The Court as a matter of policy has a tender regard for honest purchasers at sales held in execution of its decree though the decree may be subsequently set aside, where those purchasers are not parties to the suit and the decree has not been passed without jurisdiction.

But the same measure of protection is not extended to purchasers who are themselves the decree-holders; nor can the purchasers from such decree-holders claim that the Court owes them any duty, or to be within the policy which prompts the extension of protection to strangers. They have bought from one whose title is liable to be defeated, and if the decision in *Zain-ul-Abdin Khan's* case (2) bears the meaning I have attributed to it, the title acquired by the purchaser from the decree-holder is similarly defeasible. And the defeasibility of a decree-holder's title where the decree is *ex parte* is of such common occurrence that the plea of a purchaser for value without notice hardly applies.

The appeal, which has been limited to this bare point of law, therefore fails, as does the cross-objection, and the result is that we decline at this stage to interfere with the decree of the Subordinate Judge. But before we can finally dispose of the case it is necessary that it should be determined whether the sale should be set aside as against the Appellant for it is their case that the decree and the sale to the decree-holder were not set aside in their presence. The parties agree that this should be determined on an issue in this suit.

We accordingly send down the following issue for determination :—

Ought the *ex parte* decree and the sale to the decree-holder to be set aside to the prejudice of the Appellant?

The parties will be at liberty to adduce evidence on this and it will be open to the Respondents to show that the Appellant are bound by the orders that have been made. The return should be made in two months.

N. G.

(2) L. R. 15 I. A. 12 : s. c. I. L. R. 10 All. 166 (1887).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 597 OF 1914.

MOOKERJEE, J. N. R. CHATTERJEA, J. 1915, Heard, 23 and 24, August. Judgment, 24, August.	ABDUL RAHAMAN, Appellant, *v.* SARAFAT ALI and anr., Respondents.

Execution sale, if holds good when ex parte *decree set aside where property has been assigned by decree-holder purchaser to stranger—Decree subsequently passed if validates sale—Court's power to take notice of facts which have occurred since institution of proceedings*

The assignee from the decree-holder who has purchased property in execution of his own decree is in no better position than his assignor, and the sale is set aside when the decree is set aside even when the decree-holder has sold the property to a stranger.

SATIS CHANDRA *v.* RAMESSARI (5) *followed.*

As soon as an ex parte *decree is set aside, the sale, where the decree-holder is the purchaser, falls through and is not*

(5) Since reported. 20 C. W. N. 665 (1914).

validated by a fresh decree subsequently made.

SET UMEDMAL *v.* SRINATH ROY (1), HAZARI MULL *v.* JANAKI PRASAD (3) *and* RAM YEAD *v.* BINDESWARI (4) *distinguished, the decree in those cases though temporarily set aside having been ultimately maintained.*

It is well-settled that the Court may, in order to shorten litigation or to do complete justice between the parties, take notice of events which have happened since the institution of the proceedings and may afford relief to the parties on the basis of the altered conditions.

This was an appeal from a decision of T. K. Johnston, Esq., District Judge, Noakhali, dated 11th November 1913, reversing that of Babu Jadab Chandra Chakrabarti, Munsif, Sundwip, dated 28th July 1913.

The facts of the case will appear from the judgment.

Babu Jyotish Chandra Hazra for the Appellant.

Babu Kali Prosanna Piplai (for *Moulvi A. K. Fazlul Huq*) for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

We are invited in this appeal to consider whether a sale of the properties of the Appellant in execution of an *ex parte* mortgage decree should stand confirmed. The sale was held on the 2nd Nov. 1911 and was confirmed on the 13th December following. The decree-holder, who had himself become the purchaser, forthwith transferred the property to another person. On the 19th August 1912, the judgment-debtor applied to have the sale set aside; he alleged that the sale had been irregularly and fraudulently held and had caused him substantial injury. He joined as opposite parties to his application both the decree-holder auction-purchaser and the assignee from him. At the same time, he instituted proceedings to have the *ex parte* decree itself set aside. On the 22nd February 1913, the application to set aside the *ex parte* decree was granted. Thus, on the 28th July 1913, when the Munsif took up for disposal the application to set aside the sale, he found that the *ex parte* decree had already been set aside. He consequently held that the sale must be set aside on the authority of the decision in *Set Umedmal* v. *Srinath Roy* (1), although in the interval the decree-holder auction-purchaser had transferred the property to a stranger. In this view, he declined to take evidence as regards the merits of the case and set aside the sale without enquiry into the allegations of fraud, irregularity and substantial injury. On appeal by the assignee from the decree-holder auction-purchaser, the District Judge has reversed this order and has directed that the sale do stand good. He has held that the assignee from the decree-holder stands on a better footing than his assignor and is entitled to retain the property notwithstanding the cancellation of the *ex parte* decree which was the foundation of the sale. The judgment-debtor has now appealed to this Court and has invited us to hold that the sale stood cancelled as soon as the *ex parte* decree was set aside and that it was immaterial that the property had meanwhile been assigned away by the decree-holder auction-purchaser. We are of opinion that this contention is well-founded and must prevail.

In the first place, it is clear that the

(1) I. L. R. 27 Cal. 810 : s. c. 4 C. W. N. 692 (1900).

(3) 6 C. L. J. 92 (1907).

(4) 6 C. L. J. 103 (1907).

(1) I. L. R. 27 Cal. 810 : s. c. 4 C. W. N. 692 (1900)

ABDUL RAHAMAN v. SARAFAT ALI.

Primary Court was competent to set aside the sale on a ground which was not mentioned in the application of the judgment-debtor and did not in fact exist when that application was made. It is well-settled that the Court may, in order to shorten litigation or to do complete justice between the parties, take notice of events which have happened since the institution of the proceedings and may afford relief to the parties on the basis of the altered conditions. The decisions which recognise this principle are reviewed in *Rai Charan* v. *Biswanath* (2) and reference may be made particularly to *Hazari Mull* v. *Janaki Prasad* (3) and *Ram Yead* v. *Bindeswari* (4).

In the second place, it is clear that the effect of the cancellation of the *ex parte* decree on the execution sale held thereunder, is not touched by the fact that the decree-holder auction-purchaser has assigned away the property sold. As fully explained by Jenkins, C. J., in *Satis Chandra* v. *Ramessari* (5), the assignee stands in no better position than his assignor. This is borne out by the decision of the Judicial Committee in *Zain-ul-Abdin* v. *Ashgar Ali* (6), and it is plain that the contrary view adopted in *Sheik Ismail* v. *Rajab* (7) is supported neither by principle nor by authority. The theory whereby a special protection is afforded to a stranger who purchases at an execution sale will be found expounded in the case of *Narendra Chandra* v. *Jogendra Narayan* (8). That rule cannot be extended to an assignee of the decree-holder auction-purchaser.

We are informed that on retrial of the suit a decree has been made in favour of the Plaintiff against the Defendant; but as Maclean, C. J., pointed out in *Set Umedmal* v. *Srinath Roy* (1), that does not affect the question of the effect of the cancellation of the *ex parte* decree upon the sale held thereunder; as soon as the *ex parte* decree was set aside, the sale fell through, and the fresh decree subsequently made could not possibly validate that sale. On this ground, the present case is distinguishable from the decisions in *Hazari Mull* v. *Janaki Prasad* (3) and *Ram Yead* v. *Bindeswari* (4), where the very decree which was the basis of the sale, though temporarily nullified, was ultimately maintained.

The result is that this appeal is allowed, the order of the District Judge set aside and that of the Court of first instance restored. Each party will pay his own costs throughout the proceedings.

N. G. *Appeal allowed.*

(2) 20 C. L. J. 107 (1914).
(3) 6 C. L. J. 92 (1907).
(4) 6 C. L. J. 102 (1907).
(5) Since reported. 20 C. W. N. 665 (1914).
(6) L. R. 15 I. A. 12: s. c. I. L. R. 10 All. 166 (1887).
(7) I. L. R. 30 Mad. 295 (1906).
(8) 19 C. W. N. 537: s. c. 20 C. L. J. 469 (1914).

[CIVIL REVISIONAL JURISDICTION]

RULE. No. 676 OF 1915.

HOLMWOOD, J.
MULLICK, J.
1915,
25, November.

ATUL CHANDRA SEN and ors., Petitioners,
v.
RAJA PEARY MOHAN MOOKERJEE and others, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 33, r. 15—Application to sue in forma pauperis, effect of rejection under r. 5—Distinction if any between orders under r. 5 and r. 6.

On the rejection of an application for leave to sue as pauper the only course open to the Applicant is to institute a suit in the ordinary way. There is no distinction between rejection under r. 5 and an order of refusal under r. 7.

(1) I. L. R. 27 Cal. 810: s. c. 4 C. W. N. 692 (1900).
(3) 6 C. L. J. 92 (1907).
(4) 6 C. L. J. 102 (1907).

ATUL CHANDRA SEN *v.* RAJA PEARY MOHAN MOOKERJEE.

This was a Rule granted on the 8th July 1915 against an order of Babu Upendra Ch. Mukerjee, Subordinate Judge of Zillah Hughly, dated 10th April 1915, refusing the application of the Petitioners for permission to sue as paupers.

The Petitioners in this case applied to the 2nd Court of the Subordinate Judge of Hughly for leave to sue in *forma pauperis* for damages caused by the wrongful and fraudulent sale of sand from a sand-field of which the Petitioners were the joint lessees within Raja Peary Mohan's zemindary. In this application the Petitioners omitted to include one of their properties in the schedule annexed to the application under Or. XXXIII, r. 2, and after hearing under Or. XXXIII, r. 7, it was rejected on that ground. Thereafter the Petitioners preferred another application for leave to sue in *forma pauperis* to the same Subordinate Judge including the omitted property in the schedule and still claiming to be paupers. The Subordinate Judge at the hearing of this application under Or. XXXIII, r. 7, refused to entertain it holding that it was barred under Or. XXXIII, r. 15, C. P. C., and rejected it with costs. Thereupon the Petitioners applied to the High Court under sec. 115, C. P. C., and obtained a rule from Mr. Justice N. R. Chatterjea and Mr. Justice Roe on 9th July 1915.

The order of the lower Court was as follows :—

"This is an application for permission to sue as a pauper on the allegation that the Applicants are not possessed of sufficient means to enable them to pay the requisite Court-fee on the plaint.

"The Defendant No. 1 opposes the application. Neither the Government nor Defendant No. 2 has entered appearance to oppose the application. Amongst other things the Defendant No. 1 contends that the Applicants' failure in a previous application of this nature in respect to the same cause of action is a bar to the present application. He has put in the judgment of the Court passed on these applicants' previous petition for permission to sue as paupers. That judgment has been marked Ex. A.

"The Applicants have examined the Petitioner No. 1 and one Nanigopal Chatterjee. This Nanigopal has proved nothing for or against the Applicants' pauperism, and the evidence of the Applicant No. 1 alone is not sufficient to warrant a conclusion in favour of the Applicants. Now from the evidence of the Applicant No. 1 it appears that in respect to the same cause of action the applicants brought Pauper Case No. 1 of 1913 which was refused. So in view of r. 15, Or. XXXIII of the Procedure Code the present application cannot be entertained. The Defendant's contention should prevail. The decision in Pauper Case No. 1 of 1913 is a bar to this case."

Babu Santimay Majumdar for the Petitioners—Or. XXXIII, r. 15, does not refer to orders under Or. XXXIII, r. 5, as the word used in Or. XXXIII, r. 5, is "reject" and the word used in Or. XXXIII, r. 15, is "refused" which is also the word used in Or. XXXIII, r. 7. Therefore a subsequent application is not barred under Or. XXXIII, r. 15, if the previous application be rejected under Or. XXXIII, r. 5, as was the case here. Besides an investigation under Or. XXXIII, r. 5, is preliminary in its character and rejection of the said application under Or. XXXIII, r. 5, for mere default or omission of a property in the schedule according to Or. XXXIII, r. 2, ought not to operate as a bar to a renewal of the application after suitable amendment. *Bonâ fide* omission to include a property in the schedule should not be made

penal. Even if an application be "refused" under Or. XXXIII, r. 7, it should be open to the Petitioner to ask for review or revival, and Or. XXXIII, r. 15, should be no bar to it. *Re Rani Umasundari Debi* (1) referred to.

Babus Mohendra Nath Roy, Kumar Sankar Ray and *Haradhon Chatterjee* who appeared for the Opposite Party were not called upon to reply.

The JUDGMENT OF THE COURT was as follows :—

The question which is raised by this Rule is really one as to what constitutes the refusal to entertain an application to sue in *forma pauperis* under r. 15, Or. XXXIII, C. P. C.

It appears that the Applicant applied once before the same learned Judge and evidence was taken on both sides. It was found that the Applicant had made false statements, that his own *purohit* contradicted him and that he was owner of a house. The Judge therefore rejected his application basing his decision formally upon r. 2, namely, that he had not furnished the particulars required with regard to the plaint.

It was sought to be argued at first that r. 15, Or. XXXIII, applies to refusals under r. 7 and does not apply at all to refusals under r. 5. That contention cannot for one moment be entertained, for there is not the slightest doubt that all the grounds in r. 5 except the ground (*a*) are grounds going to the merits and only to be determined by evidence. The question therefore narrows itself to this, namely, whether the rejection under r. 5 (*a*) in all cases is free from the bar laid down in r. 15. We do not think that it is, and no authority has been shown to us to enable us to find that it is. It has been held in numerous cases that on the rejection of an application for leave to sue as pauper the only course open to the Applicant is to institute a suit in the ordinary way. There is no distinction between rejection under r. 5 and an order of refusal under r. 7. The only exceptions which are to be found in the decided cases in the Courts are such cases as these—where the Court has not passed the order of refusal or rejection, but merely returned the application to have the question of pauperism tried by a Court of concurrent jurisdiction or where it has struck off temporarily the application for default by non-appearance. But there is no authority for holding that where the application has been deliberately framed in fraud of the conscience of the Court and false suppression of property has been found, the rejection on that ground does not constitute a bar. A case reported in 1870 is cited before us, *the matter of petition of Rani Umasundari* (1) but it is clear that this has nothing to do with the present question. That was a case where it was laid down by this Court that the Judge refusing an application to sue in *forma pauperis* is competent to entertain a petition of review of his own order. That nobody doubts. But if this be taken as an application for review before the same Judge Babu Upendra Chandra Mukherjee, all we can say is that he has again given good reasons for rejecting it. Therefore it would be an order refusing to review with which we cannot interfere.

The result is that the Rule is discharged with costs, one gold mohur.

Rule discharged.

S. M. M.

(1) 5 B. L. R. App. 29 (1870).

(1) 5 B. L. R. App. 29 (1870).

[CRIMINAL REFERENCE.]

No. 30 OF 1916.

CHITTY, J.
WALMSLEY, J.
1916,
17, March.

RAHIMAN BIBI, Complainant,
v.
MOBARAK MONDAL and anr., Accused.

Criminal Procedure Code (Act V of 1898), sec. 234—Misjoinder of charges.

Two accused persons were tried together on two charges, namely, theft in a building (sec. 380, I. P. C.) and theft of paddy in a field (sec. 379, I. P. C.) committed on two different dates, the property in the building and the paddy belonging to one and the same complainant.

Held—*That there was a misjoinder of charges under sec. 234, Cr. P. C.*

This was a Reference under sec. 438, Cr. P. C., made by Mr. G. B. Mumford, Sessions Judge of Birbhum, on the 28th February 1916, recommending that the order of Mr. J. C. Ray, Sub-divisional Magistrate of Rampurhat, dated the 5th January 1916, convicting the accused under sec. 379, I. P. C., and sentencing each of them to pay a fine of Rs. 100, may be set aside.

The material portion of the order of reference was as follows—

The accused were tried together by summary procedure for theft in complainant's house on 13th November 1915 and for theft of paddy from complainant's field on 14th November 1915.

They were acquitted on the first charge under sec. 380, I. P. C., and convicted on the second under sec. 379, I. P. C.

At no time could it have been said that the two thefts occurred in the course of the same transaction.

Sec. 234, Cr. P. C., is not applicable where several persons are jointly accused *Budhai Sheikh* v. *Tarap Sheikh* (1) and in any case the offences were not under the same section of the Penal Code. The misjoinder therefore appears to amount to an illegality as laid down in *Subramania Iyer* v. *King-Emperor* (2).

Babu Jitendra Lal Banerjee for the Accused.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference in the matter of two persons Mobarak Mondal and Sabak Mondal. They were tried summarily by the Magistrate on two charges—theft in a building (under sec. 380, I. P. C.), committed on 13th November 1915 and theft of paddy in a field (under sec. 379, I. P. C.), committed on 14th November 1915,—the property in the building and the paddy belonging to one and the same complainant. The Judge points out that the trial on these two charges of the two persons was illegal within the meaning of the sections in the Criminal Procedure Code relating to joinder of charges. Technically speaking, the Judge is correct. Sec. 234, Cr. P. C., has been held to apply only to one person and the offences are also technically not of the same kind. It is difficult to see how the accused could have been prejudiced as it appears from the Magistrate's order that the charge of theft in the building, which was for the removal of some doors, was not seriously pressed. The trial proceeded mainly on the question of taking of the paddy from the field. However, as the accused press for a fresh trial and technically speaking, the recommendation of the learned Sessions Judge is correct, we set aside the conviction and sentence and direct that the accused be re-tried on the charge of theft of paddy from the field committed on 14th November 1915.

S. C. M.

(1) 10 C. W. N. 82 (1905)

(2) 5 C. W. N. 866 (1901).

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REPORTS (*See* Index).

The Political Crisis in China.

Whilst the so-called world-war is absorbing the attention of Europe as also of large parts of Asia and Africa, China, the oldest of existing nations of the world, is passing through phases of political development, for which if a parallel in history is to be sought for at all, we must go back to 17th century England. It is now well-known that King James I was not singular in his notions concerning the Divine right of Kings. It was the common creed of rulers who established themselves upon the ruins of Feudalism and the Holy Roman Empire, and large bodies of the people, and in particular the clergy in Protestant countries, participated in it. In China as in Japan and elsewhere in Asia belief in the Divine right of Kings has been traditional and universal.

Just as in England the Stuart Kings by their personal incompetence demonstrated the futility of the theory of Divine rights in practical politics, so has been the case with the later Manchu rulers of China. But when the last Manchu Emperor was compelled to abdicate, there was not in China as in England of the middle 17th century an organised parliament ready to take over the reins of Government. Even in England, however, in the period of constitutional chaos that followed, the body which was the most strongly organised, *viz.*, the Army, quickly displaced the Parliament—with the almost inevitable sequel of the military dictatorship of Cromwell. In China too, power passed inevitably to Yuan-Shi-Kai—like Cromwell, military dictator and King in all but the name.

Cromwell is credited by history with a very conservative cast of mind. He rejected, for instance, all proposals for universal suffrage. He would have upheld the monarchy and the dynasty, if events had not convinced him that there was no alternative but to part with it. With the greatest reluctance he consented to the King's execution and he maintained throughout that "a settlement of somewhat with monarchical power in it would be very effectual." That his views regarding monarchy were not coloured by personal ambition, he made clear by disavowing all desire to make the Protectorship hereditary in his family. He felt —and events proved the soundness of his political insight—that (as he himself told Whitelocke) " the power of a King is so great and high and so universally understood and reverenced by the people of this nation that it would be of great advantage in such times as these." Cromwell failed to give practical effect to this idea, because England would not yet accept a new dynasty and it was of course out of question so long as he lived to bring back the Stuarts, even if the Stuarts were prepared to come back on his terms.

Yuan-Shi-Kai's attempt to re-establish the monarchy in his own person, certainly admits of a similar explanation, that is to say, a genuine belief in a monarchy of some sort as the only form of constitution under which China can rise and take its place by the side of Japan. To enlist such popular sentiment as there may be in favour of the old dynasty, in support of his new scheme, he is said to have offered his daughter in marriage to the deposed Emperor, with the succession to the throne after him. So far as one can generalise from the meagre information that from time to time appears in the papers, the scheme to re-establish the monarchy, though put forward with unparalleled diplomatic skill and caution, has given rise to widespread rebellion—in Politics so much indeed appears to turn on mere phrases—for

Yuan-Shi-Kai is in fact an autocrat of autocrats —President in name only of a Republic which does not in fact exist. Yuan-Shi-Kai, however, does not, by any means, seem to be at the end of his resources. The revolted provincial chiefs and he appear to be busy in reaching a constitutional settlement. A strong centralised Government in touch with public opinion and sympathetically responsive to it and removed altogether from the narrow-minded and corrupting concomitants of the departed monarchy—by whatever name it is called—would seem to all disinterested outsiders to be indispensable to the salvation of China.

China certainly seems to be the country pre-eminently fitted for such a government. Though the form of Government in China has never been other than an irresponsible monarchy, the Chinese are, as close observers have found, in spirit, the most democratic and republican of communities now existing. "The highest positions in the state," writes one who has made a special study of the country, its people and institutions, "have always been open through the medium of competitive examinations, to the humblest peasant in the empire. It is solely a question of natural ability coupled with an intellectual training of which latter there is no lack at the disposal even of the poorest." "In order to enforce their rights by the simplest and most bloodless means, the Chinese have steadily cultivated the art of combining together . . The extraordinary part of a Chinese boycott or strike is the absolute fidelity by which it is observed . . . There are no blacklegs."

This method of enforcing the will of the people has been so well perfected in China that by its means the people effectively secure what in other countries is but approximately attainable through complicated representative institutions—taxation by the people's consent. "The traditional and well-marked lines of taxation," says the same writer, "are freely accepted by the people; any attempt, however, to increase the amounts to be levied or to introduce new charges of any kind, unless duly authorised by the people themselves, would be strongly resisted. As a matter of fact, the authorities never run any such risks. It is customary for the local authorities to invite the leading merchants and others concerned to a private conference and only when there is a general consent of all the parties do the officials venture to put forth proclamations saying that such and such a tax will be increased or imposed. Any other method may lead to disastrous results. The people refuse to pay and coercion is met by a general closing of shops and stoppage of trade."

"The nominal form of Government", the same writer adds (speaking of the monarchy), "is an irresponsible autocracy; its institutions are likewise autocratic in form but democratic in operation . . . What the people of China will not stand is injustice: at the same time they will live contentedly under harsh laws which they have at one time or another imposed upon themselves."

No better proof can be found of this statement than is afforded by the mode by which officials collect revenue and are paid their salaries in China. "The occupants of petty posts collect revenue in various ways, as taxes or fees, pay themselves as much as they dare and hand up the balance to a superior officer who in time pays himself in the same sense and again hands up the balance to his superior officer. When the Viceroy of a Province is reached he too keeps what he dares, sending up to the Imperial Exchequer in Peking just enough to satisfy the powers above him. There is thus a continual check by the higher grade upon the lower, but no check on such extortion as *might be* practised upon the tax-payer. *The taxpayer sees to that himself.*" "Speaking generally . . . this system works fairly well. Few officials overstep the limits which custom has assigned to their posts and these who do generally come to grief."

Although, therefore, the situation in China under Yuan-Shi-Kai affords instructive parallels to that of England under Cromwell, foreign publicists would do well to bear the above facts in mind before rashly predicting that the future of China lies necessarily through black anarchy and rebellion. The future of China lies in the hands neither of self-seeking oligarchs nor of doctrinaire intellectuals. The solution whenever it comes must be such as will have to satisfy the "great democracy of the greatest republic the world has ever seen."

By an Imperial decree issued in 1907, China was promised by its late rulers a "constitution"

in the European sense, a form of representative Government. The time-honoured methods of strike and boycott were to give place to direct interchange of views expressed through popular representatives. The National Assembly was however to be a purely consultative body. All legislative power was to continue in the hands of the Emperor alone. " At the first blush," says the writer previously quoted, " this seems like giving with one hand and taking away with the other and so perhaps it would work out in more than one nation of the West. But those who know the Chinese at home know that when they offer political advice, they mean it to be taken." The prophecy has not been fulfilled, and the proposed constitution has passed away with its authors. The causes of the upheaval cannot well be ascertained nor of the events that have followed. They must not however be looked for in any casual assimilation of Western ideals, for China is intensely conservative. The changes whatever they be will work themselves out from within. She is too well organised to suffer any to be imposed from outside.

HOW CAN OCCUPANCY RIGHT BE ACQUIRED?

(*Continued from page cxxiii.*)

POSSESSION MUST BE BONA FIDE.—But although rights of occupancy may be acquired by holding land under a person having no title in the land, a trespasser himself could not acquire such a right, *Peer* v. *Meeah*, W. R. Sp. F. B. 116; *Gholam* v. *Purno*, 3 W. R. (Act X) 147; *Gareeb* v. *Bhuban*, 2 W. R. (Act X) 85. In order to have the benefit of the enactment the person must be in *bonâ fide* possession upon payment of rent. Accordingly a *raiyat* who secretly possessed himself of land and pays no rent for it has no right of occupancy in that land, *Gareeb* v. *Bhuban*, 2 W. R. (Act X) 86; *Gholam* v. *Purno*, 3 W. R. (Act X) 147. Nor can possession obtained and continued by fraud create any right of occupancy, *Bhubanjoy* v. *Ram*, 9 W. R. 449.

PERMISSIVE POSSESSION.—Permissive possession not founded upon any right such as that of a servant or licensee, though for twelve years, cannot confer the right, *Meherali* v. *Ramrutan*, 21 W. R. 400; *Addoyto* v. *Peter*, 17 W. R. 383; *Kabeel* v. *Radha*, 16 W. R. 146; *Wooma* v. *Boku*, 13 W. R. 333.

CULTIVATION BY RAIYAT HIMSELF NOT NECESSARY.—The acquisition of the right does not depend on the *raiyat's* cultivation: It is not necessary that the *raiyat* should cultivate himself the land in his occupation. If the land is acquired primarily for that purpose, cultivation carried by any one of the methods indicated in *Brindaban* v. *Issar*, (1864) W. R. (Act X) 1; *Ram* v. *Lukhi*, 1 W. R. 71; *Kali* v. *Amiruddin*, 9 W. R. 579, would impress on him the status of a settled *raiyat* of the village (Finucane and Ameer Ali's B. T. Act, 1st Ed. 120-121) capable of acquiring the right of occupancy. And whether he let out the land to others for purposes of cultivation, taking from them a share of the produce by way of profit, or whether he had it cultivated by members of his family or by labourers his position was the same, *Brindaban* v. *Issar*, (1861) W. R. (Act X) 1; *Ram* v. *Lukhi*, 1 W. R. 71; *Kali* v. *Amiruddin*, 9 W. R. 579. The law does not require that a person in order to acquire the right should be a *bonâ fide* cultivator. The provisions of Bengal Tenancy Act are applicable to all lands used for agricultural purposes and are not restricted to such lands alone as are *actually* under cultivation, *Dinu* v. *Sashi*, 22 C. L. J. 219.

PAYMENT OF RENT IF NECESSARY.—It was held in early cases that for the acquisition of a right of occupancy only two conditions were necessary—(*a*) the cultivation or holding of land for a period of twelve years, and (*b*) that the person holding or cultivating the land should be a *raiyat*, *Narain* v. *Opnit*, I. L. R. 9 Cal. 304; 11 C. L. R. 417. But it was provided in the former Rent Act that a *raiyat* had an occupancy right in land " *so long as he paid the rent* payable on account of the same," Act X of 1859, sec. 6; Act VIII, B. C. of 1869. It was accordingly held that though non-payment of rent did not bar the acquisition of occupancy right, payment of rent was necessary to maintain it and non-payment rendered a *raiyat* liable to be evicted, see (3) above. And though non-cultivation of land, coupled with non-payment of the rent might be sufficient to justify the conclusion that the tenant had relinquished the land, mere non-payment of rent was not in itself sufficient to shew that there was no subsisting right of occupancy, *Nilmani* v. *Sonatan*, I. L. R. 15 Cal. 17; see also *Hem* v. *Chand*, I. L. R. 12 Cal. 115; *Masyatulla* v. *Nur Zahan*, I. L. R. 9 Cal. 808: s. c. 12 C. L. R. 389. But non-payment of rent may be a valid ground for holding that the land was held not by a *raiyat* but by a

trespasser, Sarada Charan Mitra's Land Law of Bengal, 331. When the relation of landlord and tenant has once been proved to exist, the mere non-payment, though for several years, is not sufficient to shew that it has ceased, *Ranga* v. *Abdul*, I. L. R. 4 Cal. 314: s. c. 3 C. L. R. 119: I. L. R. 7 Bom. 40.

Rent in money or kind.—A *raiyat* who paid rent *in kind*, but who had held or cultivated the land for a period of twelve years had a right of occupancy in the land so held or cultivated by him so long as he paid the rent (though in kind) for the same, *Jutto* v. *Basmattee*, 15 W. R. 479; *Hurihar* v. *Biressar*, 6 W. R. (Act X) 17.

Radha Raman Mukerjee, M.A., B.L.

(To be continued.)

Reviews.

Land Tenures in the Madras Presidency. *By S. Sundaraja Iyengar, B.A., B.L., Vakil, High Court, Madras. The Modern Printing Works, Mount Road, Madras. 1916.*

The work is much above the general level of legal compilations, for it does not content itself with commenting on and compiling case notes upon the provisions of the Local Statutes. It is an attempt—and a scholarly one—to understand and explain the bases of land-holding in the Presidency—the materials therefor having been derived as much from decisions of Law Courts and official documents as from the statutes. The statutes themselves are set out at the end, to give completeness to the work. Some idea may be formed of the nature and scope of the treatise from the chapter headings, some of which are "Origin and Existence of Private Property," "Property, Ownership and Possession," "The Mirasi Tenure," "Beneficial Tenures," "Service Tenures," "Malabar Land Tenures." It is most refreshing to observe that the first two chapters above-mentioned are written almost entirely upon the basis of Indian materials. In dealing with the details of tenures in his Presidency, however, the author does not refuse light from other parts of India and Calcutta decisions are quite frequently referred to. A glossary of terms is another indispensable aid to the elucidation of the subject, which the author has considerately appended to the work. We regard this work as a valuable contribution to the comparative study of land tenures in India.

The Law of Transfer in British India. *By H. S. Gour, M.A., D.C.L., LL.D. In three volumes, Vol. III. Fourth Edition Calcutta: Thacker Spink & Co. 1916. Price Rs. 10.*

This, the concluding volume of the Fourth Edition of Mr. Gour's Commentaries on the Transfer of Property Act, deals with secs. 105 to 137 of the Act. There is besides a supplementary chapter dealing with conveyancing to which are appended several conveyancing precedents. At the end of the volume will be found collected the Law Commissioners' Report of 1879 recommending the enactment of the statute, the Select Committee's Reports, and the proceedings in Council with reference to the Act of 1882 and all amending enactments of later dates. The notes have been revised and brought up-to-date, an addenda of cases decided when the present edition was in the press bringing the citations for the entire book down to January 1916. Of the quality of the commentaries, little need be said in noticing the fourth edition, for all we said in regard to them in our notices of previous editions and previous volumes of the present edition hold good of the volume under notice.

The Law of Partition as administered in India. *By S. C. Mitter, B.A., Barrister-at-Law. Butterworth & Co. (India), Ld. 6 Hastings Street, Calcutta. 1916.*

This a handy brochure of nearly two hundred pages, well-arranged and provided with a full subject-index, dealing with the Law of Partition under the following main headings.—(1) Properties liable to partition and properties not liable; (2) Partition under the several schools of Hindu Law; (3) Right to partition; (4) Mode of effecting partition; (5) Partition by Civil Court; (6) Partition by Revenue Court; (7) Mahomedan Law (General); (8) Mahomedan Law (Details of shares, etc.). The treatment is naturally in some respects fuller than that obtainable in general treatises on Hindu or Mahomedan Law. It does not, on the other hand, profess to be an exhaustive treatise on the subject as Babu Ram Charan Mitter's Tagore Law Lecturers on Joint Family and Partition are. Within its small compass, it will be useful as a practitioner's hand-book and will, we are sure, be freely used as such.

[PRIVY COUNCIL.]
[APPEAL FROM MADRAS.]

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.
1916,
21, February.

SUNA ANA ARUNACHELLAM CHETTY and ors., Appellants,
v.
S. R. M. RAMASWAMI CHETTY, Respondent.

Will—Genuineness, proof of—Clear and trustworthy evidence of attesting witness if to be rejected because appearance of document suspicious—Court if in such a case may speculate as to what would have been a proper Will for the testator.

Proof of the genuineness of a Will depended mainly upon the testimony of a doctor who attested on the last page of the Will, the signature of the deceased and who deposed that at the time the Will was executed, the deceased was perfectly capable of understanding a business transaction. The Will on examination showed that the writing on the last page was inconveniently crowded above the signature of the testator, and, on the last page but one, the writing at the foot was so placed as to lend colour to the suggestion that the page had been filled up after the signature had been attached. Upon this the Trial Judge built the theory that the Will had been written in blank pages over signatures of the testator previously obtained.

Held—*That the doctor's evidence, if believed, (and which the Judicial Committee did believe) completely destroyed this theory, and that the High Court was right in pronouncing in favour of the genuineness of the Will.*

That it would be most unsafe and most undesirable, in circumstances such as these, to try to spell out from the peculiar form in which a document written in the vernacular appears, a hypothetical answer to the clear, distinct and trustworthy evidence of the doctor who witnessed the Will.

Where a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of Will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or with justice.

This was an appeal from a judgment of the Madras High Court, dated 12th September 1911, which reversed a judgment of the District Judge of Madura.

The sole question for decision was whether the Will propounded was proved or not. Of the attesting witnesses to the Will, eight persons, including a doctor, and two vakils, were examined before the District Judge in support of the Will, but the District Judge held that the Will was not genuine. Mr. Justice Abdul Rahim, in whose judgment Sankaran Nair, J., concurred, came to the opposite conclusion. The learned Judges held that there was a large body of respectable and trustworthy evidence in support of the Will and that there were no sufficient reasons for discrediting that evidence.

Messrs. L. DeGruyther, K. C., and *Bhugwandin Dubé* appeared in support of the appeal.

Sir Robert Finlay, K. C., and *Mr. Kenworthy Brown* for the Respondent were not heard.

THEIR LORDSHIPS' JUDGMENT was delivered by

THE LORD CHANCELLOR.—Two questions are raised in this appeal: the one is whether the appeal is competent to the Appellants, and the other whether

SUNA ANA ARUNACHELLAM CHETTY *v.* S. R. M. RAMASWAMI CHETTY.

a Will, which was executed on the 10th November, 1904, by one Subramanian Chetty, is or is not a good and valid testamentary document.

With regard to the first point, their Lordships desire to express no opinion. In the view that they take of this case *its decision is not material*, and their opinion must not be taken to involve an assumption that the Appellants have a sufficient interest to enable them to maintain the appeal.

With regard to the other question, it is clear that the judgment of the Judge of the District Court, which was in the Appellants' favour, can only be supported if the evidence of a doctor, Dr. Van Allen, be disqualified, because either it is untrustworthy owing to faulty recollection, or, if accepted, does not go far enough to establish the validity of the Will. If, therefore, their Lordships considered the doctor's evidence accurate and adequate, it would be unavailing for counsel to ask the Board to examine the detailed story of the other witnesses who were called before the District Court.

Their Lordships have given careful and close attention to the evidence of Dr. Van Allen, and are clearly of opinion that reliance can safely be placed on it in all material respects, and that it does fully and sufficiently establish the validity of the Will that is in dispute.

From this evidence it appears that the deceased was operated on by Dr. Van Allen on the 9th November, 1904, in the American Hospital at Madura. He was operated on for a carbuncle, but he was, and he had for some time past to the doctor's knowledge been, suffering from diabetes. On the day following the operation the doctor observed from certain symptoms that there was a prospect of the patient sinking under the shock. He accordingly, at noon on the 10th November, told him or his friends that he had better see to his affairs, and accordingly vakils were called in, who prepared the document which is in dispute. The doctor says that he saw the Will signed by the testator. He says that he was with him for half an hour, during which he signed and he (the doctor) attested. The doctor also saw a man taking notes, apparently at the dictation of the testator, *though he did not hear what passed* between them, and at 9 or 10 in the evening, after the signature of the document, the deceased left the hospital in a state of great weakness, and within a few hours died.

Now the doctor's evidence is quite clear that, in his opinion, the deceased was perfectly capable of understanding a business transaction, and understood what he was doing at the time when he executed the Will. He gives several reasons, the chief of which, repeated from time to time, is that he could tell by the appearance of the face and eyes of the patient; this appears to have been regarded as unsatisfactory by the District Judge, who thought that it was not a means by which the doctor could ascertain the strength and intelligence that was left to the dying man.

Their Lordships are quite unable to accept the view of the learned Judge in this matter. There are many signs by which a doctor can determine whether a man's mind is sound or no, and certainly not the least important is the character and appearance of the man's eyes and expression.

But the matter does not rest there, because the doctor says himself that he was talking to the patient throughout the day trying to cheer him up, though whether he spoke to him at the moment when his

Will was executed or immediately afterwards is not made plain.

Their Lordships think that the real fact that explains the judgment of the District Judge is this: When the Will is examined it appears that the last page has the writing inconveniently crowded above the signature of the testator, and the last page but one has also at the foot of the page writing so placed as to lend colour to the suggestion that the page had been filled up after the signature had been attached. It goes no further than that; but upon that it appears that the learned Judge has built up a theory of a dishonest conspiracy with regard to the preparation of this Will, which their Lordships are clear Dr. Van Allen's evidence completely destroys. If the view were right that this Will had been written on blank pages over signatures of the testator previously obtained, it would have been quite impossible for Dr. Van Allen to have said, as he did again and again, that he saw the deceased execute the Will, and it would have been equally impossible for Dr. Van Allen to have attested on the last page of the Will the signature of the deceased without noticing that there was no writing whatever over it. Remembering his responsibilities, as he clearly did, as an attesting witness, he would have been quite unable, if the paper was blank, to have come and said, in the plain words which he used, that he saw the signature of the deceased attached to this document.

These are the reasons that convince their Lordships that, whatever may be the true cause of the inconvenient way in which some of this writing appears, the explanation is not and cannot be the one that the learned Judge has assigned; it would indeed be most unsafe and most undesirable in circumstances such as these to try to spell out from the peculiar form in which a document written in the vernacular appears a hypothetical answer to the clear, distinct, and trustworthy evidence of the doctor who witnessed the Will.

Their Lordships only desire to add, in conclusion, this: When a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of Will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or with justice.

Their Lordships see no reason whatever to doubt that the view that has been taken by the High Court of Judicature at Madras is correct, and they will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitor: *Mr. Douglas Grant* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE No. 3486 OF 1912.

MOOKERJEE, J. ROE, J. 1915, Heard, 1 and 2, June. Judgment, 2, June.	GIRIJA KANTA CHAKRABARTY and ors., Defendants, Appellants, *v.* MOHIM CHANDRA ACHARJYA, Plaintiff, Respondent.

Mortgage by two out of three brothers, members of joint Hindu family—Death of one executant—

GIRIJA KANTA CHAKRABARTY *v.* MOHIM CHANDRA ACHARJYA.

Suit against other executant and the non-executing brother only as representing the deceased executant —Ex parte ***decree and sale in execution and purchase by mortgagee—Non-executing brother's original share if passed by the sale—Decree for joint possession if can be made—Transfer of Property Act (IV of 1882), sec. 44***

Delivery of symbolical possession is operative against the judgment-debtor who from that date becomes a trespasser, and the remedy of the decree-holder who has failed to get actual possession is by suit.

Where A and B, two out of three brothers, A, B and C, members of a joint mitakshara *family, executed a mortgage of their whole property, and the mortgagee on the death of A sued to enforce the mortgage against B as mortgagor and also as the legal representative of A and against C, describing him only as A's legal representative :*

Held—*That the decree and the sale could not affect C's original one-third share in the mortgaged property, since the question of the validity of the mortgage as against C who was not a party thereto could not be raised and decided in the mortgage suit.*

That in a suit by the purchaser to recover the property, C was not barred from raising the question by the doctrine of constructive res judicata.

That the Plaintiff as purchaser of an undivided two-thirds share in huts used as residence by a joint Hindu family could not be given a decree for joint possession, regard being had to sec. 44 of the Transfer of Property Act.

That the proper course to follow is either to direct delivery of possession by partition in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition.

This was an appeal preferred on 22nd November 1912, against the decree of Babu Beeraja Charan Mitra, Subordinate Judge of Zillah Faridpur, dated 12th July 1912, modifying the decree of Babu Profulla Chandra Guha, Munsif of Chikandi, dated 30th March 1911.

The facts of the case will appear from the judgment.

Babu Prokash Chandra Majumdar for the Appellants.

Babus Mukund Nath Roy and *Satish Ch. Bhattacharjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an apepal by the Defendants in a suit for possession of land and huts on declaration of title by purchase at a sale in execution of a mortgage decree. The facts essential for the decision of the questions of law raised before us may be briefly stated. Three brothers A, B and C were owners of the disputed property, and their interest may be regarded as the unit for our present purpose. On the 18th December 1887, A and B executed a mortgage in favour of the Plaintiff; they dealt with the entire property and apparently ignored the interest of their brother C. A died in 1892 and left his two brothers B and C as his representatives. On the 13th November 1895, the mortgagee sued B and C to enforce his security. B was made a party in his character as one of the original mortgagors, and also as one of the representatives of A; C was described only as the representative of his deceased brother A. There was no allegation in the plaint that the mortgage, though executed by A and B, was operative against C, either because the debt had been incurred for family purposes or because A and B had implied authority to bind their brother C. Neither B nor C entered appearance and an *ex parte* decree was made on the 19th December 1895. The decree

was executed in due course, the property was brought to sale and passed into the hands of the Plaintiff. The Plaintiff as execution purchaser obtained symbolical delivery of the property, but not actual possession. He accordingly instituted the present suit on the 6th August 1907 to eject the Defendants who are the representatives of B and C, as C had died in 1898 and B in 1901. The Court of first instance decreed the suit in part. Upon appeal, the Subordinate Judge has decreed the claim in full. On the present appeal, four points have been urged on behalf of the Defendants, *first*, that the suit was barred under sec. 47, C. P. C., and that the remedy of the Plaintiff was by way of an application to the execution Court to be placed in actual possession of the purchased property; *secondly*, that the Defendants are at liberty to impeach the *ex parte* decree as fraudulently obtained and consequently inoperative; *thirdly*, that the Defendants are not bound by the doctrine of *res judicata* and are entitled to establish that the Plaintiff has acquired title, if at all, to only two-thirds share of the property, that is, only to the interest of the two mortgagors A and B, and *fourthly*, that there should be no decree for joint possession of the huts, which are used for residential purposes by the family of the mortgagors and of their deceased brother.

As regards the first ground, there is plainly no substance in it. The Plaintiff obtained symbolical delivery after the sale had been confirmed. The delivery was operative against the judgment-debtors, who from the date thereof became trespassers. The Plaintiff can consequently sue to recover actual possession from them. This view is in accord with the decision in *Sasi Bhusan* v. *Radha Nath Bose* (1) where this Court dissented from the contrary opinion expressed by the Bombay High Court in *Sadashiv* v. *Narayan* (2) and by the Madras High Court in *Kaltayat* v. *Raman* (3). We are accordingly of opinion that the suit as framed is maintainable.

As regards the second ground, it need not be disputed, that as was ruled by this Court, in *Rajib Panda* v. *Lekhan Sendh* (4) and *Nistarini* v. *Nandalal* (5), the Defendants are competent to impeach the *ex parte* decree on the ground of fraud by way of defence to the claim of the Plaintiff. But the answer to the contention of the Appellant is that no issue was raised on this point and they cannot be permitted to attack the decree as fraudulent, when the question is not covered by any of the issues and the evidence has not been directed to the elucidation of this matter.

As regards the third ground, we are of opinion, that the Appellants have a legitimate grievance. They contend that C was made a party to the mortgage suit as a representative of his deceased brother A and that consequently the question whether the mortgage was operative against him in his personal capacity was not and could not have been raised in that litigation. There is no answer to this argument. It is, besides, clear from the decisions in *Joggeswar Dutt* v. *Bhuban Mohan Mitter* (6) and *Bhaju Chowdhury* v. *Chunilal Marwari* (7) that the question of the validity of the mortgage as against C, who

(1) 19 C. W. N. 885 s. c 20 C. L. J. 488 (1914).

(2) I. L. R. 35 Bom. 452 (1911).

(3) I. L. R. 26 Mad. 740 (1902).

(4) I. L. R. 27 Cal. 11: s. c. 3 C. W. N. 660 (1899).

(5) I. L. R. 26 Cal. 591: s. c. 3 C. W. N. 670 (1899); I. L. R. 30 Cal. 369: s. c. 7 C. W. N. 353 (1902).

(6) I. L. R. 33 Cal. 425 (1903).

(7) 11 C. W. N. 284: s. c. 5 C. L. J. 96 (1906).

was not a party thereto, could not have been properly raised and determined in a suit to enforce the security. The position was not altered by the circumstance that one of the mortgagors was dead at the commencement of the suit and one of his representatives was a person interested in his own right in the hypothecated property, adversely to the mortgage. We hold accordingly that the question now in controversy, namely, was C bound by the mortgage, was not only not raised but could not have been raised in the mortgage suit as framed. The decision of this matter is thus not barred by the doctrine of constructive *res judicata*. On the merits, it is plain that no circumstances have been established which would justify the conclusion that the mortgage, though executed by A and B, also bound the interest of C. The inference follows that the Plaintiff has acquired the interest of A and B alone and not that of C. Consequently, the Plaintiff is entitled to a declaration of title to the extent of a two-thirds share exclusive of the share of C.

As regards the fourth ground, we are of opinion that the Plaintiff, a stranger to the family, should not be placed in actual joint possession of the huts, in which the Defendants reside, whatever the strict rights of the Plaintiff may be, as purchaser of a two-thirds share of the disputed property. Sec. 44 of the Transfer of Property Act provides that where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in the section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. The proper course to follow is either to direct delivery of possession by partition in execution proceeding or to leave the purchaser to his remedy by a separate suit for partition. [*Kesabnath* v. *Hur Gobind* (8), *Ramtonoo* v. *Gobind* (9), *Bijoy Kesal Ray* v. *Shama Sundari* (10), *Eshan Chunder* v. *Nund Coomar* (11), *Fatteh Bahadur* v. *Janki Bibi* (12) and *Rajani Kanth* v. *Ram Nath* (13)]. This applies with much greater force to cases under the Mitakshara Law. [*Kaleepudo* v. *Choitan Pandah* (14) and *Kallapa* v. *Venkatesh* (15)]. If the contrary view were maintained, results would follow which are best described in the weighty words of Westropp, C. J., in *Balaji* v. *Ganesh* (16), "it is a far safer practice, and less likely to lead to serious breaches of the peace, to leave a purchaser to a suit for partition than to place him by force in joint possession with members of a Hindu family who may be not only of a different caste from his own but also different in race and religion." We are of opinion that, in the circumstances of this case, the Plaintiff should not be placed in actual joint possession of all the huts, but should be left to his remedy by a suit for partition.

The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The Plaintiff will have a decree declaring his title to the extent of two-thirds share of the disputed land and hut, which belonged to A and B, the original mortgagors, exclusive of the one-third share of their brother C who did not join in the mortgage transaction. The decree will also declare that the Plaintiff is entitled to institute a suit for partition

(8) [1853] Beng. S. D. A. 763.
(9) [1857] Beng S D A. 1585.
(10) B. L R. Sup. Vol. 172; 2 W. R Mis 80 (1865).
(11) 8 W. R. 239 (1867).
(12) 4 B. L. R. App. 55; 13 W. R. 74 (1870).
(13) I. L. R. 10 Cal. 244 (1883).
(14) 22 W. R. 214 (1874).
(15) I. L. R. 2 Bom. 676 (1878).
(16) I. L. R. 5 Bom. 499, 504 (1881).

of the property covered by the decree. Each party will pay his own costs throughout the litigation.

N. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 37 OF 1915.

WITH

RULE NO. 365 OF 1915.

D. CHATTERJEE, J.
BEACHCROFT, J.
1916,
Heard, 7 and 10, January.
Judgment, 16, January.

MOHINI MOHAN MAJUMDAR, Opposite Party, Appellant,
v.
SURENDRA CH. DEY, Petitioner, Respondent.

Civil Procedure Code (Act V of 1908), sec. 47, sub-sec. (3), Or. 21, r. 16—Assignee's application for execution opposed by attaching creditor of decree—Matter if appealable.

S, a purchaser of a decree, having applied for execution after substitution of his name as a decree-holder, M a creditor of the judgment-debtor who had attached the decree opposed the application alleging that S's purchase was fraudulent and benami. *The first Court upheld the objection, but the Appellate Court found S's purchase to be good and valid.*

Held—*That the order came within the purview of sub-sec.* (3) *to sec. 47 of the Civil Procedure Code even though (M's objection apart) the matter came under Or. 21, r. 16 of the Code.*

Provision of sec. 47, sub-sec. (3) *distinguished from the corresponding provision of sec. 244 of the old Code.*

RAM CHUNDER *v.* MUSSAMMAT HAMIRAN (1) *not followed.*

This was an appeal preferred on the 2nd February 1915 against an order of Babu Annada Kumar Sen, Subordinate Judge of Mymensingh, dated the 29th October 1914, reversing an order of Babu M. M. Banerjee, Munsif of Netrokona, dated the 2nd June 1914.

The facts of the case will appear from the judgment.

Babu Kali Kinkar Chuckerbutty for the Appellant.

Babu Birendra Kumar Dey for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

D. CHATTERJEE, J.—One Ram Kanai obtained a decree for money against the judgment-debtor. The Respondent, Surendra, purchased this decree and applied to have his name substituted as a decree-holder and to execute the decree. The Appellant Mohini having a decree against Ram Kanai attached the said decree of Ram Kanai and as an attaching creditor opposed the application of the Respondent on the allegation that the *kobala* was fraudulent and *benami*. The first Court allowed the objection. On appeal, the District Judge has held the *kobala* to be good and valid and allowed the objection of the Respondent. The attaching creditor appeals on the ground that no appeal lay to the District Judge. This would depend upon whether the case comes within the purview of sec. 47, cl. 3 of the Code of Civil Procedure. The question is whether the applicant Surendra was a representative of the decree-holder and was as such entitled to execute the decree. This question would apparently come within sec. 47, cl. 3, and if it does so come within that clause the appeal lay to the District Judge. It is contended, however, on the authority of the case of *Ram Chunder* v. *Mussammat Hamiran* (1), that in order that the case may be

(1) 11 C. W. N. 433 (1906).

(1) 11 C. W. N. 433 (1906).

brought within the purview of sec. 47, cl. 3, the dispute in question must be one in which the judgment-debtor was interested. In this case it appears that the judgment-debtor did not appear to oppose the application of either of the parties. The case referred to was decided upon the old sec. 244, C. P. C. In that section there was no numbering of the several sub-sections and the clause as to representation was dependent upon the previous part of the section which refers to the dispute between the parties to the suit. In the present Code sec. 47 has been divided into three sub-sections and the sub-sections are numbered separately. The object of that numbering seems to have been to make the several sub-sections independent of each other. In any case the three sub-sections can be read each by itself and if this is done then cl. 3 provides for the decision of a question like that which was the subject-matter of the present dispute.

It is further contended that the application was made apparently under Or. 21, r. 16 and if that was so there was no provision for any appeal to lie against the order that has been passed. Under the proviso to that rule, notice is to be served upon the transferor and the judgment-debtor and if the transferor, that is, the original decree-holder, and the judgment-debtor have notice, then the case becomes one in which all the parties are represented: If all the parties are represented, the case may, very well, be treated as one in which the question arising for decision under sec. 47 may be decided and taking it for granted that r. 16 was entirely applicable still there was nothing to prevent sec. 47 from being applied for the decision of the question as to who is the representative of the particular party to the proceeding. R. 16 of Or. 21, provides that a decree shall not be executed until the Court has heard their objections (if any) to its execution, that is, the objection of the transferor and the judgment-debtor. Here a third person also comes in, whose objection may not be within the purview of Or. 21, r. 16. Here the third person is Mohini who is the attaching creditor of Ram Kanai. That question, however, can very well be determined under sub-sec. 3 of sec. 47. We think, therefore that, on the whole, the decision is one which comes within sub-sec. 3 of sec. 47 and is, therefore, appealable. As expressly stated in the section this decision is for the purpose of execution only.

In this view of the case we dismiss the appeal with costs, hearing-fee two gold mohurs.

Beachcroft, J.—I agree.

N. G. *The rule is discharged.*

(CIVIL APPELLATE JURISDICTION.)

Appeals from Appellate Decrees Nos. 2993, 3003 to 3005 of 1913.

N. R. Chatterjea, J.
Newbould, J.
1915,
Heard, 7 and 8, December.
Judgment, 10, December.

Manindra Chandra Nandi, Plaintiff, Appellant,
v.
Srimati Durga Sundari Dassya, Defendant, Respondent.

Evidence Act (I of 1872), sec. 92, prov. 4—Registered kabuliyat—Acceptance by landlord for a long time of reduced rent, if precludes suit at kabuliyat rate—Admissibility of evidence of conduct to prove agreement to take rent at reduced rate or to prove that kabuliyat originally not intended to be acted upon.

The mere fact that the landlord accepted rent at a reduced rate from that stipulated for in the kabuliyat *for some time does not bind the lessor to accept rent at that rate in future, as the reduced rent might have been accepted as a matter of*

MANINDRA CHANDRA NANDI *v.* SRIMATI DURGA SUNDARI DASSYA.

indulgence which might be put an end to at any time.

DURGA PROSAD SINGH *v.* RAJENDRA NARAIN BAGCHI (1) *referred to.*

Under sec. 97, pro. 4 of the Evidence Act any variation of rent reserved by a registered lease must be made by a registered instrument and oral evidence is inadmissible to prove such variation, and an agreement is none the less oral because it is inferred from the conduct of the parties.

Evidence that since the execution of the kabuliyat *the tenant paid rent at a lower rate than that stated in the* kabuliyat *is admissible to show that the intention of the parties was that the* kabuliyat *from the very first was not intended to be acted upon or that there had been a waiver of the strict terms of the lease.*

BENIMADHUB GORAIN *v.* LALMOTI DASI (4) *followed.*

This was an appeal from a decision of M. Yusuf, Esq., District Judge of Rangpur, dated the 28th June 1913, reversing a decision of Babu Nani Gopal Mukherjee, Munsif, 1st Court at Kurigram, dated the 5th July 1912.

The facts of the case will appear from the judgment.

Sir Rash Behary Ghosh and *Babus Hemendra Nath Sen* and *Sarat Kumar Mitter* for the Appellant.

Babu D. N. Bagchi for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

Three questions are involved in these four appeals. The first is whether the Defendant-Respondent is bound to pay the full rent reserved in the *kabuliyat* executed by her predecessor-in-title in favour of the zemindar now represented by the Plaintiff-Appellant; *secondly*, whether the Defendant is bound to pay rent by 11 instalments as stipulated in the *kabuliyat;* and *thirdly*, whether apart from any stipulation in the *kabuliyat* the Defendant's tenant is liable to enhancement up to the limit of the customary rate if she is found to be a tenure-holder.

The *kabuliyats* in 2nd appeals Nos. 2993 and 3005 were for the term of one year each and were unregistered, and the *kabuliyats* in Nos. 3003 and 3004 were for five years each and were registered, the first two were executed in the year 1275 B. S. and the last two in the year 1280 B. S.

It appears that before the *kabuliyats* of 1275 were executed the zemindar applied to the Collector for measurement of the lands of the tenants under sec. 9 of the Bengal Act VI of 1862. The lands were measured and certain rents were assessed upon the lands found on such measurement. The zemindar then brought suits for *kabuliyats* at the rents so assessed against some of the tenants—some of the suits were decreed *ex parte*, and at least one suit appears to have been decreed after contest. The Court of first instance finds that the other tenants finding it useless to fight with the zemindar executed *kabuliyats* in her favour and the *kabuliyats* in the present cases were executed under those circumstances. It was stated in the *kabuliyats* that the lands had been measured and rent assessed according to the uniform rate prevalent from time immemorial in the purgannah and the *taluk*. The *kabuliyats* were only for short terms and it was agreed that a large portion of the rent so assessed was to be kept in suspense (*hajat*) and the balance payable as the rent for the term. It was stipulated however that no objection was to be taken to payment of the full rent after the expiry

(1) I. L. R. 37 Cal. 293; on P. C. I. L. R. 41 Cal 493: s. c. 18 C. W. N. 66 1913)
(4) 6 C. W. N. 242 (1898).

of the term, when the amount of *hajat* would be added to the *jama*.

The zemindar after the expiry of the terms of the *kabuliyats* did not realise the full rent but continued to receive rent at the reduced rate all along.

The Plaintiff based his claim for rent at the full rate on the ground that it was stipulated for in the *kabuliyat* as also upon the ground that it was the rate prevalent in the purgannah.

The Defendants denied the *kabuliyat* and pleaded that even if the *kabuliyat* was *bonâ fide*, it was never acted upon or intended to be acted upon, and that they were not liable to pay rent at the full rate or according to the *kists* as claimed.

The Court of first instance held that the Defendant was a tenure-holder, that the *kabuliyats* were genuine and *bonâ fide*, that the reduced rent was accepted after the expiry of the term as a matter of favour, that the Defendant had failed to show that the stipulation in the *kabuliyats* was not intended to be acted upon or had been waived, and it was not the Defendant's case that there was any subsequent settlement of the rent, and in the result held that the Defendant was bound to pay the full rent according to the instalments mentioned in the *kabuliyats*.

On appeal the decision was reversed by the District Judge, who was of opinion that the acceptance of rent at the reduced rate for so many years put an end to the agreement to pay rent at the full rate; and that the Plaintiff by his conduct in accepting rent at the reduced rate after the expiry of the terms, entered into a new implied contract varying the rent reserved in the *kabuliyats*.

The Plaintiff has appealed to this Court and has raised the questions set forth above.

With regard to the first question, it is to be observed that the mere fact that the landlord accepted rent at a reduced rate than that stipulated for in the *kabuliyat* for some time does not bind the lessor to accept rent at that rate in future, as the reduced rent might have been accepted as a matter of indulgence which might be put an end to at any time. See *Durga Prosad Singh* v. *Rajendra Narain Bagchi* (1) and *Baijnath Prosad* v. *Raghunath Rai* (2). As the terms of the *kabuliyats* in these cases expired before the Bengal Tenancy Act, the question whether the agreement contravened the provisions of sec. 29 of the Bengal Tenancy Act does not arise in these cases assuming that the Defendant is an occupancy raiyat. It is contended however on behalf of the Respondent that the acceptance of rent for a very long time may be evidence from which a new contract may be inferred, and the learned District Judge has come to the conclusion from the acceptance of rent at the reduced rate for a very long time, that there was a new implied contract between the parties varying the rent reserved by the *kabuliyat*.

But under sec. 92 (4th proviso) of the Evidence Act any variation of rent reserved by a registered lease must be made by a registered instrument and oral evidence is inadmissible to prove such variation. The learned District Judge relies upon the conduct of the parties, but an agreement, as pointed out by Jenkins, C. J., in *Lakhatulla* v. *Biswambhar* (3), is none the less oral because it is to be inferred from the conduct of the parties. No such evidence is admissible in the two 2nd Appeals Nos. 3003 and 3004, in which the leases were registered.

(1) I. L. R. 37 Cal. 293 : on P. C. I. L. R. 41 Cal. 493 : s. c. 18 C. W. N. 66 (1913)
(2) 16 C. W. N. 496 (1911).
(3) 12 C. L. J. 646 (1910).

In the other two cases (2nd Appeals 2993 and 3005) the leases were not registered and under sec. 92 of the Evidence Act oral evidence is admissible to prove a subsequent oral agreement.

It is contended, however, on behalf of the Appellant that no subsequent agreement to accept rent at the reduced rate was set up by the Defendant nor could it have been set up having regard to the defence taken by her, and that even if any such case had been made, the agreement could not be enforced being without consideration. It is pointed out that the Defendant did not allege that the tenants would have given up the lands had not the landlord agreed to the reduction of the rent which might have formed consideration for the agreement or any other consideration. Reliance is placed upon the case of *Durga Prosad Singh* v. *Rajendra Narain Bagchi* (1), where the learned Judges held that the agreement for reduction of rent was unenforceable as being without consideration and upon the decision of the Judicial Committee in the same case where their Lordships agreed with the view taken by this Court on the point. It was contended on the other hand by the learned pleader for the Respondent, that as the agreement set up in this case was after the expiry of the terms of the original *kabuliyats* there was sufficient consideration for the agreement and the present cases were therefore distinguishable. It is unnecessary, however, to consider this question, as the Defendant never set up any case of subsequent agreement varying the rent reserved in the original *kabuliyat*. The Defendant denied the *kabuliyat* and in the alternative pleaded that the *kabuliyat* was never intended to be acted upon; and was never acted upon. We are accordingly of opinion that the learned Judge is wrong in disposing of the case on the ground that there was a subsequent agreement varying the terms of the original *kabuliyat*.

The Defendant, however, as stated above, pleaded that the stipulation in the *kabuliyat* to pay the full rent was never intended to be acted upon and was never acted upon. It was open to the Defendant to take such a plea. In the case of *Benimadhub Gorain* v. *Lalmoti Dasi* (1), Maclean, C. J., and Macpherson, J., held that evidence that since the execution of the *kabuliyat* the tenant paid rent at a lower rate than that stated in the *kabuliyat* is admissible to show that the intention of the parties was that the *kabuliyat* from the very first was not intended to be acted upon or that there had been a waiver of the strict terms of the lease. We agree with the above view, and we think that the fact of payment and acceptance of rent at the reduced rate ever since the expiry of the lease may be adduced as evidence to show that the parties never intended that the stipulation to pay the full rent was to be acted upon or in the alternative that there had been a waiver.

The Court of first instance held that it was not intended that the stipulation to pay rent at the full rate should be inoperative or that there had been any waiver of the stipulation. The learned District Judge has not come to a finding on the point. It is true the Defendant did not distinctly plead waiver in her written statement, but she relied on the fact that the stipulation was never acted upon, and the question was gone into by the Court of first instance. We think therefore that the case should go back to the lower Appellate Court for a

(1) I. L. R. 37 Cal. 293: on P. C. I. L. R. 41 Cal. 498: s. c. 18 C. W. N 66 (1913).

(4) 6 C. W. N. 242 (1898).

decision upon the said questions: *viz.*, whether the stipulation in the *kabuliyat* as to the payment of the full rent after the expiry of the lease was intended to be acted upon or in the alternative whether there was a waiver of the stipulation after the expiry of that lease.

As regards the second point, *viz.*, whether the Defendant is bound to pay rent in 11 instalments as stipulated in the *kabuliyat*, we think that the learned District Judge is wrong in deciding the question against the Plaintiff on the ground that there is no custom of paying rent in so many *kists* in the purgannah. The question of usage can arise only where there is no written agreement between the parties, under sec. 21 of Act X of 1859. It is contended on behalf of the Appellant, that the fact that the landlord has not claimed rent according to the instalments for a certain period, does no preclude him from ever afterwards claiming rent according to the instalments stipulated for in the *kabuliyat*. Here again we think the question may arise whether having regard to the fact that rent has never been realised according to the instalments as agreed upon in the *kabuliyat*, the stipulation was intended to be acted upon. We are accordingly of opinion that this question also should be considered by the Court of Appeal below.

The last point raises the question whether apart from the *kabuliyat*, the Plaintiff is not entitled to the rent claimed on the ground that it is the customary rate. The learned District Judge has not considered the question on the ground that there was no express prayer in so many distinct terms, for assessment of fair and equitable rates of rent and that the Court of first instance dealt only with the Plaintiff's claim on the basis of the *kabuliyat*.

The Plaintiff however, as pointed out above, based his claim upon the *kabuliyat*, as also upon the ground that the rent claimed was the rate prevalent in the purgannah, and there was an express prayer that a decree might be passed for any amount that might be fixed by the Court. The second issue is sufficiently wide to cover the question, but the Court of first instance did not go into the question apparently because the claim of the Plaintiff based upon the *kabuliyat* was found in his favour. That Court found that the Defendant was a tenure-holder, and it is contended on behalf of the Plaintiff that if she is a tenure-holder her rent may be enhanced up to the customary rate under sec. 7 of the Bengal Tenancy Act. Having regard to the fact that this alternative claim was made in the plaint, we think that the parties should not be driven to a fresh suit, and that the Court of Appeal below should decide the question whether the Defendant is a tenure-holder, and if so whether the Plaintiff is entitled to the rent claimed on the ground that it is the customary rate, and if it is not the customary rate, what is the customary or fair and equitable rate to which the Plaintiff is entitled. The Court below will, of course, decide these questions only if it decides that the Plaintiff is not entitled to the full rent claimed on the basis of the *kabuliyat*. Both parties will be entitled to adduce further evidence on the point.

The result is that the decrees of the lower Appellate Court are set aside, and the cases sent back to that Court for disposal according to the directions given above. Costs to abide the result.

N. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 879 OF 1914.

HOLMWOOD, J. MULLICK, J. 1915, 21, December.	MAHABARSHA BANKAPORE, Plaintiff, Appellant, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Defendant, Respondent.

Indian Railways Act (IX of 1890), sec. 72 (2) (a) —Risk-note, how to be signed in order to bind consignor.

The provision of sec. 72, cl. (2), requiring risk-notes to be signed by or on behalf of the person sending or delivering goods to a Railway Administration, should be exactly carried out.

Where the person who delivered the goods signed not his own name but the name of the owner of the goods, there was not a sufficient compliance with the requirements of sec. 72, cl. (2).

HOLMWOOD, J. *The person who signs the risk-note must write his own name either by his own hand or by the hand of an agent who must be disclosed and have authority.*

This was an appeal preferred on the 15th April 1914 against the decree of Babu Chandra Bhusan Banerjee, Subordinate Judge of Zillah Murshidabad, dated the 15th of December 1913, affirming the decree of Babu Rajendra Nath Rai, Munsif, 1st Court at Berhampore, dated the 31st May 1910.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chakrabarty and *Hemendra Nath Sen* for the Appellant.

Babu Ram Charan Mitra for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

HOLMWOOD, J.—This second appeal arises out of a suit brought by a *mohajan* of the Bombay Presidency against the Secretary of State for India in Council in respect of certain goods which were lost in transit on one of the connected Railways which carried the goods from Beldanga to Beraras. The goods were silk goods of the value of Rs. 500, and the principal defence of the Railway Company was that they came under sec. 75 of the Railways Act IX of 1890, and as they were not insured the Railway was free from all liability under the said section. There was a further defence that the sender of the consignment executed a risk-note in Form Y specially absolving the Railway Company from all liability and the package was therefore booked and carried at owner's risk.

The Court of first instance found as a fact on the first point that the value of the contents of the parcel was declared at the time of booking as required by sec. 75 and that no insurance charge was demanded on behalf of the Railway. On these findings of fact no appeal was made as regards sec. 75, but an appeal was preferred as regards the execution of this risk-note Y under sec. 72 of the Act. The Subordinate Judge who first heard the appeal held that the Railway Company could not succeed and he gave the Plaintiff Rs. 500 compensation. His decision was apparently based on the contention that the Railway Administration must show that notwithstanding its proper care the goods were *bonâ fide* lost or destroyed by causes over which they had no control, that is to say, without any reference to the risk-note Y he appears to have been prepared to treat the Railway Company under the ordinary law of bailment without any exception even by contract. But the matter coming before this Court in second appeal Mr. Justice Chapman remanded the case holding that the Subordinate Judge ought to have come to a definite finding whether

the risk-note was genuine or not. He does not appear to have noticed that the risk-note was not signed by anybody, and he appears to have thought that the name of the Marwari the principal who was all the time in Bombay is the signature required by the law.

It was argued before the Subordinate Judge on remand and has been also argued before us, and we think rightly argued, that in the present case the agent Kundan Mul who consigned the goods to the Railway did not sign his own name on the risk note Ex. C but the Plaintiff's name, hence there was not sufficient compliance with the provisions of sec. 72, cl. (2). We think that this must prevail on the wording of the section. An agreement purporting to limit that responsibility shall in so far as it purports to effect such limitation be void, unless it is in writing signed by or on behalf of the person sending or delivering to the Railway Administration the goods. The Form which has been approved by the Governor-General in Council is a printed form, and therefore there is no binding act of the person sending the goods or his agent except the signature, and when there is no signature it cannot be said that there is a binding agreement to limit the responsibility. In this case it is obvious that there is no signature. The agent Kundan Mul instead of signing his own name and stating that he signed on behalf of Mahabarsha Bankapore his principal simply wrote Mahabarsha. It is not even the correct name of his principal. Supposing the agency had in the meantime determined it would have been impossible for the principal to prove that the agency had ceased inasmuch as the agent's name does not appear and he could only have been held liable because his own name appeared. He could have at once rid himself of the liability by showing that he did not sign the document. In contracts of this nature which derogate from the ordinary law of bailment the parties cannot be too careful to carry out the exact provisions of the law. When the law says "signed" it means the writing of the name of the person who signs it either by his own hand or by the hand of an agent who must be disclosed and have authority. In this case the writing was not executed at all in our opinion, and the result is that the Railway Company's liability cannot be escaped by reason of this alleged risk-note in Form Y.

The decree of the Subordinate Judge must be set aside and the Plaintiff's suit must be decreed for the amount allowed by the first Subordinate Judge, namely, five hundred rupees, with costs in all Courts.

MULLICK, J.—I agree that in the circumstances of this case there was not a sufficient and proper signing of the risk-note.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER No. 480 OF 1914.

	KARTICK CHANDRA MONDAL and ors., Decree-holders, Appellants.
HOLMWOOD, J. IMAM, J. 1916, 26, January.	*v.*
	NILMANI MONDAL & ors., Judgment-debtors, Respondents.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution opposed by judgment-debtor alleging payment and asking for certification thereof—Plea successful in first Court, but reversed on appeal—Second appeal by judgment-debtor—Limitation, if suspended during pendency of second appeal.

When a decree-holder is obstructed by violence or fraud and litigation is necessary to get rid of such obstruction, the execu-

tion is suspended during such litigation. But the mere pendency of an appeal from a decision which has removed all obstacles from the decree-holder's way cannot give him a right to defer execution until the disposal of such appeal.

ASHRAFUDDIN AHMED *v.* BEPIN BEHARI MULLICK (2) *and* MADHAB MANI DASI *v.* LAMBERT (3) *relied on.*

This was an appeal preferred on 11th September 1914 against the order of H. P. Duval, Esq., District Judge of Zillah 24-Parganas, dated 21st July 1914, reversing the order of Babu Nripendra Nath Guha, Munsif, 1st Court at Baruipur, dated 25th April 1914.

The material facts will appear from the judgment.

Babu Atul Krishna Roy for the Appellant.

Babu Sudhangsu Sekhar Mookerjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The facts upon which this appeal arises have only to be stated to show that the principles which have been held by the Courts in India to relieve decree-holders of their duty to bring an application for execution within three years of the last application do not apply to this case. After numerous applications for execution of a decree which was passed in December 1901, the 4th application was made on the 21st July 1908 in execution case No. 1443 of that year. On the 16th September 1908 the present Respondent, the judgment-debtor, applied before the Court stating that the decree had been satisfied by payment which should be certified. On this a miscellaneous case was started. It appears that on the same day substitutions were made of an heir of one decree-holder and of one judgment-debtor and notices were issued under sec. 248, Civil Procedure Code, fixing the 4th of November for hearing of the execution case. The miscellaneous case came up again on the 31st October and it was ordered that the execution case should come up too on that date. But in the meanwhile on the 1th November the decree-holder took no step after service of notices under sec. 248, and the execution proceeding was therefore struck off on the 5th November. Meanwhile the miscellaneous case as to certifying the payment was continued and the Munsiff allowed the judgment-debtor's application on the 17th July 1909. So far therefore the principles laid down in the cases which we had to consider would apply for the benefit of the decree-holder. But on appeal the finding of the Munsif was reversed by the learned District Judge on the 6th August 1909 and it was declared that the decree-holder had not been paid anything and that it was open to him to execute the whole decree. He took no step to renew the application for execution. Sometime afterwards the judgment-debtor appealed to the High Court. This appeal was rejected on the 11th January 1912. The present application for execution was not made till the 12th September 1913, that is, nearly two years after the High Court's decision.

It is contended that the decree-holder is entitled to the whole period during which he was *bonâ fide* litigating or resisting the judgment-debtor's application to have the satisfaction certified. Reference is first made to sec. 14 of the Limitation Act. It is, however, frankly conceded that that section can have no application inasmuch as there was no proceeding in another Court which proved fruitless for

(2) I. L. R. 30 Cal. 407, 413 (1902).
(3) I. L. R. 37 Cal. 796 : s. c 15 C. W. N. 887 ; 12 C. L. J, 328 (1910).

want of jurisdiction or some similar cause. We are then referred to what is said to be a general principle that a decree-holder is not bound to proceed with execution during the pendency of an appeal and that the limitation under Art. 182 should apply and the present proceedings should be considered to be in continuation of the previous application. As regards the first branch of this contention the authorities which have been laid before us do not seem to go further than to deal with the particular facts of the cases then before them and to hold that when a decree-holder is obstructed by violence or fraud and litigation is necessary to get rid of such obstruction the execution is suspended during such litigation. It is nowhere laid down that mere pendency of an appeal from a decision which has removed all obstacles from the decree-holder's way can give him a right to defer execution for an indefinite period; and were we to hold so, the parties could spend three years in the High Court and six years in the Privy Council and the decree-holder would be able to revive his execution after a lapse of more than 12 years. The case which goes nearest to the general proposition put before us is a decision in *Sheikh Mahommad* v. *W. A. Thomas* (1). But the general proposition therein laid down is limited by the consideration of the facts of that case and the learned Judges who decided that case added a rider to the general proposition that a decree-holder can have his rights suspended more especially when the amount for which execution has been taken is contingent on the decision in appeal.

Here there was no contingency at all. The District Judge had given the decree-holder a right to execute the decree in full and at that time there was no knowing whether the judgment-debtor would appeal or would not appeal. The mere fact of appealing could not possibly take away the decree-holder's right. Nor could it relieve him of the ordinary duty of a decree-holder. There was absolutely no reason in our opinion why he should sleep on his right pending the appeal to the High Court which in the end made no change whatever in the District Judge's order. The responsibility for getting the execution stayed for that period was with the judgment-debtors and had the decree-holder taken out execution it would have been open to the judgment-debtor to apply to this Court for a stay. This Court might have refused to stay. But for the decree-holder to say that he was in no way bound to take out execution of the decree after the order of the District Judge appears to us to be wholly untenable. The observation of Mr. Justice Banerjee and Mr. Justice Geidt in the case of *Ashrafuddin Ahmed* v. *Bepin Behari* [illegible] (2) and the principle laid down by Mr. Justice Mookerjee in the case of *Madhab Mani Dasi* v. *Lambert* (3), make it quite clear that where there is no intervention of fraud or force which prevented the consideration of the previous application there is no suspension of execution.

Now with regard to the contention that the present application may be regarded as the continuation of the previous application we need only point out that the previous application was finally disposed of on the 5th November 1908. So that that branch of the contention has no substance in it.

The result is that this appeal is dismissed with costs. We assess the hearing fee at two gold mohurs.

N. G. *Appeal dismissed.*

(1) Mis. App. 207 of 1911. Unreported.

(2) I. L. R. 30 Cal. 407, 413 (1902).

(3) I. L. R. 37 Cal. 796: s. c. 15 C. W. N. 337; 12 C. L. J. 328 (1910).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES NOS. 2971 AND 3479 OF 1913.

MOOKERJEE, J.
NEWBOULD, J.
1915,
Heard,
3, August.
Judgment,
17, August.

GOPESWAR SAHA, Plaintiff, Appellant, in 2971 and Respondent in 3479,
v.
JADAB CHANDRA CHAUDARAY and anr., Defendants, Respondents in 2971 and Appellants in 2479.

Mortgagor and mortgagee – Mortgagor prevented from paying off debt by wrongful act of mortgagee —Interest, suspension of Excessive interest when not penal.

If a creditor by his own act puts it out of the power of the debtor to make payment, no interest should be recoverable for the period during which the debtor was thus prevented from paying the creditor.

Where a mortgagor who had entered into a contract with a stranger for sale of the property with a view to paying off the mortgagee out of the proceeds, was induced by the mortgagee to resile therefrom, with the result that the purchaser sued for specific performance—the suit being defended by the mortgagee in the mortgagor's name —and got a decree :

Held, *in the mortgagee's suit to enforce his security, that the latter was not entitled to interest for the period between the contract and the completion of the sale.*

These were appeals Nos. 3479/13 and 2971/13 preferred on 17th November and 4th September 1913 respectively against the decree of M. C. Ghosh, Esq., District Judge of Zillah Mymensingh, dated the 16th June 1913, affirming that of Babu Sarat Kisore Bose, Subordinate Judge, Mymensingh, dated 17th February 1913.

The facts of the case will sufficiently appear from the judgment.

Babus Dwarka Nath Chakravartty, Provas Chandra Mitra and *Suresh Chandra Bose* for the Plaintiff.

Babus Mohini Mohan Chakravartty, Biraj Mohan Majumdar and *Krishna Kamal Maitra* for the Defendants.

The JUDGMENT OF THE COURT was as follows :—

These appeals are directed against the decree in a suit to enforce two mortgage bonds assigned by the original mortgagee to the Plaintiff. The bonds were executed on the 25th July 1898 and were assigned to the Plaintiff on the 16th July 1906. The principal sums secured by the bonds were Rs. 525 and Rs. 375 respectively, which carried interest at the rate of 15¼ per cent. per year with triennial rests. The Plaintiff commenced this action on the 13th September 1911 for recovery of Rs. 1,979-9 as, namely Rs. 900 as principal and Rs. 4,079-9 as. as interest thereon. He joined as principal Defendants the mortgagor as also the purchaser of the equity of redemption, in whose favour the transfer was completed on the 16th September 1911. The substantial question in controversy relates to the amount of interest justly recoverable by the Plaintiff. The Defendants contended, *first*, that the rate of interest was penal, and, *secondly*, that the interest was suspended from the 1st November 1908 to the 16th September 1911, as during that period the debtor was prevented by the improper act of the creditor from repaying the loan, as he would otherwise have done, by the sale of the mortgaged properties. The Subordinate Judge overruled the first contention but gave effect to the second objection and made the usual mortgage decree for a portion of the amount claimed. The Plaintiff as also the Defendants appealed to the District Judge against this decision. The District Judge has confirmed the decree of the trial Judge and has dismissed

both the appeals. Against this decree of the District Judge, the Plaintiff and the Defendants have presented separate appeals to this Court. The Plaintiff has contended that interest should have been allowed for the entire period from the date of the mortgages to the date fixed in the decree for redemption. The Defendants have argued that the contract rate of interest was extravagantly high and unconscionable, and that interest should consequently have been decreed only at a reduced rate.

As regards the appeal by the Plaintiff, there can be no doubt that where delay in the payment of the principal debt is caused by some improper act or omission of the creditor the general rule is that the accrual of interest will be regarded as suspended during such period. In the case before us, the facts concurrently found by the Courts below may be briefly recited. The mortgagor, hard pressed by the high rate of interest on the loan, found himself in a helpless condition, and on the 6th August 1908 entered into a written agreement with the second Defendant to sell the mortgaged property to him with a view to satisfy the mortgage debt from the sale proceeds. The Plaintiff, the assignee of the mortgage bonds, was himself anxious to purchase the property, so he forthwith intervened and urged the mortgagor to break his contract with the intending purchaser. The mortgagor was reluctant to resile from his agreement and explained to the Plaintiff the obvious danger of the course proposed by him, as the contract was complete and enforceable. The Plaintiff, however, successfully dissuaded the mortgagor from the contemplated sale. The result was a suit by the intending purchaser against the mortgagor for specific performance of the contract. The Plaintiff did his best to defend the suit in the name of the mortgagor, but he was ultimately thwarted as the suit was decreed. The mortgagor was accordingly obliged to complete the sale in favour of the purchaser, which he did on the 16th September 1911. The Plaintiff, thus foiled in his design to seize the mortgaged property, sued to enforce the securities he held. The question arises, whether, in the circumstances stated, the accrual of interest should not, in justice, be deemed to have been suspended during the period when, but for the improper intervention of the Plaintiff the mortgagor might have completed the sale of the mortgage property and repaid the loan from the sale proceeds. The Courts below have concurrently answered this question against the Plaintiff. The principle that if the failure to make payment of the principal debt is due to an improper act of the creditor or to such conduct on his part as prevents the debtor from repaying the loan, interest on such debt stands suspended during the time the debtor is so prevented, is of extensive application. The Courts have taken recourse in various reported decisions, both in England and in the United States, to this principle to attain the ends of justice. No useful purpose would be served by an analysis of the varying circumstances of the different cases, but reference may be made to the decisions in *Edwards* v. *Warden* (1), *Merry* v. *Rybes* (2), *Marlborough* v. *Strong* (3), *Bower* v. *Dalzel* (4), *Anderton* v. *Arrowsmith* (5), *Laing* v. *Stone* (6), *London Ry. Co.* v. *South Eastern Ry. Co.* (7), *Webster* v. *British*

(1) 1 App. Cas. 281 (1876).
(2) 1 Eden 1 (1757).
(3) 4 Brown P. C. 539 (1723).
(4) M. and M. 228 (1829).
(5) 2 Per. and Dav. 408.
(6) 2 Man. & Ryl. 561; M. & M. 229 (1829).
(7) [1892] 1 Ch. 120.

Empire (8), *Hayes* v. *Elmsbey* (9), *Stevenson* v. *Davis* (10), *Bowman* v. *Wilson* (11), *Pinkard* v. *Ingersoll* (12), *Union Insurance Co.* v. *Chicago Ry. Co.* (13), *Southern W. L. Co.* v. *Haas* (14), *Watson* v. *McManus* (15), *Morford* v. *Ambrose* (16), *Hart* v. *Brand* (17), *Suffolk Bank* v. *Worcester Bank* (18), *Steven* v. *Baringar* (19), *Reid* v. *Russelaer* (20) and *Plotner* v. *Warehouse* (21). It is obviously just that if a creditor, by his own act, puts it out of the power of the debtor to make payment, no interest should be recoverable for the period during which the debtor was thus prevented from paying the creditor; the wrong was with him and he cannot charge the effect to the other. This doctrine is based on the plainest grounds of justice, equity and good conscience and has been rightly applied by the Courts below for the protection of the Defendants.

As regards the appeal by the Defendants, the decisions of this Court in *Khagaram Das* v. *Ram Sankar Das* (22), *Abdul Majid* v. *Khirode Chandar Pal* (23) and *Chellaphroo Chowdhuri* v. *Banga Behary Sen* (24) show that a Court is competent to grant relief whenever the rate of interest appears to the Court to be of a penal character, that is, so unconscionable and extravagant that no Court should allow it. We are not prepared to hold that the present case falls within that rule. The amount claimed as interest if distributed over the entire period works out at the rate of 35 per cent. per annum simple interest, while the amount actually decreed by the Courts below works out at the rate of 22 per cent. per annum simple interest. We cannot say that this rate is so excessive as to justify our interference.

The result is that both the appeals are dismissed and the decree of the District Judge is affirmed.

N. G. *Appeals dismissed.*

(5) 15 Ch. D. 169 (1880).
(9) 23 Can. Sup. Court 623.
(10) 23 Can. Sup. Ct 629.
(11) 2 Mac. Crayy (U. S.) 394; 12 Fed. Rep. 864.
(12) 12 Alabama 441.
(13) 146 Ill 3:0; 34 N. E. 948.
(14) 76 Iowa. 432; 41 N. W. 63.
(15) 223 Pa. 583; 72 All. 1066.
(16) 3 J. J. Marshall (Ky.) 688.
(17) 1 A. K Marshall 159: 10 Am. Dec. 715.
(18) 5 Pickering (Mass.) 106.
(19) 13 Windell N. Y. 689
(20) 3 Cowan N Y. 393; 5 Cowan 587.
(21) 122 S. W. 443.
(22) 19 C. W. N 775: s. c. 21 C. L. J. 79; I L. R. 42 Cal. 652 (1914).
(23) 19 C. W. N. 509: s. c. I. L. R. 42 Cal. 690 (1914).
(24) Since reported. 20 C. W. N. 408 (1915).

[CIVIL REFERENCE.]

No. 1 OF 1916.

D. CHATTERJEE, J.
BEACHCROFT, J.
1916,
Heard, 3, April.
Judgment,
11, April.

ABDUL QUADER KHALIFA, Plaintiff,
v.
FRITZ KAPP, Defendant,

Alien enemy, suit against, if lies—Cause of action arising upon contract made after war—Internment, effect of.

No matter whether the cause of action arose before or after war, an alien enemy can be sued in Courts in British India and would have every right to prosecute his case before the Courts in accordance with the laws of procedure.

HALSEY *v.* LOWENFELD (1) *referred to.*

The fact that the Defendant has been interned does not make any difference as it does not cut down his liabilities.

This was a reference under sec. 113 and Or. 46, r. 1, C. P. C., (from Babu Sarat Chandra Ghosh, Munsif, Dacca, dated the

(1) [1916] 1 K. B. 132 (915).

ABDUL QUADER KHALIFA *v.* FRITZ KAPP.

30th September 1915), in the matter of a Small Cause Court Suit No. 1548 of 1915, for decision by the High Court of certain points raised therein.

The reference was in the following terms:—

The Plaintiff Abdul Quader Khalifa a Mahomedan British subject of this town of Dacca, has sued Mr. Fritz Kapp, residing in this town at the time of the institution of this suit, for Rs. 19-14 due as charges for the making of cotton wearing apparel, etc. The Defendant is a German and not a Naturalized British subject. This suit was instituted on 23rd August 1915, *i.e.*, long after the declaration of war between His Majesty's Government and the Government of the Emperor of Germany. The Defendant had a business in Photography which had to be closed after the declaration of the war. At the time of the service of summons upon the Defendant he was at Dacca and within the jurisdiction of this Court, but under orders of internment. He was interned once before but was allowed to return to Dacca. The Defendant appeared in Court personally in obedience to the summons and wanted to compromise but the parties ultimately could not agree and hence the case is pending for trial. The Defendant's pleader has informed this Court that the Defendant is not in the house in which he used to reside and that possibly he has been interned again at some place near Darjeeling. He could not thus communicate with his client.

The case set out in the plaint is (1) "that the Plaintiff was in the habit of doing tailoring business for the Defendant and also supply him with materials according to his directions since some years"; and (2) "that in November 1914 the Defendant cleared his dues to the Plaintiff up to October 1914." The present claim for Rs. 19-14 is for the work done in November and December 1914 within this town of Dacca.

The Plaintiff was asked by this Court "to show that this Court has jurisdiction to entertain and try this suit during the pendency of the war." Thereupon the Plaintiff's pleader cited two cases reported in the Notes portion of the *Calcutta Weekly Notes* which will be noticed presently.

There is no provision in the Code of Civil Procedure as to what should be the procedure in case of a suit against an alien enemy. Sec. 83 of the Code provides that alien enemies residing in British India with the permission of the Governor-General in Council may sue in the Courts of British India, as if they were subjects of His Majesty. This provision does not necessarily imply that a suit against an alien enemy is maintainable.

It is not disputed that the Defendant is an alien enemy. "Alien enemy is a subject of a nation which is at war with this country"—Wharton's Law Lexicon. Alien is a person born in a foreign country, out of the allegience of the British Crown. He is a foreign-born resident of a country, in which he has not citizenship—Webster's Dictionary. Thus the Defendant is an alien enemy at present residing in this country under order of internment at the time of the institution of this suit, and now actually interned. Thus he is not treated as if he is a British subject, and is not residing in this country under a license. He is not allowed to carry on his business as a photographer. He is thus under restraint as an enemy.

The question naturally arises whether he is subject to the law in force in British India, *i.e.*, whether he is bound by the provisions of the Indian Contract Act and the Code of Civil Procedure. The answer to the question is not free from doubt. It seems to me at the date of the suit and

under the circumstances in which he has been placed they are not applicable to him. For it is said in Austin's Jurisprudence at page 144, that "A positive law is set or directed exclusively to a subject or subjects of its author or that a positive law is set or directed exclusively to a member or members of the community wherein its author is sovereign . . . Living within the territory, he (a stranger) is liable to be reached by the legal sanctions by which the law is enforced." Being under order of internment the Defendant cannot be said to be living in British India—he is rather compelled to live here and he has got little freedom of action or of movement.

The Defendant does not fall within the definition of the term "enemy" as defined in the Proclamation of 10th August 1914, or in the Proclamation of 30th September 1914. Besides the term "enemy" is used in those Proclamations for the purposes of those Proclamations only.

Then as to an alien enemy's liability to be sued in England the earliest case decided after the declaration of the present war is the case of *Robinson & Co.* v. *Continental Insurance Co.* (2). It was decided on 16th October 1914 by Mr. Justice Bailhache and noticed in 19 C. W. N., p. viii. It is stated in the note that his Lordship held that "to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief . . I am of opinion that the rule is confined to cases in which the alien enemy is Plaintiff and that war does not suspend an action against a Defendant alien enemy. The next question is—can he appear and defend either personally or by counsel? I think he certainly can . . . I have come to the conclusion that there is no rule of the Common Law which suspends an action in which an alien enemy is Defendant and no rule of Common Law which prevents his appearing and conducting his defence." In this case the cause of action arose before the war and the pleadings were closed before the war.

The next case is *W. L. Ingle, Ld.*, v. *Manheim Insurance Co.* (3) (and reproduced in Contemporary Law Review, Vol. IV, p. 20) decided by the same Judge. In this case the cause of action arose after the declaration of the War but before the Proclamation of 8th October 1914. It was held that the Proclamation was not retrospective and that the right of suit accrued before the Defendant company acquired the status of an alien enemy within the meaning of that Proclamation. In this case his Lordship observed that "In the case of individuals and at common law the question whether a man is to be treated as an alien enemy for the purpose of his contracts, rights of suit and the like, does not depend upon his nationality or even upon his true domicile, but upon whether he carries on business in this country or not. If he does it is not illegal even during war to have business dealings with him in this country in respect of the business which he carries on here. He is not in respect of that business divided by the war line, but has what is sometimes called a commercial domicile here (England)." In the present case the Defendant has no commercial domicile within the meaning of the passage quoted. Besides it is doubtful if the Common Law of England referred to in the above two rulings is applicable to India. It has never been introduced into the

(2 [1915] 1 K. B. 155 : s. c. 31 T. L. R. 20 ; 19 C. W. N. viii (1914).

(3) [1915] 1 K. B. 227 (1915).

Mofussil at least (Interpretation of Indian Statutes, p. 159, on the authority of *Ameer Khan's* case (4). *Srinath* v. *Dinabandhu* (5).

The next and last case cited is the case *Porter* v. *Freudenberg* (6) decided on the 19th January 1915 by the Court of Appeal in England and reported in 19 C. W. N. lxxix. In this case it is not clear from the report whether the cause of action arose before or after the declaration of war and before or after the Proclamation of 8th October 1914. It was held broadly approving the decision in *Robinson & Co.* v. *Continental Insurance Company* (2) that an alien enemy can be sued; that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. In coming to this conclusion their Lordships quoted with approval the following passage from Blackstone's Commentaries, 21st Ed., Vol. I, c. 10, p. 373 :—" Alien enemies have no civil rights or privileges, unless they are here (England) under the protection and by permission of the Crown," and held he cannot enforce his civil rights as a Plaintiff. " Every right is the creation of Law. And, though every obligation and sanction does not imply a right, every right implies an obligation and a sanction." Austin's Jurisprudence, page 160. " A relative duty is incumbent upon one party, and answers to a right residing in another party." Page 161. If it be said that the alien enemy has no civil right no one can do him any civil wrong. If he has no civil right he has no right to exercise his civil *right* to defend himself. A right to be heard in defence is a civil right created by statute. For it is provided in Or. 8, r. 1 of the Code of Civil Procedure that " the Defendant may, and, if so required by the Court, shall at or before the first hearing or within such time as the Court may permit, present a written statement of his defence." If he has no civil right he, as Defendant, cannot get costs or execute his decree for costs. Still more anomaly will be created if he be allowed to put his judgment-debtor a British subject to jail for non-payment of such costs. If these and like consequences be taken into consideration, the rule that he has got no civil right should have no qualified meaning; for otherwise anomalies in the administration of justice are created. It seems to me from the notes on his Code of Civil Procedure by Mr. S. C. Roy, B.A., LL. B. (Cantab) Bar.-at-Law, that there is no English Statutory Rule corresponding to Or. 8, r. 1 of the Code of Civil Procedure quoted above.

In the English cases cited above it appears the decisions were based more or less on the absence of any common law there; and no reference was made to the International law, which seems to me to be the true guide where the Defendant being an alien enemy is not allowed to carry on any business and is under order of internment or is actually interned; as restraint is put upon his civil right to work and earn his livelihood and to do all lawful acts lawfully to that end, he cannot be said to be residing in this country with implied or express permission of the Government of India or of the Crown. In such a case the reasonable rule seems to be that " remedy only remains suspended and revives on the restoration of peace." Halsbury's Laws of England, Vol. I, page 311; and in my opinion this rule is to be

(2) [1915] 1 K B 155 : s c 31 T L. R. 20 ; 19 C. W N. viii (1914).
(4) 6 B. L. R. 392 (1870).
(5) 18 C. W. N. 1217 : s c. I. L. R. 42 Cal. 525 (P. C) (1914).
(6) [1915] 1 K. B. 857 : 19 C. W. N. lxxix (1915).

taken liberally, *i.e.*, whether the alien enemy is the Plaintiff or the Defendant, and as in this case, the contract having been completed during war, no cause of action can arise until peace is restored.

As to the rule laid down in the last English case the circumstances being not quite similar I doubt how far it is binding upon the Courts in India, which are to decide according to justice, equity and good conscience, and are to be guided by the principles of English law applicable to a similar state of circumstances although the English law is not obligatory upon the Courts in the mofussil. (Interpretation of Indian Statutes, pp. 333 to 335.)

I therefore beg to submit for the decision of the Hon'ble High Court :

1. Whether this suit for work done by a British Indian Subject during war is at present maintainable against an alien enemy, under order of internment, the contract having been made and the breach thereof having occurred during war?

2. Whether the trial or hearing be suspended until restoration of peace?

No one appeared in support of the Reference.

Babu Ram Charan Mitra opposing the reference said.—Citing Commercial Cases Vol. XX, p. 125 and sec. 9, C. P. C., read with sec. 83, C. P. C., 2 Halsbury 275, Bacon's Abridgment, p. 291, *Robinson & Co.* v. *Continental Insurance Co.* (2). Dicey on Parties in Action, *Fritz Olner* v. *Lavezzo* (7) and *W. L. Ingle, Ld.* v. *Manheim Insurance Co.* (3), said, in *Robinson & Co.* v. *Continental Insurance Co.* (2) the alien was sued before the war. He cannot appeal after the war. In the present case the cause of action arose after the war. Civil Courts have jurisdiction to try all Civil Suits within the jurisdiction of these Courts *Fritz Olner* v. *Lavezzo* (7).

[BEACHCROFT, J.—There is the other question involved in whether the contract is enforceable. The contract was made during the war.]

As in the case of infants it was for bare necessities of life which were supplied by the Plaintiff. It would be doing an injustice to the British subject not to allow him to proceed with the suit.

The Civil Procedure Code makes ample provision allowing British subjects to proceed. We need not go into the question of Common Law referred to in the reference as there is positive law. The most recent English case on the subject is *Halsey* v. *Lowenfeld* (1).

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff is a British Indian subject, a tailor, in the town of Dacca. The Defendant, a subject of the German Emperor, was a photographer in that town. In November 1914, *i.e.*, after the declaration of war with Germany, the Plaintiff did some tailoring work for the Defendant, and the present suit was brought for the recovery of wages, etc., due on that account. The question referred is whether such a suit would lie during the pendency of the war. We think the suit would lie and there is nothing in law to prevent its being tried before the restoration of peace.

Sec. 9 of the Civil Procedure Code provides that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits the cognisance of which is expressly or impliedly barred. Sec. 83 provides that alien enemies residing in British India with the permission of the Governor-

(2) [1915] 1 K. B. 155 : s. c 31 T. L. R. 20 ; 19 C. W. N. viii (1914).
(3) [1915] 1 K. B. 227 (19 5).
(7) I. L. R. 10 Cal. 878 (1884).

(1) [1916] 1 K. B. 143 (1915).
(7) I. L. R. 10 Cal. 878 (1884).

ABDUL QUADER KHALIFA *v.* FRITZ KAPP.

General in Council may sue in the Courts of British India but an alien enemy residing in British India without such permission shall not sue in such Courts. There is no provision in the Code barring suits against alien enemies and we see no reason why such suits should not be heard and decided during the continuance of the war. No matter whether the cause of action arose before the war or after the war an alien enemy can be sued in our Courts and would have every right to present his case before the Courts in accordance with the laws of procedure. The latest case in England is that of *Halsey* v. *Lowenfeld* (1). In that case Mr. Justice Ridley held after discussing previous cases that a suit for rent accrued due after the declaration of the war was maintainable in the British Courts against an alien enemy. We see nothing in our own Code of Procedure to prevent us from taking the same view. The fact that the Defendant has been interned does not make any difference as the object of internment is to prevent him from doing mischief and not to cut down his liabilities. The case, therefore, must be tried in due course of law.

S. C. C.
N. G.

[CIVIL REVISIONAL JURISDICTION]

RULE No. 680 OF 1915.

D. CHATTERJEE, J. BEACHCROFT, J. 1915, Heard, 24 and 25, November. Judgment, 8, December.	THE EAST INDIAN RY. CO., Defendant, Petitioner, *v.* RAM AUTAR, Plaintiff, Opposite Party.

Indian Railways Act (IX of 1890), secs 77, 140 —Notice on Claims-Superintendent, if notice on Agent—Suit for compensation for loss of goods consigned—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 30.

(1) [1916] 1 K. B. 143 (1915).

In the absence of evidence to prove that the Claims-Superintendent was authorised by the Agent to receive notices on his behalf, held, *that a notice of claim served on the former was not served in compliance with the provisions of sec. 140 of the Railways Act.*

The law requires that the notice should be on the Agent and whether a particular officer is authorised by the Agent to receive such notice on his behalf is a question of fact that must be decided on evidence.

WOODS *v.* MEHER ALI (1) *distinguished.*

JANAKI DAS *v.* THE BENGAL NAGPUR RAILWAY CO. (2), THE EAST INDIAN RAILWAY CO. *v.* MADHO LAL (3) *and* RADHA KISSEN *v.* THE EAST INDIAN RAILWAY CO. (4) *referred to.*

Where the consignor sued a Railway Company for compensation for loss of goods alleging the same to have been due to the wilful negligence of or theft by its servants,

Held (semble).—*That the suit was governed by Art. 30 of the 1st Schedule to the Limitation Act.*

This was a Rule granted on the 9th July 1915 against the judgment of Babu Jnanendra Chandra Banerjee, Small Cause Court Judge of Patna, dated 7th May 1915.

The material facts will appear from the judgment.

Babus Mohendra Nath Ray and *Ambikapada Choudhury* for the Petitioner.

Babu Shoroshi Churn Mitter for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

The firm of Putidas Mahadeo Lal consigned 10 tins of cocoanut oil at the

(1) 18 C. W. N. 24 (1908).
(2) 16 C. W. N. 356 (1912).
(3) 17 C. W. N. 1134 (1913).
(4) 19 C. W. N. 62 (1913).

THE EAST INDIAN RY. CO. *v.* RAM AUTAR.

Howrah Station of the E. I. Railway Company for carriage to the Plaintiff at the Futwah Station on the 3rd December 1913. The consignment did not reach the Plaintiff and he gave notice of demand of compensation to the Claims-Superintendent of the Company at Howrah on the 25th December 1913. He gave a notice to the Agent on the 10th of August 1914, but the said notice was refused. This suit was then filed on the 2nd January 1915 claiming compensation for the loss of the goods alleging that the said loss was due to the wilful negligence of the servants of the Company or to theft by its servants. The Company replied that the suit was incompetent as no notice had been served on the Agent as required by law: that the suit was barred by limitation, that the Company was not liable as the loss was due to a train robbery.

The learned Judge below held that the plea of a train robbery was not made out: that the notice had been duly served upon the Claims-Superintendent whose duty it was to settle such claims and that was sufficient and that the suit was not barred. Upon these findings he gave a decree to the Plaintiff.

The Company has moved this Court mainly on three grounds:—(1) That the non-service of a notice on the Agent is fatal to the suit: (2) That the suit as laid in the plaint was barred under Art. 30 of the 1st schedule to the Limitation Act, and (3) lastly, that the Plaintiff had failed to prove that the case came within the exception mentioned in the risk-note B under which the Company would be liable only under certain circumstances.

We think that the first ground is sound. Sec. 77 of the Railways Act provides that a notice of claim for compensation must be made within six months from the date of the delivery to the Company, and sec. 140 provides that the notice must be served on the Agent of the Company in India (*a*) by delivering the notice to him, (*b*) by leaving it at his office, (*c*) by forwarding it by post, etc.

The notice to the Agent in this case was sent on the 10th of August 1914, *i.e.*, more than six months after the delivery which took place on the 3rd December 1913, and the notice that was given to the Claims-Superintendent was not a notice to the Agent. The learned Judge below has held that the Claims-Superintendent usually settles these claims and therefore the notice was valid. He does not, however, find that the Claims-Superintendent was authorised by the Agent to receive such notices on his behalf and there is no evidence on the record to make out such a case. Reliance has been placed on the case of *Woods* v. *Meher Ali* (1). It was held in that case that a notice to the Traffic Manager in the Claims Department was sufficient as that officer usually settles such claims and such claims are usually referred to him by the Agent. In the present case there is no evidence that such claims are usually referred by the Agent to the Claims-Superintendent nor is there any finding, as there was in the case of *Woods* v. *Meher Ali* (1), that the notice had reached the Agent. In the case of *Janki Das* v. *The Bengal Nagpur Railway Co.* (2) it was held by Sir Lawrence Jenkins, C. J. and N. R. Chatterjea, J., that a notice to the Goods Superintendent was not sufficient. In the case of *The East Indian Railway Co.* v. *Madho Lal* (3). Harington and Carnduff, JJ., held that a notice to the Divisional Traffic Manager was not sufficient. In the case of *Radha Kissen* v. *The East Indian Railway Co.*

(1) 13 C. W. N. 24 (1908).
(1) 13 C. W. N. 24 (1908).
(2) 16 C. W. N. 856 (1912).
(3) 17 C. W. N. 1184 (1913).

(4), Fletcher and N. R. Chatterjea, JJ., held that a notice to the Goods Superintendent was not sufficient. The law requires that the notice should be on the Agent and we think that the notice must be on the Agent and whether a particular officer is authorised by the Agent to receive such notices on his behalf is a question of fact that must be decided on evidence. We are also inclined to favour the second contention of the Petitioner as the case made in the plaint was one of loss and would therefore come under Art. 30 of the Schedule to the Limitation Act. In this view of the case it is not necessary to consider the third point.

We make the Rule absolute with costs two gold mohurs.

N. G. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

SUIT No. 124 OF 1916.

CHITTY, J. WALMSLEY, J. 1916, 18, February.	V. R. ALEXANDER, Complainant, Petitioner, *v.* R. W. CONNORS and 4 others, Accused, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 253, 259—Warrant case—Discharge of accused for absence of complainant.

In a warrant case an order discharging an accused person on account of the absence of the complainant cannot be made under sec. 253, Cr. P. C. Such an order can only be made under sec. 259 and in a case where the offence may be lawfully compounded.

This was a Rule upon the Chief Presidency Magistrate of Calcutta to show cause why the orders of Mr. Keays, Second Presidency Magistrate of Calcutta, dated the 7th and 8th of December 1915, discharging the accused under sec. 253, Cr. P. C. and refusing to restore the case, should not be set aside.

The facts of the case are that on the 26th October 1915 one V. R. Alexander filed a complaint against the opposite party charging them under secs. 147, 341, 352, 354, 392 and 411, I. P. C., before Mr. Keays on the allegation that while he was passing along the Corporation Street on the evening of the 11th October 1915 he was abused and assaulted and forcibly carried away to a certain distance by accused Nos. 2-5 and others under the orders of accused No. 1, with whom he had been on bad terms and also that his stick and cap were snatched away by them. The Magistrate after holding judicial enquiry into the matter granted summons against the accused under secs. 147, 341 and 352, I. P. C. On the 7th December, the first day of hearing, the complainant was a few minutes late when his case was called on and the Magistrate passed the order "Complainant absent, accused discharged. Sec. 253 Cr. P. C." A few minutes after the complainant appeared in Court and an application was made on his behalf for the restoration of the case which was also refused, the next day. The Complainant thereupon moved the High Court and the present rule was obtained.

Babus Jyotish Chandra Hajra, Debendra Nath Kumar, Mrityunjoy Chatterji, Apurva Chandra Mukerjee and Heramba Chandra Guha appeared in support of the rule.

No one appeared to show cause.

THE JUDGMENT OF THE COURT was as follows :—

In this case, the procedure of the learned Magistrate in discharging the accused under sec. 253 Cr. P. C. in consequence of the absence of the complainant was not in accordance with law. Sec. 253

(1) 19 C. W. N. 62 (1913).

V. R. ALEXANDER *v.* R. W. CONNORS.

only provides for the discharge of an accused where the Magistrate finds that no case has been made out or he considers the charge to be groundless. The discharge in the absence of the complainant can only be made under sec. 259, Cr. P. C. and then only in a case where the offence may be lawfully compounded. We must accordingly set aside the order of discharge and direct a further enquiry into the case. As on 8th December 1915 the learned Magistrate expressed a strong opinion with regard to the case, we direct, that the Chief Presidency Magistrate do transfer the case to some other Magistrate for trial.

S. C. M.

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER No. 511 OF 1914.

CHAMIER, C. J.
JWALA PRASAD, J.
1916,
6, April.

RAM BAHADUR SINGH and anr., Defendants, Nos. 1 and 2, Appellants,
v.
AJODHYA SINGH, Plaintiff, Respondent.

Transfer of Property Act (IV of 1882), sec. 59—Mortgage-bond—Attestation—Person subscribing as scribe if attesting witness

Per CHAMIER, C. J.—*To be an attesting witness within the meaning of sec. 59 of the Transfer of Property Act, the witness must not only have seen the execution of the document but should have also subscribed as a witness.*

SHAMU PATTER *v.* ABDUL KADIR (4) *relied on.*

RAJ NARAIN GHOSH *v.* ABDUR RAHIM (1), DINAMOYI DEBI *v.* BON BEHARI KAPUR (2) *and* BADRI PRASAD *v.* ABDUL KARIM (3) *referred to.*

Where a person who subscribed a mortgage bond as scribe was proved to have been present when the document was executed and the lower Appellate Court upon this and other evidence found that he had seen the document executed and held that he was an attesting witness within the meaning of sec. 59 of the Transfer of Property Act:

Held, *per* CHAMIER, C. J.—*That although on the finding he must be held to have seen the mortgage-deed executed, the scribe was not an attesting witness as he did not subscribe as a witness.*

Per JWALA PRASAD, J.—*That in the absence of evidence showing that he had witnessed the execution it could not be presumed that he had.*

A scribe of a deed who has witnessed the execution may sign the deed because he has done so, and yet describe himself as a scribe.

This was an appeal against the judgment and decree of R. Sheepshanks, Esq., District Judge of Mozufferpur, dated the 22nd July 1914, reversing the decree of Baba Rajeswar Prosad, Munsif of Hajipur, dated the 22nd April 1914.

This appeal arose out of a mortgage suit. The Plaintiff Ajodhya Singh brought this suit on the allegation that Jhenti Singh the father of Defendant No. 1 and grandfather of Defendants Nos. 2 to 4 executed a mortgage-deed on 21st June 1904 on receipt of a loan of Rs. 100 bearing interest at 12 per cent. per annum. The defence *inter alia* was that the deed was not duly executed and attested. Various issues were raised in the Primary Court, but that Court on

(1) 5 C. W. N. 454 (1901).
(4) L. R. 39 I. A. 218: s. c I. L. R. 35 Mad. 607; 16 C. W. N. 1009 (1912).
(2) 7 C. W. N. 160 (1902).
(3) I. L. R. 35 All. 254 (1913).

the evidence of the Plaintiff found that when the mortgagor signed the mortgage-deed only one witness out of five witnesses was present and the remaining witnesses came afterwards and on receipt of acknowledgment from the mortgagor that he had signed the deed, they signed the bond as witnesses. The first Court therefore held that the mortgage-deed was not duly attested by two witnesses within the meaning of sec. 59 of the Transfer of Property Act and dismissed the suit. On appeal to the District Judge, the learned District Judge held that as the scribe was present all along and that as he signed the bond as a scribe, he must be taken to be another attesting witness and so the deed was duly attested within the meaning of the law and so he decreed the appeal and remanded the case to the first Court for decision on the other issues raised in the case. The Defendants Nos. 1 and 2 thereupon preferred this second appeal.

Mr. Atul Krishna Ray for the Appellants contended that the scribe in the present case is not an attesting witness within the meaning of the law. "Attesting witness" has been defined by Lord Campbell in *Burdett* v. *Spilsbury* (5) as "a witness who has seen the deed executed and who signs it as a witness." The meaning of attestation has been settled by the Privy Council in *Shamu Patter* v. *Abdul Kadir* (4). The case of *Badri Prasad* v. *Abdul Karim* (3) is also in point. Referred also to *Ranu* v. *Luxman Rao* (6).

The case of *Raj Narain Ghosh* v. *Abdur Rahim* (1) is no authority after the Privy Council decision referred to above. The case of *Dinamoyi Debi* v. *Bon Behari Kapur* (2) referred to in the lower Appellate Court's judgment is clearly distinguishable.

Mr. Luchmi Narain Singh for the Respondent contended that the present case is distinguishable from *Badri Prasad* v. *Abdul Karim* (3). The Privy Council judgment is in my favour. The cases of *Raj Narain Ghosh* v. *Abdur Rahim* (1) and of *Dinamoyi Debi* v. *Bon Behari Kapur* (2) are authorities for the proposition that a scribe is an attesting witness, although there is no evidence that he signed after the execution of the mortgage-deed by the mortgagor.

The Judgment of the Court was as follows :—

Chamier, C. J.—This appeal arises out of a suit brought by the Respondent Ajodhya Singh upon a simple mortgage made by an ancestor of the Appellants to secure the repayment of Rs. 100 and interest thereon. The only defence with which we are now concerned is that the document is not proved to have been attested by two witnesses as required by sec. 59 of the Transfer of Property Act. The execution of the document purports to have been witnessed by five witnesses who have signed their names as attesting witnesses in the margin in the usual place. In the right hand bottom corner of the document there is the signature of a man named Lalbihari who describes himself as *Katib tamassuk*. It is contended that Lalbihari was an attesting witness. It has been found by both the Courts below that none of the persons who signed their names in the margin as attesting witnesses were present when the executant signed his name on the document except Gangotri

(1) 5 C. W. N. 454 (1901).
(2) I. L. R. 35 All. 254 (1913).
(4) L. R. 39 I. A. 218 : s. c I. L. R 35 Mad. 607 ; 16 C. W. N. 1009 (1912).
(5) [1843] 10 Cl & Fin. 340, 417 (1843).
(6) I. L. R. 33 Bom. 44 (1908).

(1) 5 C. W. N. 454 (1901).
(2) 7 C. W. N. 160 (1902).
(3) I. L. R. 35 All. 254 (1913).

THE

Calcutta Weekly Notes.

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REPORTS (See Index).

Constitution of Benches.

The constitution of Courts and distribution of business amongst them, which is to take effect immediately after the disposal of the Full Bench Reference are as follows :—

LETTERS PATENT APPEALS.—The Hon'ble the Chief Justice and the Hon'ble Mr. Justice Mookerjee.

GROUP I.—The Hon'ble Mr. Justice Woodroffe and the Hon'ble Mr. Justice Chaudhuri.

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GROUP III.—The Hon'ble Mr. Justice N. R. Chatterjea and the Hon'ble Mr. Justice Richardson.

GROUP IV.—The Hon'ble Mr. Justice D. Chatterjee and the Hon'ble Mr. Justice Newbould.

CRIMINAL BUSINESS AND SPECIAL APPEALS OF ALL GROUPS.—The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Walmsley.

ORIGINAL SIDE.—The Hon'ble Mr. Justice Fletcher and the Hon'ble Mr. Justice Greaves.

Criminal Session.

The Second Calcutta Criminal Session will commence its sittings from Wednesday next, Mr. Justice Greaves presiding.

Mr. Justice Sheepshanks.

We are glad that Mr. R. Sheepshanks, I.C.S., has been appointed a Judge of the Calcutta High Court to officiate in the place of Mr. Justice Beachcroft who has gone on leave. Mr. Sheepshanks was formerly a Registrar on the Appellate Side of the Calcutta High Court. As District and Sessions Judge at Mozaffarpur he has for many years enjoyed the reputation of being a painstaking, patient and sound Judge who was always anxious to do justice.

Professional service for enemy subjects.

We noticed in these columns some time ago how under the traditions of the English Bar even a treacherous enemy subject when accused of the contemptible crime of spying experiences no difficulty in engaging counsel to defend him before the British Courts. The Lord Chief Justice observed in the case of the spy *Kurpferle* "It is in accordance with the honourable tradition of the Bar that even a charge so odious as that of spying in the interest of the enemy should meet with a proper defence." We have seen that in a number of cases before the Prize Court and applications for *habeas corpus*, alien enemy subjects have always been able to avail themselves of professional services.

The recent case of *Scales* v. *Wulfing* shows also in a striking manner how even bitterly hated enemy subjects when they approach British Courts receive all the facilities open to them under the British system of justice and even a British jury return a dispassionate verdict ignoring the grave wrongs to which the British people have been subjected during the War. In this case the plaintiff brought a suit for wrongful dismissal against the defendant who is the proprietor of *Sanalogen* and was resident at the time of the suit in Berlin. The defendant engaged a leader of the English Bar and after contest a British jury brought in a verdict in favour of the alien enemy.

Mr. Justice Darling who tried the case somewhat humorously observed that the English law furnished precedent for even the Devil to be represented by counsel and His Lordship in

support of this referred to the following practice of the Middle Ages.

"In the middle ages, when the heretics used to be tried, it was commonly said that the Devil had put into the mind of the accused person to say this or that, and it was felt to be unjust that the Devil should be accused before several cardinals and bishops and not be represented. Therefore a person was appointed called the Devil's Advocate. The prosecution put forward their case; the heretic put forward his case; and then the Devil's Advocate said what he could for his case."

A correction.

Mr. M. V. Ramaswamy Iyer, the author of the article styled "Power of Court to Revise Valuation by Plaintiff under sec. 7, cl. iv, of the Court Fees Act, 1870" which appeared at p. cxiv of the current volume writes to inform us, that he has been incorrectly described at p. cxvii as "Vakil, High Court, Madras." He is a Vakil, but not of the High Court. The word Vakil, we now gather, is, in Madras, the general term applied to all pleaders and is not restricted, as in this Province, to pleaders of the High Court only.

HOW CAN OCCUPANCY RIGHT BE ACQUIRED?

(Continued from page cxxviii.)

By twelve years' occupation.—In the second place the occupancy is acquired by a raiyat occupying for a period of *twelve years*.

Occupation wholly or partly before or after Act.—The holding of land for twelve years may be *wholly before or wholly after or partly before and partly after* the passing of Act X of 1859 to entitle the raiyat to a right of occupancy, *Thakoorani* v. *Bisheshur*, B. L. R. F. B. 202; 3 W. R. (Act X) 297, and the Bengal Tenancy Act has laid down the same rule of law, Act VIII of 1885, Sec. 20 (1).

Ancestor's occupation.—A raiyat is also entitled to the benefit of the occupation by his father or other person from whom he has inherited. "A person shall be deemed"—according to the Bengal Tenancy Act—"to have held as raiyat any land held as a raiyat by a person whose heir he is"; Act VIII of 1885, Sec. 20 (3). Thus in computing the period of twelve years required for the acquisition of a right of occupancy, raiyats are entitled to add to their own possession the time during which the person from whom they inherited the land had been in occupation; *Watson* v. *Sarat*, 7 W. R. 395: *Nani* v. *Murari*, 8 W. R. 127: *Lal* v. *Solano*, I. L. R. 10 Cal. 45: 12 C. L. R. 559. This is under the old law as well as the present.

Joint occupation by co-sharers.—Whether the land was in the sole and *exclusive* possession of the raiyat or was held *jointly* with others, or partly jointly and partly severally, he was under the old law, entitled to the benefit of the possession for the purpose of accrual of the occupancy right; *Forbes* v. *Ram*, 22 W. R. 51. But see *Mahomed* v. *Ram*, 8 B. L. R. 338: 22 W. R. 52n. The Bengal Tenancy Act also refers to raiyats in joint occupation of land as raiyati holding and lays down that when land is held by two or more *co-sharers* as a raiyati holding, each of the co-sharers is deemed to hold it as a raiyat and acquires the status of a sett'ed raiyat and a right of occupancy with it, Act VIII of 1885, Sec. 20 (4): See *Forbes* v. *Ram*, 22 W. R. 51, setting aside *Mahomed* v. *Ram*, 22 W. R. 521: 8 B. L. R. 338. The mere fact of *joint holding* by a number of persons does not prevent the right as to the entire land growing in any one of these joint-tenants or tenants-in-common, Sarada Charan Mitra's Land Law of Bengal, 330: See *Peary* v. *Radha*, 5 C. L. J. 9.

The status of a settled raiyat is thus acquired by a cultivator who has held any land in the particular village for twelve years continuously, jointly with others, for the whole period or part of the time.

Transferer's possession.—They were and still are entitled to add to their possession the period during which the holding had been in the occupation of their transferers, if the *jotes* were transferable, but not otherwise, *Watson* v. *Sarat*, 7 W. R. 395: *Dinobandhu* v. *Ram*, 9 W. R. 522 *Durga* v. *Brindaban*, 11 W. R. 162: *Narendra* v. *Ishan*, 22 W. R. 22: 1 B. L. R. 274: *Khirod* v. *Gordon*, 23 W. R. 237: *Lal* v. *Solano*, I. L. R. 10 Cal. 45: 12 C. L. R. 559, even with the consent of the landlord, *Tara* v. *Surjo*, 15 W. R. 152: *Hyder* v. *Bhubendra*, 17 W. R. 179.

Occupation under lease or otherwise.—Formerly under Act X of 1859, a raiyat could acquire a right of occupancy by twelve years' occupation, whether he held under a *patta* or not, but this provision did not affect "the terms of any written contract for the cultivation of land when it contains any express stipulation to the contrary," Act X of 1859, secs. 6 and 7.

Successive or single lease—Effect of covenant for re-entry.—The question as to the effect of occupation under *successive* written *leases* for terms of years aggregating to more than twelve years, or under a *single* lease for more than twelve years, was raised in several cases and there were conflicting judgments of the High Court, and the law was ultimately settled by a Full Bench. "The whole question"—said Couch, C. J. ,delivering the judgment," "turns upon what is the meaning of an express stipulation contrary to the raiyat acquiring the right of occupancy. Now, where there is a *patta* for a fixed term, no doubt at the expiration of that term the landlord has a right of re-entry upon the lands; and if the raiyat does not give up possession, the landlord may recover the land from him. The landlord need not enter upon the land, if he does not think fit; he may, and often does, allow the tenant to remain in possession of the land. I cannot hold that the right to re-entry which arises by reason of the expiration of the term named in the *patta* can be regarded as an express stipulation that the raiyat shall not, if he occupies the land for more than twelve years, acquire the right of occupancy given by section 6," *Sheo* v. *Ram*, 17 W. R. F. B. 62 : 8 B. L. R. 165, followed in *Golam* v. *Harish*, 17 W. R. 552 : *Narain* v. *Mansur*, 25 W. R. 155. The effect of this decision seems to be whether a raiyat held under a single lease or under different leases following one after the other he acquired a right of occupancy in the land so held by him when the entire period of occupation exceeded twelve years, provided there was *no express covenant for re-entry* by the landlord at the expiration of any of them. An *implied covenant for re-entry* was not sufficient to defeat the statutory right which could be acquired by a raiyat by twelve years' occupation, *Mukhtar* v. *Brojoraj*, 9 C. L. R. 144 : *Chandrabati* v. *Harington*, I. L. R. 18 Cal. 349 : L. R. 18 I. A. 27. A mere reservation of a right of re-entry on the part of the landlord unless it amounted to an express stipulation by which the raiyat contracted himself out of the benefit of the Act did not bar the accrual of the right.

Holding over after expiry of term.—An express covenant for re-entry, however, entitled the landlord to eject the raiyat at the end of the term, but if the landlord allowed the raiyat to hold over after the expiration of the term of the lease he was der the lease to the subsequent period a the total period exceeded twelve years raiyat acquired a right of occupancy, *Iba* v. *Mahomed*, 25 W. R. 114 : *Mukht Brojoraj*, 9 C. L. R. 143. The Bengal ancy Act has laid down that a raiyat ac the right of occupancy for twelve years ther he holds "under a lease or otherwis Act VIII of 1885, Sec. 20 (1) and Sec. that is to say he acquires the right whether is a covenant for re-entry or not, and "no in any contract between a landlord and t made before or after the passing of thi shall bar in perpetuity the acquisition take away, the right of occupancy in any Act VIII of 1885, Sec. 178. A covenan re-entry is now invalid and is not enforce

IN CASE OF PRIVATE LAND.—In case o private lands of proprietors held by a r we have already seen that the right cann acquired when such lands are held "un lease for a term of years or from year to Act VIII of 1885, Sec. 116, and whethe raiyat holds under one lease or succ leases possession for twelve years gives h right. But if the land was not initial out for a term or from year to year, it seem that twelve years' occupation would on the raiyats the right even on such *Masudan* v. *Gudar*, 1 C. L. J. 456, so in of *utbandi*, *char* and *diara* lands. See *a*

RADHA RAMAN MUKERJEE, M.A., I

(*To be continued.*)

Reviews.

THE LAW OF GAMING AND WAGERING. *S. G. Velinker, B.A., LL.B. Published l Times Press, Bombay.*

This is the second edition of a treatise o law of gaming the first edition of which published fifteen years ago. It is a volu about 250 pages which contains all the dealing with gambling of the several Le tive Councils in India. In the notes o sections both English and Indian cases been referred to. The book will be found by the busy practitioner.

COMMENTARIES ON THE INDIAN RAILWAY (IX OF 1890). *By M. Teruvenkata Ch Madras. Printed by Hoe & Co., at the Pa Press, Stringer's Street, George Town. Price Rs. 4.*

The author of this work was formerly

and has compiled the "High Court Decisions of Indian Railway Cases." He thus brings to the preparation of the present work, a ripe experience and a familiarity with the case-law. The Indian Railways Act, however, forms only a portion of the Railway Law of the country, and this Act with its commentaries occupies only about ⅓ half of the book. An equal half of it is taken up by the general rules framed by the Railway Board for the Railways administered by Government, Rules for enquiring into and reporting on Railway accidents, Rules for warehousing and retention of goods, Forms of Risk-notes, and provisions of other statutes bearing on railways and miscellaneous cases not assignable to any particular provisions of the Railways Act. A neatly got-up and compact volume which gives nearly all the information a legal practitioner requires in dealing with railway cases, it can hardly fail to be useful.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before D. CHATTERJEE and BEACHROFT, JJ. APPEAL FROM ORIGINAL ORDER No. 478 OF 1913. UPENDRA MOHAN SAHA CHOWDHURI AND ORS., Appellants *v.* BRINDABAN BEHARY SAHA PRAMANIK, Petitioner in Insolvency, Respondent. 3rd February 1916.

Provincial Insolvency Act, sec. 36—Order of enquiry if legal.

This was an appeal preferred against the order of J. D. Cargil, Esq., District Judge of Zilla Mymensing, dated the 21st of July 1913.

The Respondent, Brindamad Behary Saha Pramanik, was adjudicated an insolvent on the 5th October 1912 and a Receiver was appointed of his property. On the 18th February 1913, some of his creditors made an application stating that the insolvent and his brother have transferred certain properties in favour of their uncle and brother-in-law to defeat the creditors. Notices were thereupon issued upon the transferees and the insolvent to show cause why the transfer should not be declared void against the Receiver and annulled by the Court. The transferees filed written statements and cited witnesses but they took a preliminary objection to the effect that the proper person to make this application was the Receiver and not the creditors and hence it cannot be entertained under sec. 36. The District Judge passed the following order dated 21st July 1913 :—

"Pleaders heard. This is an application under sec. 36 of the Provincial Insolvency Act. In 12 C. L. J. at page 452 it is held that the language of sec. 36 justifies the inference that the proper person to make the application under that section is the Receiver. In the present instance the application has been made to this Court by certain creditors. The application is rejected. The creditors can move the Receiver who if he sees fit will make the necessary application to this Court."

This appeal was against this order.

Afterwards the Receiver submitted a report supporting the allegations of transfer stated in the application of the creditors.

On receipt of this report the learned District Judge made the following order :—

"Send the papers to the Munsif of Tangail, Second Court, for enquiry and report under sec. 36, Insolvency Act, whether the transfers referred to in para. 5 (*a*) to (*c*) of the Receiver's report were made in good faith and for valuable consideration."

On receipt of the Munsif's report the District Judge called upon all persons interested to show cause why those properties should not be included in the list of assets of the insolvent and sold by the Receiver.

The present appeal was preferred by the creditors making the insolvent as the only Respondent.

Held—That there was no warrant in law for the reference to the Munsif. That the further order made upon the receipt of the report was also not quite accurate. The order should have been in accordance with the terms of sec. 36, as to why the transfer should not be annulled.

Their Lordships directed the Judge that he should "proceed with the case after issuing fresh notice upon the transferees to show cause why the transfer should not be annulled under sec. 36 of the Provincial Insolvency Act and upon hearing such cause as may be shown, he will pass the necessary order under sec. 36."

Babus Manmatha Nath Mukerjee and *Satindra Nath Mukerjee* for the Appellants.

Babu Satish Ch. Chaudhuri for the Respondent.

Prasad and unless it can be held that Lalbihari was an attesting witness the suit must be dismissed. The Court of first instance held that Lalbihari was not an attesting witness, but on appeal the District Judge observed that according to the evidence adduced by the Plaintiff Lalbihari was present throughout the whole transaction from the drawing up of the bond up to the time when the parties went away. "If so," says the learned Judge, "he was present when the bond was signed. Plaintiff does not say in so many words that Lalbihari actually witnessed the executant's signature, but his witness No. 2 does say so. I believe this evidence and I find that the scribe saw the bond signed." What witness No. 2 said was that he and the persons whose names appear in the margin of the document and Lalbihari were present when the executant signed his name. The learned District Judge appears to hold that as Lalbihari was present when the mortgagor signed the document and afterwards signed his own name on the document he must be regarded as an attesting witness. As authority for this view he cites the cases of *Raj Narain Ghosh* v. *Abdur Rahim* (1) and *Dinamoyi Debi* v. *Bon Behari Kapur* (2), and he disagreed with the interpretation that was put upon those rulings by Mr. Justice Griffin and myself in the case of *Badri Prasad* v. *Abdul Karim* (3). The present case no doubt differs from the Allahabad case just mentioned, for in that case the scribe of the document wrote his name on the deed before the deed was signed by the executant. But we were of opinion in that case that an attesting witness within the meaning of sec. 68 of the Indian Evidence Act, 1872, was a witness who has seen the deed executed and who has signed the deed as a witness. I am of the same opinion now and I rest my decision on the judgment of their Lordships of the Privy Council in the matter of *Shamu Patter* v. *Abdul Kadir* (4). In that case their Lordships quoted the decision in *Burdett* v. *Spilsbury* (5) with approval and in particular approved of the statement of the Lord Chancellor that a party who sees a Will executed is in fact a witness to it and if he subscribes as a witness he is then an attesting witness. Their Lordships held that the word "attested" in sec. 59 of the Transfer of Property Act, the section with which we are concerned in the present case, was used in that sense. In the Allahabad case we said that although the scribe might have witnessed the execution of the deed in suit he did not sign the deed as a witness. The same remark may be made here. Lalbihari on the finding of the learned District Judge must be held to have seen the execution of the mortgage-deed, but it is evident that he did not sign the deed as a witness. I therefore hold that Lalbihari is not an attesting witness within the meaning of sec. 59 of the Transfer of Property Act. In my judgment the Munsif was right in dismissing the suit. I would allow this appeal, set aside the order of the District Judge remanding the suit for retrial and dismiss the suit with costs in all three Courts.

JWALA PRASAD, J.—The only point that arises in this appeal is whether the mortgage-bond in suit was duly attested by at least two witnesses as required by sec. 59 of the Transfer of Property Act. The bond bears the signatures of a number of persons as attesting witnesses to it and also

(1) 5 C. W. N. 454 (1901).
(2) 7 C. W. N. 160 (1902).
(3) I. L. R. 35 All. 254 (1913).
(4) L. R. 39 I. A. 218: s. c. 16 C. W. N 1009; I. L. R. 35 Mad. 607 (1912).
(5) 10 C. & F. 340 (1848).

the signature of Lalbihari Lal described therein as the scribe of the bond. Upon the evidence in the case the learned Munsif held that one only of the witnesses of the bond was present at the time of the execution thereof by the mortgagor. The learned District Judge held that the scribe was present throughout the whole transaction from the drawing up of the bond till the parties went away. From this he infers that the scribe was present when the bond was signed and he says that the Plaintiff No. 2 deposed that the scribe actually witnessed the signature of the mortgagor. On looking into the evidence, I find that that witness does not say that the scribe witnessed the execution of the deed. The fact that Lalbihari Lal is described as *katif tamsuk* does not show that he did not witness the execution. It often happens that the scribe of a deed does witness the execution and he may sign the deed because he has done so and yet describe himself as *katif*. In the present case there is no evidence that Lalbihari Lal did witness the execution of the deed and it cannot be presumed that he did. I agree with the order proposed by the learned Chief Justice.

The order of the Court is that the appeal is allowed, the order of the District Judge set aside and the suit is dismissed with costs.

A. K. R.

PRIVY COUNCIL.

[Appeal from Bombay.]

Viscount Haldane.	Nagindas Bhugwandas, Appellant,
Lord Parmoor.	*v.*
Lord Wrenbury.	Bachoo Harkissondas, Respondent.
Sir John Edge.	
Mr. Ameer Ali.	
1915,	
26, November.	

Hindu Law—Partition—Adopted son of one brother if may share equally with natural-born son of another—Position of adopted son, where no legitimate son subsequently born to adoptive father—Hindu Law, progressive character of—Change in adopted son's position in Hindu society.

In cases of distribution of family property by partition, an adopted son (according to paragraphs 24 and 25 of sec. 5 of the Dattaka Chandrika) stands exactly in the same position as he would stand if he were a naturally-born son of his adoptive father, subject to this qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son.

Upon this interpretation, paragraphs 24 and 25 of sec. 5 of the Dattaka Chandrika are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha and they are consistent with the reference to the text of Vasistha in paragraph 1 of sec. 10 of the Dattaka Mimansa.

Where of two brothers, B and H, who were members of a joint Hindu family, B left a widow who adopted the Plaintiff as B's son, and H left Defendant, his natural-born sons.

Held—*That in a suit for partition Plaintiff was entitled to an equal share of the coparcenary property with the Defendant.*

NAGINDAS BHUGWANDAS *v.* BACHOO HARKISSONDAS.

MARKBY *and* PRINSEP, JJ.'s *interpretation of paras. 24 and 25 of sec. 5 of the Dattaka Chandrika in* RAGHUBANUND DOSS *v.* SADHU CHURN DOSS (1) *overruled.*

TARA MOHUN BHUTTACHARJEE *v.* KRIPA MOYEE DEBIA (2) *and statement as to adopted son's status in* MITTER J's., *judgment in* KALI KOMUL MOZOOMDAR *v.* UMA SHUNKUR MOITRA (7) *approved.*

This was an appeal against a judgment of the Bombay High Court (Scott, C. J., and Batchelor, J.), reversing on appeal the decision of Macleod, J., of the same High Court.

The suit was instituted by the Appellant against the Respondent for partition of joint family property formerly owned by two brothers, Bhagwandas Nagardas and Hurkissondas Nagardas, the two surviving sons of Nagardas Shobhagdas who had died in 1893. Hurkissondas died on 14th September 1900, leaving him surviving his wife who was then pregnant and who was brought to bed of a posthumous child on 18th December 1900, *viz.*, the Defendant-Respondent. Bhugwandas died childless on 17th December 1900, leaving a widow, who pursuant to an authority given to her, adopted the Plaintiff-Appellant as son to Bhugwandas on 17th February 1901. The parties were Gujrati Hindus.

The question in the suit was as to the share Plaintiff would get out of the ancestral joint family property. Macleod, J., who heard the suit in the first instance held that the shares of Plaintiff and Defendant were an equal half. On appeal Scott, C. J., and Batchelor, J., held that the Plaintiff was entitled only to a one-fifth share, mainly relying on the interpretation placed on paras. 24 and 25, sec. 5 of the Dattaka Chandrika by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (1).

Sir Robert Finlay, K.C. (with him *Mr. DeGruyther, K.C.* and *Mr. A. M. Dayne*) for the Appellant, submitted that the texts in question had been misinterpreted. If it was correctly interpreted, it would be in conflict with the Mitakshara and Dattaka Mimansa, sec. 10. *Raghubanund Doss* v. *Sadhu Churn Doss* (1) has been doubted in *Raja* v. *Subbaraya* (4). It is also opposed to a previous Calcutta decision *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (2). referred to *Birbhadra* v. *Kalpataru* (8) and *Dinonath Mukerji* v. *Gopal Chunn Mukerji* (3). The adopted son's position is generally the same as that of the natural-born son. Mayne's Hindu Law, secs. 169, 170.

Mr. DeGruyther, K.C. (following) referred to *Pudma Coomari Debi* v. *The Court of Wards* (6) and *Puttu Lal* v. *Parbati Kunwar* (9) as to the authority of treatises like the Dattaka Mimansa and Dattaka Chandrika when in conflict with the Mitakshara.

Mr. J. A. Clyde, K.C. (and *Mr. E. B. Raikes* for the Respondent, submitted that the position of the adopted son is clearly one of inferiority. He is the 7th in the list of sons (Mitakshara, Ch. I, sec. XI, 1), and formerly only the first six were entitled to succeed. The text of Vasistha cited in Mitakshara, Ch. I, sec. XI, 24 gives the adopted son a reduced share.

The text from Dattaka Chandrika, naturally interpreted, gives the adopted

(1) I. L. R. 4 Cal. 425 (1878).
(2) 9 W. R. 423 (1868).
(7) L. R. 10 I. A. 188 (1883).

(1) I. L. R 4 Cal. 425 (1878).
(2) 9 W. R. 423 (1868).
(3) 8 C. L R. 57 (1881).
(4) I. L. R. 7 Mad 253 (1883).
(6) L. R. 8 I A. 229 (1881).
(8) 1 C. L. J. 388 at p. 404 (1905).
(9) L. R. 42 I. A. 155 ; s. c. 19 C. W. N. 841 (1915).

son of a coparcener a reduced share. Golap Chandra Sarkar in his book on adoption understands (p. 399) the texts in this sense. As to the authority of Dattaka Chandrika, see *Sri Balasu Gurulingaswami* v. *Sri Balasu Rama Lakshamma* (10), Mayne's opinion (in para. 170) is based on a faulty translations.

Mr. E. B. Raikes (following) referred to Sarkar on Adoption, pp. 401, 402. His criticism of *Raghubanund Doss* v. *Sadhu Churn Doss* (1) was not correct. *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (2) was a case of collateral not of direct succession as here. As also *Dinonath Mukerji* v. *Gopal Churn Mukerji* (3).

The adopted son occupies an inferior position in the matter of offering oblations. Sarbadhikari's Hindu Law of Inheritance, p. 124, citing Nirnaya Sindhu. West and Buhler's Digest, Vol. I, 23, 67. Mayne's Hindu Law, sec. 271. Yajnavalkya does not give any share to the adopted son and the other sons following because they do not offer funeral cakes.

Sir Robert Finlay, K.C., on reply.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—The suit in which this appeal has arisen is one for the partition of the joint family property of a family of Gujerathi Hindus, of which the Plaintiff by adoption and the Defendant by birth are the male members. The question in this appeal is one as to the share in the joint family property to which the Plaintiff is on partition entitled.

The property in question belonged to a joint family, the male members of which were in 1900 Bhugwandas Nagardas and Hurkissondas Nagardas, the two surviving sons of Nagardas Shobhagdas who had died in 1893. Hurkissondas Nagardas died on the 14th September 1900, leaving his wife surviving; she was then pregnant, and the Defendant, who was the posthumous child, was born on the 18th December 1900. Bhugwandas Nagardas died childless on the 17th December 1900, leaving his widow surviving him; he had given to her an authority to adopt a son to him, and in pursuance of that authority she, on the 17th February 1901, adopted the Plaintiff as a son to her deceased husband. The parties are governed by the Mitakshara, as altered or interpreted by the Vyavahara Mayukha. The Plaintiff claimed that he was entitled on partition to a moiety of the family property. On the other hand the Defendant contended that the Plaintiff, as an adopted son, was entitled to a reduced share only of the family property; in support of that contention the Defendant relied upon paragraphs 24 and 25 of sec. 5 of the Dattaka Chandrika as those paragraphs were construed and applied in the High Court at Calcutta by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (1).

This suit was tried in the High Court at Bombay by Macleod, J., who held that the doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only in cases in which the competition is between an adopted son and a natural-born son of the same father (which is not the case here), and he gave the Plaintiff a decree for an equal share. From that decree the Defendant appealed.

On appeal Sir Basil Scott, C. J., and Batchelor, J., holding, as their Lordships understand their judgment, that there is nothing in the Mitakshara which is in-

(1) I. L. R. 4 Cal. 425 (1878).
(2) 9 W. R. 423 (1868).
(3) 8 C. L. R. 57 (1881).
(10) L. R. 26 I. A. 113 at p. 132; s. c. 8 C. W. N. 427 (1899).

consistent with paragraphs 24 and 25 of sec. 5 of the Dattaka Chandrika as these paragraphs were construed by Markby and Prinsep, JJ., in *Raghunbanund Doss* v. *Sadhu Churn Doss* (1), adopted the construction of Markby and Prinsep, JJ., of those paragraphs, and decided that the Plaintiff as an adopted son was on partition entitled only to a reduced share in the family property. From their decree this appeal has been brought.

The learned Judges of the High Court on the appeal from Macleod, J., in this suit had before them Sutherland's translation of paragraphs 21 and 25 of sec. 5 of the Dattaka Chandrika, the translation of those paragraphs which was relied upon by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (1) and a translation made by Sir Ramkrishna Bhandarkar, which appears to have been accepted as correct by the parties to this suit. Sutherland's translation was not a complete translation of the Sanskrit text. The translation which was relied upon by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (1), and is apparently accepted as a correct translation by Mr. Mayne in paragraph 169 of his *Hindu Law and Usage*, is as follows :—

Paragraph 24.—"Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, the adopted son of the same description obtains his due share. And in the event of the ancestor having other sons, a grandson by adoption, whose father is dead, obtains the share of an adopted son. Where such son may not exist, the adopted son takes the whole estate even."

Paragraph 25.—"Since it is a restrictive rule that a grandson succeeds to the appropriate share of his own father, the son given, where his adopter is the real legitimate son of the paternal grandfather, is entitled to an equal share even with a paternal uncle, who is also such description of son; therefore a grandson who is an adopted son may (in all cases) inherit an equal share even with an uncle. This must not be alleged (as a general rule). For there would be this discrepancy where the father of the grandson were an adopted son, he would receive a fourth share; but the grandson if he were such son (of him) would receive an equal share (with an uncle in the heritage of the grandfather) and accordingly, whatever share may be established by law for a father of the same description as himself, to such appropriate share of his father does the individual in question, (*viz.*, the adopted son of one adopted) succeed. Thus, what had been advanced only is correct. The same rule is to be applied by inference to the great-grandson also."

The translation which was made by Sir Ramkrishna Bhandarkar is as follows :—

"It should be understood by this that an adopted son acquires the ownership wherever possible of his proper share by a relation similar to the relation, brotherhood, &c., by which a natural-born son acquires a right to the property of his brothers, &c. Similarly, an adoptive grandson whose adopting father is dead acquires the ownership of the share proper for an adopted (son) when the owner of the property has got another son or other sons and of the whole when he has got no son or sons. It should not be argued that because a grandson is necessarily the owner of the share proper for his father, the taker (in adoption) of the adoptive son being a natural-born son of the grandfather and entitled to a share equal to that of the uncle similarly born, the adoptive grandson should take a share equal to that of the uncle; for it involves impropriety, inasmuch as the adopted son gets one-fourth and the adoptive grandson an equal share. Therefore that share is proper for a son's father which he would get by law if he were of the same description (adopted or natural-born) as the son. This way should be followed in the case of great grandson also."

(1) I. L. R. 4 Cal. 425 (1878).

Their Lordships are not in a position to say which of those translations is the more literal translation, each is obscure, but in the opinion of their Lordships neither translation warrants any conclusion as to the meaning of the author of the *Dattaka Chandrika* other than that at which their Lordships have arrived.

The author of the *Dattaka Chandrika* was in paragraphs 24 and 25 of sec. 5 of his Commentary, relying upon the text of Vasistha according to which "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part." That text of Vasistha is quoted by Nanda Pandita in paragraph 1 of sec. 10 of the *Dattaka Mimansa*, who added, "on the death of him (the naturally-born son) he (the adopted son) is entitled to the whole." It is obvious that Vasistha and Nanda Pandita were referring to cases in which the competition would be between an adopted son and a naturally-born subsequent son of the same father, and were not referring to cases in which on partition the competition would be between an adopted son of one member of a joint Hindu family and a naturally-born son of another member of the family, as for instance a naturally-born son of a brother or a nephew of the adoptive father.

The author of the Dattaka Chandrika expressed his views somewhat obscurely and confusedly in paragraph 24 and 25 of sec. 5 of his Commentary, but their Lordships consider that it is not difficult to ascertain what his meaning was. For the purposes of his Commentary he paraphrased the text of Vasistha that "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part," and in paragraphs 24 and 25 of sec. 5 he illustrated the text of Vasistha, as he understood that text, by examples of its application.

His meaning is that in cases of the distribution of family property by partition an adopted son stands exactly in the same position as he would stand if he were a naturally-born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son. The author of the Dattaka Chandrika, applying the well-established rule of Hindu Law that a son takes no greater share than his father, if a qualified person, would have been entitled to, illustrated the application of the principle of the text of Vasistha by contrasting the case of a competition between an adopted son of a naturally-born son and that naturally-born son's naturally-born brother with the case of an adopted son of an adopted son competing with a naturally-born son of his adoptive father's adoptive father, in other words his uncle through the adoption of his adoptive father. In the first case, as the author of the Dattaka Chandrika pointed out, the adopted son would take a share equal to that of his uncle by adoption; in the latter case, as a son cannot take a greater share than his father would have been entitled to, the adopted son of an adopted son would take a less share than his uncle by adoption who was a naturally-born member of the family, and who would have taken a greater share than his brother by adoption.

As their Lordships construe paragraphs 24 and 25 of sec. 5 of the Dattaka Chandrika those paragraphs are not in

conflict with any principle of the Mitakshara or of the Vyavahara Mayukha, and they are consistent with the reference to the text of Vasistha in paragraph 1 of sec. 10 of the Dattaka Mimansa. To construe and apply those paragraphs as they were construed and applied by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (1) would bring them into conflict with what are now well-established principles of Hindu law. The attention of Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (1) which was decided by them in 1878, does not appear to have been drawn to the case of *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (2), which came on appeal before the High Court at Calcutta in 1868. In that case Loch and Hobhouse, JJ., held that an adopted son took the full share which his adoptive father would have taken in the property of a deceased collateral; their respective grandfathers were *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (2), the Plaintiff by birth and the Defendant by adoption were in equal relationship to the deceased collateral; their respective grand-fathers were the first cousins of the collateral and their respective fathers were his first cousins once removed. Loch and Hobhouse, JJ., were pressed in argument to put a construction upon paragraph 25 of section 5 of the Dattaka Chandrika adverse to the claim of the adopted son, but they held that an adopted son is entitled to all the rights and privileges of a son of the body legitimately begotten, where there is no such son subsequently born; and that there was no reason why the Plaintiff and the Defendant in the suit before them should not each take the share to which their respective fathers were entitled. The parties to the suit which was in appeal before Loch and Hobhouse, JJ., were governed by the law of the Dayabhaga, but that fact does not distinguish that case in principle from the case which is now before this Board. The decision in *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (2) was followed in 1881 by McDonell and Field, JJ., in *Dinonath Mukerji* v. *Gopal Churn Mukerji* (3). In *Raja* v. *Subbaraya* (4), which was, however, a case relating to Sudras, Sir Charles Turner, C. J., and Muttusami Ayyar, J., in 1883 doubted that paragraph 25 of section 5 of the Dattaka Chandrika had been correctly construed in *Raghubanund Doss* v. *Sadhu Churn Doss* (1). Their Lordships are not aware of any case in the High Court at Bombay before the present suit came on appeal before that Court in which the construction of Markby and Prinsep, JJ., of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika has been adopted.

In support of the judgment in the suit of the High Court at Bombay in appeal it was further contended before this Board on behalf of the Defendant that the position of a member by adoption in a joint Hindu family, and his interest in the joint family property, are inferior to the position and interest of a member by birth of the family, and it was suggested that an adopted son does not on his adoption become a coparcener in the joint family property. It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. As to this contention it is sufficient to say that whatever

(1) I. L. R. 4 Cal. 425 (1878).
(2) 9 W. R. 423 (1868).

(1) I. L. R. 4 Cal. 425 (1878).
(2) 9 W. R. 423 (1868).
(3) 8 C. L. R. 57 (1881).
(4) I. L. R. 7 Mad. 253 (1883).

may have been the position and rights between themselves of such twelve sons in very remote times, all of these twelve sons, except the legitimately born and the adopted, are long since obsolete. A discussion as to their rights and interests, even if they could now be ascertained, would be beside the point and could throw no light on the construction of paragraphs 24 and 25 of sec. 5 of the Dattaka Chandrika or upon the position and rights of an adopted son. Hindu law and customs have not stood still, and what we are now concerned with is the position at the present time of an adopted son in a Hindu family. As early as 1833 this Board in *Sumboochunder Chowdry* v. *Naraini Dibeh* (5) considered that according to Hindu law an adopted son becomes for all purposes the son of the father by adoption. This Board in 1881 in *Pudma Coomari Debi* v. *The Court of Wards* (6) approved of the decision of this Board in *Sumboochunder Chowdhry* v. *Naraini Debeh* (5), and held that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relations by adoption, and also that an adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and the Dattaka Mimansa. Those excepted instances relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father. To the same effect is the decision of this Board in *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (7). In the last-mentioned case when it was before the Full Bench of the High Court at Calcutta, Romesh Chunder Mitter, J., held that—

> "According to Hindu law an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter, as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it."

With that statement as to the Hindu law of adoption their Lordships agree.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the decree in appeal of the High Court at Bombay should be set aside and the decree of Mr. Justice Macleod should be restored.

The Respondent must pay the costs of this appeal and of the appeal in the High Court.

Solicitors: *Messrs. Hughes & Son* for the Appellant.

Solicitors: *Messrs. Latteys* and *Hart* for the Respondent.

B. D. *Appeal allowed with costs.*

(5) 8 Knapp. 55 (1835).
(6) L. R. 8 I. A. 229 (1881).
(7) L. R. 10 I. A. 138 (1883).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 57 OF 1915.

SANDERSON, C. J.
WOODROFFE, J.
MOOKERJEE, J.
1916,
Heard, 24, 25, 26, & 27, January.
Judgment, 11, February.

RAGHUMULL, Defendant, Appellant,
v.
LUCHMONDAS, Plaintiff, Respondent.

Under-brokerage contract—Brokerage contract terminable by parties by three months' notice before the end of the term—Under-broker who had notice of brokerage contract if may claim damages for whole term when brokerage contract legally termi-

RAGHUMULL *v.* LUCHMONDAS.

nated before expiry of term—Under-broker wrongfully dismissed before brokerage contract terminated—Damages, measure of—Brokerage contract, if terminable by fresh agreement—Under-broker, if may insist on termination by notice—Hindu joint family, carrying on business in partnership—Contract by family, if terminates with death of co-parcener—Contract Act (IX of 1872), sec. 253, cl. 10—Rule of Hindu law, if to be considered.

By an agreement between A and B, dated 31st May 1911, the former appointed the latter to act as broker for him for 5 years or for such further period as might be mutually agreed upon between the parties. It was provided in the agreement that it might be determined by either party by giving three months' notice to the other party. In pursuance of another term of the said agreement B (the broker) appointed C to act as under-broker for him during the subsistence of the said agreement and C (the under-broker) had notice of the said agreement. On 12th August 1912, the broker B, wrongfully dismissed the under-broker C, and subsequently on 2nd December 1912 in good faith entered into a second agreement with A inconsistent with the first.

Held, *in a suit by C against B for wrongful termination of the under-brokerage contract, that as the under-brokerage contract depended upon the subsistence of the brokerage contract and the latter contract was validly terminated on the 2nd December 1912, the under-brokerage contract also came to an end on the same day, and the Plaintiff was entitled to recover damages as for the period from his dismissal on 12th August to the termination of the contract on 2nd December 1912.*

Per MOOKERJEE, J.—*That the three months' notice required by the contract between A and B was for the benefit and protection of the contracting parties themselves and C was not entitled to make a grievance that either party has allowed the other to determine that agreement without insisting on the prescribed notice.*

Where X and Y members of a joint family (of which Y was the karta) *carrying on a joint family business entered into a contract of under-brokerage and X subsequently died; but Y and the other party to the contract went on dealing with each other as if the contract subsisted:*

Held, *per* CURIAM, *that X's death did not terminate the contract.*

Per MOOKERJEE, J.—*Where there are two joint agents and one of them dies, upon his death the contract of agency terminates only so far as he is concerned, but not as regards the surviving agent.*

The rights and liabilities of coparceners in a joint Hindu family cannot be determined by exclusive reference to the Indian Contract Act, but must be considered also with regard to the general rules of Hindu Law; according to these rules, the death of one of the coparceners does not dissolve a family partnership.

This was an appeal preferred on the 14th July 1915 against the judgment of Mr. Justice Greaves, dated the 31st May 1915, delivered in the exercise of the Ordinary Original Civil Jurisdiction.

Mr. N. Sarkar (with *Mr. S. N. Banerjee*) for the Appellant.

Mr. B. C. Mitter (with *Messrs. A. N. Chaudhuri* and *D. C. Ghosh*) for the Respondent.

The JUDGMENTS OF THE COURT were as follows:—

SANDERSON, C. J.—This is an appeal by the Defendant Raghumull from a judgment of Greaves, J., delivered on the 31st May 1915.

The Plaintiff's claim against the Defen-

dant was for damages for breach of an agreement in writing, dated the 8th June 1911, for money due for under-brokerage under the said agreement, for brokerage and profits alleged to be due by reason of a verbal arrangement by which it was alleged the Plaintiffs were to receive remuneration for certain transactions on the terms of the written agreement: and for brokerage in respect of other matters set out in the statement of claim.

It appears that by an agreement dated 31st May 1911 Messrs. David Sassoon & Co. appointed the Defendant Raghumull and Juggoomul (who is since dead) trading in the name of Madhoram Hurdeodass, their brokers for the sale and purchase of sugar during the subsistence of that agreement, that is for a period of 5 years from the date thereof, or for such other period as might be mutually agreed upon unless sooner determined under the provisions in that behalf thereinafter contained.

The clause relating to the determination of the contract is 15, whereby it is provided as follows:—"This agreement may be determined by either party giving the other three calendar months' notice. Provided always that the company shall be at liberty to terminate this agreement at any time in the event of the brokers failing duly and faithfully to perform their duties under the agreement, and thereupon the accounts between the broker and the company shall at once be closed."

By cl. 2 of the agreement, the brokers were to employ such under-brokers as should be necessary for the purposes of the company's sugar business, and that such under-broker should be under the control of the company.

Consequently on the 8th June 1911, Raghumull and Juggoomul entered into an agreement with the Plaintiffs by which the Plaintiffs were appointed to act as under-brokers for the brokers for the sale and purchase of sugar in respect of all contracts to be entered by them for or on behalf of David Sassoon & Co. under the agreement of 31st May 1911, and during the subsistence of the said agreement or for such other period as the brokers (that is Raghumull and Juggoomul) and the company might further extend. Cls. 2, 3, 4, 5, 8, 10 and 11 of the agreement provide as follows:—

"2. All purchases and sales of sugar through the under-brokers shall be guaranteed by them and all contracts for all such sales and purchases shall be countersigned by the under-brokers who shall in every respect be responsible for the due observance and performance and fulfilment of all such contracts provided the said under-brokers or their subordinate under-brokers shall be unable to obtain contracts for the sale and purchase of sugar at the rates quoted by the said brokers—the said brokers shall be at liberty to enter into contracts for the sale or purchase of such sugar through other under-brokers or under-broker at or above the quoted rates and in such cases the under-brokers shall not be responsible to the brokers nor shall be entitled to any brokerage in respect of such contracts."

"3. During the subsistence of this agreement the under-brokers shall not act as under-brokers for any other broker for purchases and sales of sugar and unless prevented from illness or any other unavoidable cause shall attend the office or place of business of the broker daily either by himself or his duly authorised agents."

"4. The brokers shall on arrival of the goods sold through the under-brokers give notice of the arrival or any other notice required to be given to purchasers by delivering such notice to the under-brokers

and the notice so given shall be deemed sufficient for all purposes."

" 5. The under-brokers shall be entitled to during the continuance of this agreement on all contracts passed through him at the rate of eight annas per cent. on the value of the goods the subject-matter of the contracts, and brokerage shall only become payable by the brokers to the under-brokers after delivery of the goods under each of such contracts and after the said brokers shall become themselves entitled to their brokerages and commission from the said company under the said agreement."

" 8. That the under-brokers shall be liable for all loss and damages (if any) and costs of all suits and proceedings in respect of and on all contracts which may be passed through them as aforesaid and by reason of the bankruptcy of any contracting party to the extent of one-fourth or twenty-five per cent. of such loss and shall also be entitled to the profits arising out of the said contracts to the extent of one-fourth or twenty-five per cent. of such profits besides the commission mentioned in para. 5 of this agreement. That in case of any such loss the under-brokers shall on demand by the brokers forthwith deposit with them their share of such loss unless there be sufficient money in the hands of the brokers belonging to the under-brokers, and in such case the brokers shall have full power to deduct the same from such deposit."

" 10. The under-brokers shall not during the subsistence of this agreement directly or indirectly act as under-brokers of any other company or person whomsoever for the sale or purchase of sugar and that they will not during the subsistence of this agreement without the written consent of the brokers first had and obtained buy or sell or trade or deal or speculate in sugar the subject-matter of this agreement or guarantee any sugar contract with any other firm or firms, and in case it is discovered that the under-brokers have committed a breach of this clause, it shall be lawful for the brokers to terminate this agreement and the brokers shall in that case be entitled to recover from the under-brokers damages by way of liquidated claim the sum of rupees one thousand for the breach of this clause."

" 11. The brokers shall have full power to cancel this agreement should it be found that the under-brokers have acted contrary to any of the clauses of this agreement or have been unfaithful in the discharge of their duties under this agreement."

Business was carried on under these agreements until 27th April 1912 when Juggoomul died. No difference at that time was made in the business arrangements of the parties, and Raghumull appears to have carried on the brokerage business, at all events so far as the Plaintiffs were concerned, in the same way as before Juggoomul's death.

On the 12th August 1912 the Defendant's attorney wrote the following letter :—

" I am instructed by Messrs. Madhoram Hardeodass to give you notice which I hereby do that under and by virtue of the power vested in them by the 11th clause of agreement, dated the 8th day of June 1911 and made between my clients of the one part and yourselves of the other part, they hereby cancel the said agreement as and from this date by reason of your having acted contrary to the terms and conditions thereof.

" My clients in giving this notice do so without prejudice to their rights under the said agreement to hold you responsible in

respect of contracts and transactions entered into by you prior to this date.

"I am further instructed by my clients to give you notice not to act in any way under the said agreement by entering into any fresh contract or otherwise, and that if you act contrary to this notice you will do so at your own risk and peril."

Several matters were relied upon at the trial as being specific breaches of contract, on all of which the learned Judge found in the Plaintiff's favour. On the hearing of this appeal the Defendant relied upon two of these alleged breaches only :—

(1) The first was that without the order or knowledge of the Defendant, the Plaintiff entered into a contract for the purchase of 950 tons of sugar.

(2) The second was that the fact that the first Plaintiff was an undischarged bankrupt was concealed from the Defendant and Juggoomull.

As regards the first of these, it appears that the Plaintiffs wrote to the Defendant on or about the 16th July 1912 the following letter :—

"To Sri Lala Madhoramjee Hurdeodass Ji—Please accept the compliments of Luchomdas Joynarain. Further, white sugar, tons 950, in words nine hundred (illegible) tons we sold for August-December without your order in respect of which you held us liable for your loss in respect of difference at 0-1-0 a maund, in words one anna per maund. We agree to the same, Miti Assar 11, Sudi 1, Sambat 1969."

This letter undoubtedly shows that 950 tons were sold by the Plaintiffs without the Defendant's order, and if it could be shown that this related to "sugar, the subject-matter of this agreement," within the meaning of the words in cl. 10 of the 8th June 1911 agreement, it would have been a breach of the contract which would have entitled the Defendant to terminate the agreement, for cl. 10 provides that the under-brokers "will not during the subsistence of this agreement without the written consent of the brokers first had and obtained buy or sell sugar, the subject-matter of this agreement, and in case it is discovered that the under-brokers have committed a breach of this clause, it shall be lawful for the brokers to terminate this agreement, and the brokers shall in that case be entitled to recover from the under-brokers damages by way of liquidated claim, the sum of Rs. 1,000 for the breach of this clause."

But undoubtedly there were transactions between the Plaintiffs and the Defendant which were outside the agreement in the sense that they did not relate to "sugar, the subject-matter of this agreement," and it is alleged by the Plainiffs that the transaction, with reference to which the letter of the 15th July 1912 was written, was one of the transactions outside the agreement, and that the parties settled the matter by agreeing that the Plaintiffs should pay the difference at one anna per maund.

It was for the Defendant to prove that the transaction related to "sugar, the subject-matter of this agreement," and, consequently came within cl. 10 of the agreement and in my judgment, the Defendant has not afforded such proof and consequently he fails in this ground of appeal.

As regards the second alleged breach, the learned Judge has found as a fact, though not without some doubt, that the Defendants Raghumull and Juggoomul were aware of the insolvency of Luchmondas, there was evidence on which he could come to the above-mentioned conclusion, and on consideration of the evidence relating thereto, I am not prepared to say that the learned Judge's finding on this question

of fact was wrong, and therefore, in my judgment, the second ground fails.

The next point taken by the learned Counsel for the Defendant was that the agreement of 31st May 1911 was terminated by the death of Juggoomul and that as the under-brokerage agreement of 8th June 1911 was dependent on the subsistence of the agreement of 31st May 1911, the under-brokerage agreement became determinable at will, although, until determined by notice at any time, the course of dealing between the Plaintiffs and the Defendant would be regulated thereby; and that consequently the Defendant was entitled to put an end to the contract on 12th August 1912, even though there were no breaches of contract on the part of the Plaintiffs.

In the further alternative it was contended that the Plaintiffs were in any event not entitled to more than reasonable notice.

I am not prepared to accept these contentions: it was alleged in the statement of claim and not denied that the Defendant and Juggoomul were members of a joint Hindu family which carried on the joint family business under the name Madhoram Hurdeodass, of which the Defendant was the *kurta*, and, in my judgment, both the Plaintiffs and Defendant by their course of dealing, after Juggoomul's death, must be taken to have treated the agreement of the 8th June 1911 as binding and subsisting in all its material terms.

The Plaintiffs therefore were entitled to a continuance of the employment as under-brokers, in the absence of any breach of contract which rendered it lawful for the Defendant to put an end to it, under the agreement of 8th June 1911. This agreement, however, was dependent upon the subsistence of the agreement of 31st May 1911, between the Defendant and David Sassoon & Co.

Now, on the 2nd of December 1912, a fresh agreement was entered into between the Defendant and David Sassoon & Co. with regard to the brokerage business. The fact of this agreement was referred to at the trial, but on objection by the Plaintiffs' Counsel it was not admitted in evidence. On the hearing of the appeal the Defendant's Counsel submitted that it should be admitted as evidence, and after some argument the learned Counsel for the Plaintiffs withdrew his objection and the document was admitted.

This agreement differs from the agreement of 31st May 1911 in many material respects: it is not necessary for me to refer in detail to the clauses which have been read in the course of the argument; it is sufficient for me to say that the terms of it are inconsistent with the subsistence of the old agreement of 31st May 1911, and, in my judgment, it must be taken that as from the 2nd December 1912 at all events, the agreement of the 31st May 1911 came to an end. It was urged by the learned Counsel for the Defendant that the old agreement must be taken to have come to an end on the 13th day of August 1912, because it appears from the terms of the agreement of 2nd December 1912, that part of the deposit of three lacs of rupees, *viz.*, Rs. 87,186-9-4 was paid on the 13th August 1912, but, in my judgment, in the absence of any other evidence, this is not sufficient to justify us in holding as against the Plaintiffs that the agreement of 31st May 1911 was terminated on the 13th August 1912.

It was argued by learned Counsel for the Plaintiffs that the Defendant could not voluntarily put an end to the business under which the Plaintiffs were em-

ployed, and consequently that they were entitled to damages based on the continuance of the employment for the remainder of the five years.

But the Plaintiffs' agreement was expressly made to be dependent upon the subsistence of the Defendant's agreement with David Sassoon & Co., and it was provided by the terms of the latter agreement that it might be terminated by three months' notice by either party; the Plaintiffs' agreement recites the agreement of the 31st May 1911 and the Plaintiffs must, therefore, be taken to have contracted with reference to and subject to the terms thereof including the right of the Defendant and David Sassoon & Co. to put an end to the agreement of 31st May 1911.

There is no suggestion that the agreement of the 2nd December 1912 was not a *bonâ fide* business arrangement between the Defendant and David Sassoon & Co. and it must, therefore, be taken that the old agreement of 31st May 1911 came to an end on the 2nd December 1912, and in the absence of any evidence to the contrary, it must further be taken that it was put an end to in a regular and proper manner, by reason of and in accordance with the provisions contained in the agreement of 31st May 1911. The agreement between David Sassoon & Co. and the Defendant of the 31st May 1911 having come to an end on December 2nd, 1912, it follows that the agreement between the Plaintiffs and the Defendant of the 8th June 1911 also came to an end on that date, because the latter agreement by its terms was made dependent on the subsistence of the former.

The case, therefore, stands thus: the Defendant by his letter of the 12th August 1912 committed a breach of the agreement of 8th June 1911, inasmuch as at that date he had no right to put an end to the agreement, and the Plaintiffs are entitled to damages in respect thereof but that inasmuch as the agreement came to an end as above-mentioned on the 2nd December 1912, the Plaintiffs are not entitled to damages for any period beyond that date, and the damages should be assessed accordingly. As regards the rate at which damages should be allowed the learned Judge has assessed them on the basis of Rs. 1,000 a month and has given damages for the unexpired period of 46 months: with the decision as to the period I cannot agree, as already explained; and as regards the rate, this Court has been asked by the learned Counsel for the Plaintiffs to assess the damages and to increase the figure beyond Rs. 1,000 After taking into consideration all his arguments on this point, I think that the rate at which the damages should be assessed is Rs. 1,250 a month: and, in my judgment, the Plaintiffs are entitled to damages at that rate from the 12th August 1912, until the 2nd December 1912 instead of the sum of Rs. 30,000 awarded by the learned Judge.

The next point urged by the learned Counsel for the Appellant was that the decree should be varied by striking out the words "And profits" in the 3rd and 4th paras. of the first part of the direction as to the accounts.

This depends on the alleged verbal arrangement as to business between the Plaintiffs and the Defendant and Juggoomul which was outside the under-brokerage agreement.

It was alleged by the Plaintiffs that they were entitled to a considerable sum in respect of "Brokerage and profits" in respect of certain goods which the brokers bought from time to time on their own account from David Sassoon & Co. and

the buyers of David Sassoon & Co., Ld., and then sold through the Plaintiffs, in regard to which it was alleged to have been agreed that the Plaintiffs should receive remuneration on the terms of the agreement; that is, including both brokerage and a share of the profits. The question is, whether such an agreement was proved.

The evidence relating to this is to be found at pages 28, 46, 107-125, 126, and the Exhibits H and I.

(At page 28, see lines 22 to 10.)

(At page 46, see lines 8 to 29.)

Juggoomul being dead could not be called as a witness, the Defendant denied the alleged arrangement (107) and our attention was not drawn to any evidence given by the other Plaintiff Joy Narain as to the alleged verbal agreement, and as far as I know, he did not deal with it.

The learned Judge dealt with this matter at page 160. He said "With regard to items 4 and 6, I accept the Plaintiffs' story as to the verbal arrangement, and as to the amount of the brokerage payable, namely, 8 annas per cent., having regard to the terms of the Exts. H and I, and unless the figures are agreed, an account must be taken of all sums due to the Plaintiffs for brokerage calculated at 8 annas per cent. on goods of the Defendant sold by the Plaintiffs in the years 1911 and 1912.

With regard to items 2, 3 and 5, I accept the Plaintiffs' story, and if the figures are not admitted, an account must be taken of what is due to the Plaintiffs for brokerage in respect of those transactions".

Items 4, 5 and 6 of Ex. B contained a claim for brokerage only.

Items 2 and 3, *viz.*, Rs. 7,017 and 4,401 contained a claim for ½ share of the profits made by the Defendant, as well as brokerage at ½ per cent. As to these the learned Judge says, "With regard to items 2, 3 and 5, I accept the Plaintiffs' story, and if the figures are not admitted, an account must be taken of what is due for brokerage in respect of these transactions," and in his summary at page 162, he directs an account of the brokerage only.

So far, therefore, it is not clear that the learned Judge has found in favour of the Plaintiffs as to the profits, on the contrary he seems to draw no distinction between items 2 and 3 and 5, though items 2 and 3 contained a claim for profits, whereas item 5 was confined to brokerage only.

In the decree, however, it must be pointed out the words "and profits" have been added to the direction for accounts in respect of these matters, and the question is whether they should be allowed to remain.

It is significant that in examination-in-chief at page 28 the first Plaintiff said nothing as to the arrangement to share profits, but he spoke of an arrangement as to "Commission," p. 28, line 33: and the other Plaintiff said nothing at all about the arrangement. The evidence really consists of one or two sentences in the cross-examination at page 46, which are in themselves ambiguous: see lines 14 and 25, 26. There is no evidence, as far as I am aware, that accounts were ever made up on the basis of the Plaintiffs sharing such profits in respect of this business, and, in my judgment, the evidence was not sufficient to justify the addition of the words "and profits" in the decree, and I am of opinion, therefore, that these words should be struck out in the above-mentioned paragraphs of the decree.

As regards the sum of Rs. 1,600, referred to at page 160, line 13, of the judgment,

it was alleged that there was no evidence with regard to this: we intimated during the course of the argument that this was a matter which must be investigated in the taking of the accounts.

The next point is as to the account directed in para. 2 of the second part of the decree, *viz.*, as to the loss sustained by the Defendant. This, as it stands, is limited to loss sustained by the Defendant between the 8th June 1911 and the 12th August 1912, whereas it is contended by the Defendant that the account should be taken of any loss sustained by the Defendant in respect of contracts entered into through the Plaintiffs between those dates.

Cl. 8 of the agreement of 8th June 1911 provides that the under-brokers shall be liable for all loss in respect of, and on all contracts which may be passed through them as aforesaid to the extent of one-fourth or 25 per cent., and shall also be entitled to the profits arising out of the said contracts to the extent of one-fourth or 25 per cent., besides the commission mentioned in para. 5. In view of this clause, I think the Defendant's contention is correct, and just as the Plaintiffs are entitled to an account of what is due to the Plaintiffs for commission and profits on contracts passed through them before August 12th, 1912, so also are the Defendants entitled to an account of the losses sustained by the Defendant in respect of contracts passed through the Plaintiffs before 12th August 1912.

It is admitted, as I understand, that the Defendants are entitled to set off the two sums of Rs. 1,700 and Rs. 750: the first in respect of the contract referred to in the letter of 15th July 1912 at page 139 of the paper-book, which has inadvertently been omitted, and the second in respect of the Plaintiffs' share of the costs of a suit to which the Defendant is entitled under cl. 8 of the agreement.

The result is that the decree, in my judgment, should be varied in accordance with the above-mentioned conclusions, and, as the Defendant has succeeded in some parts of his appeal and failed in others, I think he is entitled to receive 2/3 of his taxed costs of this appeal from the Plaintiffs, and that the learned Judge's direction as to the costs of the trial should not be altered.

WOODROFFE, J.—Of the five alleged specific breaches of contract set forth in the judgment, three have been abandoned on appeal in which we have been asked to consider items (3) and (5) only. The onus of justifying the termination of the contract lies on the Defendants who claim to have rightly terminated it by reason of the Plaintiff having acted contrary to its terms and conditions.

As regards the first point I think that Mr. B. C. Mitter establishes that the case originally sought to be made was that any dealing in sugar was a breach of the contract, a point which has not been here insisted upon: that is, the case made was that the Plaintiff could not sell or buy any sugar in the market irrespective of the question whether the sugar belonged to Messrs. Sassoon & Co. The evidence therefore was not directed to the point as to whether the 950 tons were sugar in which Sassoon & Co. had a proprietary interest. There is no evidence that this sugar was subject of the agreement and the alleged breach of contract is not made out. The fifth ground is that the first Plaintiff was (as is not disputed) an undischarged insolvent and that that fact was concealed from the Defendants. The learned Judge has held though not without some doubt that the Defendants were aware of the insolvency of Luchmondas.

There is evidence in the case which may be considered as justifying this conclusion of fact. Chetternull was not called, and in my opinion no sufficient ground has been established for reversing the decision of the trial Judge on this point. This ground also fails and the only question upon this part of the case is, what are the damages to which the Plaintiffs are entitled. I may here notice the contention of the Appellant that on the death of Juggoomul the business came to an end and that there was thereafter a contract terminable at will. It does not, however, necessarily follow that where two or more agents are employed and one of the agents dies, it is a termination of the agency, and the notice of the 12th August 1912 (Ex. D) seems inconsistent with the Appellants' argument. The case is not open on the pleadings. I am not prepared to hold that Raghumull did not continue the business or that the agreement with Sassoon & Co., so far as Raghumull was concerned, was done away with. The old agreement I think continued until at least December 1912. The question then is, what is the effect of the agreement of the 2nd December 1912 between Sassoon & Co. and Raghumull which was tendered and rejected in the first Court, but was admitted by us on appeal. There is no question but that the agreement of the 8th June 1911 is dependent on the head . . . agreement between the Defendants and Sassoon & Co. of the 31st May 1911. The latter was put an end to by the agreement of the 2nd December 1912, and in the absence of any evidence to the contrary it must be assumed it was properly terminated as between the parties thereto. The question is, does the existence of such fresh agreement affect the Plaintiff's claim to damages. It is not denied by the learned Counsel for the Respondents that in assessing damages the Court is entitled to take into consideration the fact that under cl. 15 of the head agreement it might be terminated by three months' notice. But it is denied that the Defendants' employer could by entering into this new contract put an end to the business in which the Plaintiff was employed, there being an underaking under cl. (1) of the subordinate agreement to employ the Plaintiff for five years. It is admitted that if the notice under cl. 15 had been properly given so as to terminate the head agreement, the under-brokering agreement would fall also: but it is said this has not been shown and therefore the Plaintiff is entitled to the damages awarded. I think this argument erroneous and that if, as here, the head contract was terminable on three months' notice, the Plaintiff is not entitled to damages for any longer period, and the learned Judge was in error in assessing damages on the basis of a five years' term. The Respondent contends that in any event he is entitled to three months' notice from December but this is not established, seeing that there is no provision for it in the under-brokering agreement which existed only during the subsistence of the head agreement. Mr. Justice Greaves has based his decree for damages on the basis of a profit of Rs. 1,785 a month from which the deduction mentioned in his judgment made leaves Rs. 1,000 a month. He has given damages for 46 months the remaining term of the agreement or Rs. 46,000 less Rs. 16,000 as stated in his judgment or Rs. 30,000. It is contested that the profits earned during the 14 months is a test for the remaining period as also the assumption that there would be no losses. It is objected that the Court has not taken into account the loss actually suffered. In my opinion, however, the Plaintiffs are only entitled to damages for the period between the 12th August 1912, when notice was

given terminating the contract and the 2nd December 1912 when by the new head agreement entered into with Sassoon & Co. the former agreement was terminated.

Then what should be allowed? Learned Counsel wished to show that the profits were Rs. 42,000 and not Rs. 30,000 as stated in the judgment from which Rs. 4,000 on account of under-brokerage and Rs. 1,000 for establishment charges should be deducted leaving Rs. 37,000 or some Rs. 3,000 a month, that is Rs. 12,000 for four months. But it is not open in appeal to learned Counsel, to go beyond the admission of fact recorded in that judgment, *viz.*, that the under-brokerage earned was Rs. 30,000 and that damages should be assessed on the basis of a profit for 14 months of between Rs. 25,000 and Rs. 30,000. Counsel then argued that he is entitled to take it at the higher figure of Rs. 30,000 or say Rs. 1,785 a month. He rightly contends that if damages are given for only four months, no deductions should be made on the ground that other employment might have been obtained; for seeing the shortness of the period it was not reasonable to expect that employment might be obtained during that time. I see no sufficient reason to disturb the learned Judge's conclusion as to the other sums which the Plaintiff claimed to deduct. A fair sum under the circumstances to allow would be Rs. 1,250 a month as damages for the termination of the agreement. For I think that the Appellant's contention that the Plaintiff is not entitled to any damages at all fails. That contention is based on the assumption that at the date the notice terminating the contract was given, the head contract with Sassoon & Co. had been terminated. This is a new case. The suit and notice proceed on the assumption that at the date of the latter there was a subsisting agreement which was cancelled by reason of the acts of the Plaintiff contrary to the terms thereof. The point as put before us is not raised in the grounds of appeal. It is in my opinion open to us to consider the agreement of 2nd December 1912, on the question of quantum of damages, but it is a different thing to entertain a new contention that the Plaintiff is not entitled to damages at all, not because he had acted in breach of the agreement but because there was no subsisting agreement at all. The evidence is not sufficient to support the contention that the agreement with Sassoon & Co. had been terminated prior to December 1912, and the notice given to the Plaintiff implies by its terms that it was still subsisting. Otherwise there was no necessity to allege a breach of the agreement as grounds for its cancellation. It would have been sufficient to say that the agreement with the Plaintiff was at an end because the Defendant's agreement with Sassoon had been terminated. An application was accordingly made to us to adduce evidence on this point. This, however, could not be granted at this stage of the proceedings, raising as it did a new case and a defence which if it were established would make a large part of the evidence unnecessary. In my opinion the Defendant may seek to establish that the Plaintiff is not entitled to damages on the ground that he has committed a breach of contract or that if he has not committed such a breach, he is not entitled to so much in the way of damages as the Judge has awarded, but not that he is not entitled to any damages on the ground that at the date of the notice there was no subsisting agreement to terminate at all.

The other claim is for Rs. 48,705-7-3, the particulars of which are given in Ex. B attached to the plaint. It was contended that the Respondents had failed to prove the agreement set out in para. 8 of the

plaint. The learned Judge appears to have accepted the Plaintiff's case as to both brokerage and profit.

In the decree account of profit is given and it is said this is not in conformity with the ordering portion of the judgment. There is no ground of appeal on this point. Had objection been taken the judgment would, having regard to its findings, have been rectified. The minutes were settled by the learned Judge in the presence of both parties and an account directed both as to brokerage and profits which the learned Judge would not have done had he not in fact decided the claim and intended to direct an account on both heads. The evidence does not however appear to sufficiently support the decree from which in accounts (2) and (3) the words " and profits " should be excluded. In the second account in the set-off account the decree should run " sustained by the Defendants on account of contracts entered into between the 8th day of June 1911 and 12th August 1912."

In my opinion therefore the judgment of the first Court should be varied by substituting the sum of Rs. 1,250 a month from the 12th August to 2nd December 1912 in lieu of Rs. 30,000 awarded by the learned Judge and by the amendments last mentioned and in the judgment of the Chief Justice, but that in other respects the judgment and decree should stand. The Appellant having reduced the sum decreed by some Rs. 24,000 has achieved substantial success and is entitled to the costs of this appeal except as to such portion of the hearing which may be taken to represent the time occupied in the discussion of points on which the Appellant has failed. On this as on other points dealt with by the Chief Justice I agree with his judgment.

MOOKERJEE, J.—This is an appeal by the Defendant in an action for recovery of damages for wrongful termination of a contract of under-brokerage, as also of brokerage commission and profits. On the 31st May 1911, David Sassoon & Co. appointed the Appellant Raghumull and his brother Juggoomul, since deceased, (who constituted the firm of Madho Ram Hardeodas) as brokers for the purchase and sale of sugar. The contract was to be in force, as provided in the first clause, for a period of 5 years, or for such further period as might be mutually agreed upon between the parties, unless sooner determined under the provisions contained in the agreement itself. This referred to the fifteenth clause, which laid down, *first*, that the agreement might be determined if either party gave the other three calender months' notice, and, *secondly*, that the company might terminate the agreement at any time should the brokers fail to perform their duties duly and faithfully. The second clause gave liberty to the brokers to employ under-brokers who would be under the control of the company. Pursuant to the provision of this clause, the brokers, on the 8th June 1911, appointed the Respondents Luchmondas Khandelwal and Jaynarayan as under-brokers. The under-brokerage agreement recited the fact of the brokerage contract, and expressly stipulated in the first clause that the under-brokers would act during the subsistence of the brokerage agreement or for such additional period as the brokers and the company might further extend. Business was carried on under these contracts till the 27th April 1912, when Juggoomul died; and, thereafter, the business was continued apparently as if no change had taken place. On the 12th August 1912, Raghumull, the surviving broker, notified to the under-brokers that the agreement with them stood cancelled as they had act-

ed contrary to the terms and conditions thereof and asked them not to take any further action as under-brokers. On the 2nd December 1912, a new agreement was made between Raghumull on the one hand and David Sassoon & Co. on the other. The under-brokers thereafter instituted the present suit for recovery of Rs. 1,98,705-7-3 from Raghumull. They claimed Rs. 1,50,000 as damages for wrongful termination of the under-brokerage contract; the remainder they claimed as brokerage and profits in respect of various transactions which they had carried on, on behalf of the Defendant, under alleged oral agreement. The Defendant repudiated the claim as unfounded, and alleged that if proper accounts were taken, a large sum would be found due to him from the Plaintiffs. Upon the fundamental question in the case, namely, whether the under-brokerage agreement had been wrongfully terminated, Mr. Justice Greaves has found in favour of the Plaintiffs, and he has awarded them damages to the extent of Rs. 30,000; he has further directed various accounts to be taken in respect of transactions between the parties. On the present appeal, the decree has been assailed in respect of the written as well as the oral agreement, and the arguments addressed to us may conveniently be separately considered.

As regards the under-brokerage contract of the 8th June, 1911, the Appellant has contended that he had validly terminated it on the 12th August 1912 under para. 10 of the agreement, as the Plaintiffs had, without his written consent and contrary to the provisions of the instrument, dealt in sugar. In support of this contention, reliance has been placed in this Court upon one transaction only, namely, a sale of 950 tons of sugar by the Plaintiffs, without the authority of the Defendant, a few days prior to the 15th July, 1912. It is plain that this transaction does not avail the Defendant. The burden of proof is on the Defendant to establish that there was just cause for dismissal; this he has failed to discharge, *Cussons* v. *Skinner*, (1): para. 10 of the agreement of the 8th June, 1911, entitles the brokers to terminate the contract for improper dealing in sugar which was 'the subject-matter of the agreement.' There is no evidence to show that the 950 tons of sugar mentioned formed the subject-matter of the agreement; it might well have been sugar outside the agreement. Consequently the Defendant has not established the only ground now assigned to justify his action under para. 10 of the agreement.

It has next been argued that, apart from para. 10, the Defendant was entitled to terminate the agreement on the ground that the Plaintiff Luchmondas, had prior to his appointment as under-broker, been adjudged insolvent, and had concealed from the brokers the fact that he was an undischarged bankrupt. On this point, Mr. Justice Greaves has found that the brokers, when they appointed the Plaintiff as an under-broker, knew of his insolvency. The evidence in support of this view is rather slender, and the learned Judge arrived at his conclusion not without some doubt. This, I think, does not weaken the value of his opinion; it indicates, on the other hand, full appreciation of the character of the evidence on the point. I have considered the evidence and I see no reason to take a different view. The direct testimony available at this distance of time is, as may be expected, meagre; but the surrounding circumstances make it extremely probable that the brokers knew about the insolvency of the

(1) 11 M & W. 161 (1843).

Plaintiff; the fact of such knowledge is, I think, "proved" within the meaning of the Indian Evidence Act (Sec. 3) which requires that the Court should consider the existence of the disputed fact so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. In this view, it is unnecessary to consider what the legal position of the Defendant would have been, if he had proved that the Plaintiff had, at the time of his appointment, concealed from him the fact of his bankruptcy.

We must then proceed on the assumption that the dismissal of the Plaintiffs on the 12th August 1912 was wrongful, and determine on this basis the damages to which they are entitled for breach of contract. Mr. Justice Greaves has assessed the damages on the hypothesis that the Plaintiffs would have, but for their wrongful dismissal, continued to act as under-brokers for the full term of five years from the 8th June 1911. This view has been contested by the Appellant, and it has been argued, *first*, that the contract was terminated by the death of Juggoomul on the 27th April 1912, and, *secondly*, that, in any view, it came to an end on the 2nd December 1912, when the Appellant entered into a new agreement with David Sassoon & Co. The first branch of this contention cannot, I think, prevail. It is plain, as appears from the decision in *Bhagirath* v. *Prem Chand* (2), that where there are two joint agents and one of them dies, upon his death the contract of agency terminates, only so far as he is concerned, but not as regards the surviving agent. Consequently, notwithstanding the death of Juggoomul, the agreement between David Sassoon & Co. and Raghumull, made on the 31st May 1911, *prima facie* continued in operation. It is equally plain that the death of Juggoomul did not operate to dissolve the firm of Madho Ram Hardeodas, which was owned by a Hindu joint family whereof the Defendant Raghumull was the *karta*. Sec. 253, cl. (5), of the Indian Contract Act, which provides for the dissolution of a partnership on the death of a partner, must be read as qualified by the introductory words, "in the absence of any contract to the contrary." A contract to the contrary may well be inferred, in the present case, from the conduct of the parties. The business was carried on, as it would have been, on the footing that the position of the firm was not affected by the death of Juggoomul. The Plaintiffs expressly asserted this in para. 3 of the plaint, and the Defendant admitted the allegation as substantially correct in para. 1 of his written statement. The notice whereby the Defendant terminated the agreement on the 12th August 1912, proceeded on the basis that the firm was still in existence. In these circumstances, the principle recognised in *Gokul Krishna* v. *Sashimukhi* (3) clearly applies. It is further worthy of note that the case of joint ownership in a trading business, created through the operation of Hindu Law, between the members of an undivided Hindu family, does not stand on precisely the same footing as that of an ordinary partnership arising out of contract. The rights and liabilities of coparceners in a joint Hindu family firm cannot be determined by exclusive reference to the Indian Contract Act, but must be considered also with regard to the general rules of Hindu Law which regulate the transactions of such joint families; according to those rules, the death of one of the coparceners does not dissolve a family partnership [*Samalbhai* v. *Someshwar*

(2) 17 C. L. J. 201 (1912)

(3) 16 C. W. N. 299 (1911).

(4), *Lutchmanen* v. *Siba Prokash* (5), *Vadi Lal* v. *Shah Khushal* (6), *Maharaj* v. *Hargobind* (7) and *Narayan Das* v. *Rallie Brothers* (8)]. But though the first branch of the argument for the Appellant thus proves untenable there is, I think, no answer to the second branch of the argument, namely, that the agreement, dated the 31st May 1911, and along therewith the subordinate agreement of the 8th June 1911 came to an end on the 2nd December 1912. The test to be applied to determine whether the later agreement operated as a rescission of the prior contract was formulated in *Mathura Mohan* v. *Ram Kumar* (9): the true principle is that a contract need not be rescinded by an express agreement to that effect; if the parties make a new and independent agreement concerning the same matter, the latter may be construed to discharge the former, when the terms of the latter are so inconsistent with those of the former that they cannot stand together. In the present case, the agreement made between David Sassoon & Co. and Raghumull on the 2nd December 1912, is different in material particulars from the agreement of the 31st May 1911, which, we must consequently hold was rescinded on that date. The Appellant has, on this ground, contended that as the under-brokerage contract was to continue in force only during the subsistence of the agreement of the 31st May 1911, the Plaintiffs are not entitled to the benefit of the Defendants' contract beyond that date. The Respondents have argued, on the other hand, that there are two valid answers to this position, namely, *first*, that in the absence of evidence to prove that the brokerage contract was terminated in strict conformity with cl. 15, which contemplates three months' notice, that agreement cannot be deemed to have been legally determined; and, *secondly*, that as on the illegal cancellation of the under-brokerage contract on the 12th August 1912, a right to recover damages accrued to the Plaintiffs, their position could not thereafter be prejudiced by any termination of the brokerage contract even in strict conformity with cl. 15. In my opinion, neither of these contentions is tenable. As regards the first branch, it is plain that the three months' notice required by cl. 15 was for the benefit and protection of the contracting parties themselves, and that the Plaintiffs are not competent to make a grievance that either party has allowed the other to determine that agreement without insisting on the prescribed notice. It is significant that the under-brokerage contract does not even require that in the event of a determination of the brokerage contract by three months' notice, the brokers would be bound to give similar notice to the under-brokers. The under-brokers might have protected themselves by the insertion of a clause to this effect in their agreement, and if we were to accede to their argument, we would have in substance to read such a provision into the agreement. As regards the second branch of the contention, it is obvious that there is no foundation for it. When the under-brokerage agreement of the 8th June 1911 was illegally cancelled by the brokers on the 12th August 1912, a right, no doubt, accrued to the under-brokers to recover damages for breach of contract. But the inference is manifestly fallacious that the damages must be assessed on the hypothesis that the under-

(4) I. L. R. 5 Bom. 38 (1880).
(5) I. L. R 26 Cal. 340: s. c. 3 C. W. N. 190 (1899).
(6 I. L. R. 27 Bom. 157 (1902).
(7) [1915] P. L. R. 218.
(8 [1912] P. R. 61.
(9) 20 C. W. N. 370: s. c. 23 C. L. J. 26 (46) (1915)

brokers would have held their employment for a term of five years from the 31st May or 8th June 1911, *i.e.*, up to the 31st May or 8th June 1916. The under-brokerage contract was liable to come to an end, whenever the contingency mentioned in cl. 15 of the brokerage contract might happen. Consequently, even if the contingency had not actually happened before the assessment of damages, it would have been incumbent upon the Court to make allowance for the probability of such termination of the contract. The calculation of the value of the damages with any approach to exactness in such circumstances, might have been a problem of great practical difficulty. But here, fortunately, the contingency did happen before the institution of the suit, and the Court thus possesses an accurate measure of the loss actually sustained by the Plaintiffs. On no conceivable principle can the Court be invited to base its decision on the calculation of the chance of a probable event, when that event has actually happened and the chance has been transformed into a certainty. There is also no force in the contention that after breach of the under-brokerage contract, the brokerage contract could not be terminated, as between the parties thereto, by notice under clause 15. No such limitation can be read into that clause. It is plain that David Sassoon & Co., might at any time determine the agreement, notwithstanding what might have passed between their brokers and under-brokers; and as the right to rescind under clause 15 was mutual, there is no reason why the brokers should be in a different position. The Respondents placed much reliance upon the decisions in *Inchbald* v. *Western Neilgherry Coffee Co.* (10), *In re Patent Floor Cloth Co.* (11), *Joyner* v. *Weeks* (12) and *Ogdens* v. *Nelson* (13). These cases are clearly distinguishable; they merely illustrate the elementary principle that where a principal, in breach of an express or implied contract with his agent, refuses to complete a transaction or otherwise prevents the agent from earning his remuneration, the agent is entitled to recover, by way of damages, the loss actually sustained by him as a natural and probable consequence of such breach of contract; in the case before us, the under-brokerage contract, if it had continued in operation till the 2nd December 1912, would then have come to an end, not in breach, but in conformity with an express agreement between the parties. The question of the mode of assessment of damages where there has been an anticipatory breach of a contract, is of considerable nicety; but the principle has been recognised in cases of high authority that the damages are to be estimated with reference to what would have been the position of the party wronged if the contract had been duly performed. Reference may in this connection be made to a familiar class of decisions considered in the case of *Bilasiram* v. *Gubbay* (14) | *Johnstone* v. *Milling* (15), *Hochster* v. *De La Tour* (16), *Frost* v. *Knight* (17), *Brown* v. *Muller* (18), *Cherry* v. *Thompson* (19) and *Roper* v. *Johnson* (20) and *Rochen* v. *Horst* (21)].

(1) 17 C. B. N. S. 733; 142 R. R. 603 (1864)

(11) 41 L. J. Ch. 476 (1872).
(12) [1891] 2 Q. B. 31, 44.
(13) [1904] 2 K. B. 410, 417; affirmed on app. [1905] 1 A. C. 109.
(14) 20 C. W. N. 240; s. c. 23 C. L. J. 62 (1915)
(15) 16 Q. B. D. 460 (1886).
(16) 2 E. & B. 678 (1853).
(17) L. R. 7 Exch. 111 (1872).
(18) L. R. 7 Exch. 319 (1872).
(19) L. R. 7 Q. B. 573 (1872).
(20) L. R. 8 C. P. 167 (1873).
(21) 178 U. S. 1.

I do not feel pressed by the contention that the view I take may open the door to fraud and that the brokerage contract may, by mutual and collusive agreement, be terminated to the prejudice of the under-brokers. Cl. 1 of the under-brokerage agreement, read with cl. 15 of the brokerage contract, affords ample protection against such a device; what is essential to terminate the under-brokerage contract is a real and not merely colourable determination of the brokerage contract; the former will continue unaffected so long as the latter subsists in fact; the Court will not hesitate to look behind the mere form through which the parties might have gone and give effect to the substance of the transaction. There is, however, no suggestion in this case that the new contract of the 2nd December 1912, was other than a genuine and *bonâ fide* business arrangement. I hold accordingly that the parties to the brokerage contract were fully entitled to rescind that agreement, as they did, by a new contract; that the Plaintiffs cannot escape the inevitable consequences of such action on their part, and that they are consequently entitled to damages, not up to the 31st May 1916, but only up to the 2nd December 1912. Such damages, I think, should be allowed at the rate of Rs. 1,250 a month; this is higher than the rate adopted by Mr. Justice Greaves, because, if the damages are allowed for a short period, deductions cannot be legitimately made to any large extent on account of fluctuations of profits and like circumstances. The decree, in so far as it allows Rs. 30,000 as damages for breach of contract, must accordingly be varied.

The only other point argued with reference to the under-brokerage contract, relates to the liability of the Plaintiffs for loss, if any, sustained by the Defendant on account of contracts made by them between the 8th June 1911 and the 12th August 1912. The decree directs an account of the loss actually sustained by the Defendant during this period; the Appellant argues that an account should be taken of the loss on all contracts made during the period mentioned, though the loss might have accrued at a later period. In my opinion, this contention is clearly well founded. The Plaintiffs have claimed and have been awarded the benefit of all profits on contracts made during this period; it is only fair that they should bear the loss as well [cf. *McClean* v. *Kennard* (22)]. The decree must consequently be varied in this respect.

As regards the claim on the verbal agreement, the only substantial question in dispute is the liability of the Defendant to allow the Plaintiffs' profits in addition to brokerage on sales and purchases made by the Plaintiffs for the Defendant though not included in the agency agreement. I cannot find in the evidence, which has been analysed in detail in the judgment of the Chief Justice, any satisfactory proof in support of the claim to profits in addition to brokerage, and it is significant that no reference was made to profits in the decree as originally drawn up. In my opinion, this part of the claim must be disallowed. Finally, we have the claim in respect of the three sums of Rs. 1,750, 750 and 1,600; as regards the first two, it is practically conceded that they should be allowed in favour of the Appellant, while, as regards the third, an enquiry must be directed.

On these grounds, I agree to the order which the Chief Justice proposes to make in this appeal.

Messrs. B. N. Basu & Co., Solicitors, for the Appellant.

(22) L. R. 9 Ch. 338 (1874).

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Messrs. Pugh & Co., Solicitors, for the Respondent.

D. C. G. *Decree modified.*

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 2 OF 1915.

CHITTY, J.
WALMSLEY, J.
1916,
Heard,
9, March.
Judgment,
21, March.

THE KING-EMPEROR,
v.
SHEIKH ABDUL and six ors., Accused.

Criminal Procedure Code sec. 110—Previous conviction, proof of, in cases of bad livelihood—Central Bureau register, evidentiary value of—Presidency Magistrate, special rule if any applicable to—Locus penitentiæ—Evidence of general repute.

Presidency Magistrates are not absolved from the ordinary rules of evidence in taking proof of previous convictions. Whenever it is required to prove a previous conviction against a man, whether it be for the purpose of enhancement of punishment under sec. 75, I. P. C., or in proceedings under Chap. VIII of the Criminal Procedure Code, such previous conviction must be proved strictly and in accordance with law. Unless they are so proved no Court, whether it be that of a Presidency Magistrate or not, can properly take such previous convictions into consideration against an accused person.

Before the Magistrate previous convictions of one of the accused were sought to be proved by two witnesses one of whom was a certified expert in finger prints and who produced a register from the Central Bureau containing the thumb impression of the accused and his descriptive roll and a list of his previous convictions. The other witness was a clerk in the prison at Bombay who produced an extract from the jail register showing previous convictions of a man who was certified therein to be the same man as the accused, and certified copies of previous convictions of the same man. This witness was asked by the Magistrate to examine the accused and see if he bore the marks attributed to the convict in Bombay and he expressed his opinion that he did :

Held—*That the previous convictions were not properly proved.*

Accused persons should be given some chance of reforming their characters and they should not be proceeded against under sec. 110, Cr. P. C., soon after they have emerged from jail.

Nature of evidence sufficient to prove habitual commission of offence discussed.

This was a Reference under sec. 123, Cr. P. C., made by E. Keays, Esq., Offg. Chief Presidency Magistrate of Calcutta, dated the 21st September 1915, for confirmation by the High Court of the order passed by him against the accused directing them to execute bonds with two sureties for Rs. 500 each to be of good behaviour for three years.

The case was heard by the High Court on the 21st and 22nd December 1915, and on the 3rd January 1916 was sent down to the lower Court for taking further evidence.

The order of the Court sending back the case to the Magistrate for the recording of the further evidence was as follows :—

" This is a reference under sec. 123, Cr. P. C., in the matter of six persons, Sheikh Abdul, Sheikh Doma, Abdul Ramim, Sheikh China, Isak Khan and Sheikh Bombia. Another accused Sheikh Wazzid is absconding and so has not been dealt with by the order. The six men above-mentioned have each been ordered by the Acting Chief Presidency Magistrate to execute a bond for Rs. 500 and to find two sureties each for Rs. 500, to be of good behaviour for three years

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and in default of their so doing to be rigorously imprisoned for 3 years.

"We find ourselves unable to deal with the reference on the record as it stands before us and we regret to say that this is due to the extremely careless and unsatisfactory manner in which the case has been disposed of by the Court below. The case against all the accused was that they were habitual thieves and desperate and dangerous characters under cls. (*a*) and (*f*) of sec. 110. Some twenty witnesses were called who all came with one refrain "I know all the accused. They are all pick-pockets. Everyone is afraid of them." The Sub-Inspector N. C. Chatterjee then intimated that he had examined 97 witnesses and was prepared to call them all. He added (as he ought not to have been allowed to do) that every person he had examined bore out the charges against the accused. After another witness had been examined the Magistrate intimated that sufficient had been called already. He thereupon drew up a general order against the six persons under sec. 112. The prosecution witnesses were then cross-examined, witnesses were called for the defence and the order, the subject of this reference, was passed. It was argued that the procedure followed by the Magistrate was incorrect, but he appears to have proceeded as in a warrant case, and that is the procedure prescribed by sec. 117 for cases where the order requires security for good behaviour. The accused have not been prejudiced in any way by the form of procedure adopted.

"They have, however, good cause for complaint on more substantial grounds. Although under sec. 117 the fact that a person is an habitual offender may be proved by evidence of general repute or otherwise, and it cannot be said that the very general statements of the witnesses were wholly inadmissible in evidence, still no Court ought to act on a body of evidence such as that before us without making some attempt to test the statements of the witnesses, and obtain from them some particulars of the facts on which their general statements were based. No attempt whatever was made to differentiate the cases of the several accused though it is obvious that they cannot have been associated in every individual act which each witness may have seen. No attempt was made to distinguish between them either in the evidence or in the order of the Court. An even more serious ground of complaint is with regard to the previous convictions alleged against several of the accused. Previous convictions were alleged against five out of the six : but in no case were those convictions properly proved. These men appear to have many *aliases* and in several instances, the convictions were in different names from those now borne by the accused. In such cases no satisfactory proof of identity was given. Against Sheikh Bombia no fewer than eight previous convictions were alleged, of which no proof whatever was forthcoming. The reason given at the Bar was that, as he had been convicted in Bombay, it would have taken too long and been too troublesome to get evidence from there. Now the proof of previous convictions is manifestly of the greatest importance in cases like the present. It is impossible to say from the Magistrate's judgment how far, if at all, he took them into consideration. If they had been properly proved and considered, it might have made a great difference between the several accused, one of whom has no previous conviction, while two others are said to have six and eight respectively. We accordingly send

back the case to the Magistrate for the recording of the further evidence. Some effort should be made to ascertain from the various witnesses what they know against each individual accused. All previous convictions alleged should be properly proved. The case of each accused should then be separately considered. The accused will have the right to call such further evidence in their defence as they may be advised, to meet the fresh evidence that is adduced against them.

"The case should be taken up at once and disposed of with as little delay as possible. The Magistrate should then return the case with his opinion upon it to this Court. Pending the hearing the accused may be released on bail to the satisfaction of the Magistrate."

After taking further evidence the Magistrate sent back the record to the High Court with the following observations.

"I have the honour to forward the following observations.

The prosecution have called twenty-one fresh witnesses, twelve of whom solemnly proved the previous convictions against the various accused, and seven were called to prove specific instances of thefts against various accused (some of them did not come up to expectation) and two on subsidiary points.

The prosecution have now proved—

5 previous convictions against 1st accused.

1 previous conviction against 3rd accused.

2 previous convictions against 5th accused.

8 previous convictions against 6th accused.

The second and fourth accused have not been previously convicted. The second accused is the nephew of Jummon (who has already been bound down as the harbourer) and lives with him.

The additional evidence implicates Sk. Abdul, Doma, Abdul Rahim, Cheena and Bombia.

Sk. Abdul is implicated by P. Ws. 28, 40, 41 and 43.

Doma by P. Ws. 28, 40 and 43.

Abdul Rahim by P. Ws. 28, 40 and 41.

Cheena by P. W. 41, but this witness merely states that Cheena accompanied Sk. Abdul in a pick-pocket expedition.

Bombia by P. W. 41, but this witness does not speak to this accused being seen by him actually picking pockets.

All the witnesses who speak to specific acts of thefts admit they did nothing to secure the apprehension of the theft and give as their reason that they knew it would be useless as the police were in league with the thieves. In my opinion this additional evidence adduced by the prosecution does not carry the case against the accused very much further. P. W. 31 Munshi Abdul Hamid employed in the Government Printing Press gives Cheena a good character. There is no previous conviction against this accused and the case against him was certainly the weakest, and with the added weight of the character given to him by P. W. 31 I consider he should be discharged. I would call attention to the evidence of Superintendent Farrow (P. W. 41) as regards Sk. Abdul, Abdul Rahim and Bombia. The evidence of this officer appears to me to be of great importance.

There is no evidence against Isak Khan (5th accused) that he actually picked pockets and the two previous convictions against him are both for short terms *viz.*, 2 weeks' R. I. and 3 months' R. I.,

but both these convictions were for picking pockets.

There is also no evidence against Bombia (6th accused) that he was actually seen picking pockets, but there can be no question that he is a most dangerous criminal who has come over from Bombay to Calcutta because the former place was too hot to hold him.

As regards the previous convictions against the various accused these were all admitted by the pleaders for the accused at the first trial. I can hardly believe that the procedure adopted in the Police Courts was explained when it is sought to prove previous convictions against accused persons.

It is as follows :—

An accused person's finger impression is taken and is sent up to the Central Bureau to see if his antecedents can be traced. If anything is traced against him, a certified copy of the conviction or convictions is then applied for and a police officer is called who produces it. The accused is then asked if he admits the previous conviction and if he does, he is convicted on that plea. If he denies the previous conviction, an officer before whom he was convicted or a warder in whose jail he served his sentence is called to prove the identity of the accused, and personally I also compare the finger impression of the accused with that produced from the Central Bureau. Had the accused in the present case denied the previous convictions alleged against them, I entirely agree that they would have serious cause to complain, but under the circumstances I respectfully submit they had none. I need scarcely point out that if the procedure which has been in vogue in the Police Courts for at least twenty years is wrong and previous convictions have to be proved in the way they have been proved in this case that it will entail a very heavy expenditure as there are hundreds of cases in our Courts during the year in which the factum of a previous conviction has to be taken into consideration.

As regards the record it contains everything that could assist the prosecution or help the defence. Both the Public Prosecutor and the leading pleader for the defence Mr. Suresh Chunder Mitter (who is one of the most capable pleaders in my Court) both stated in open Court that I had omitted nothing that was of the smallest importance. Perhaps I may mention that every witness was asked if he had seen anything personally and, if he had, I made a note in the record of what he had seen.

The evidence against the accused was nearly all circumstantial, namely, that they all used to hang about stopping places of the trams and mix up with the crowds and were constantly seen dividing money and articles at Jummon's. Mr. Suresh Mitter who argued the case for the accused admitted that the case for the prosecution was overwhelmingly strong with the exception of the second and fourth accused, and his only anxiety was that I should see for myself that any objections that might be taken to the sureties he put forward were well-founded."

Babus Monmothanath Mukerji, Tarakeswar Pal Choudhury and *Heramba Chunder Guha* for the Accused.

Mr. C. R. Das for *Mr. B. C. Mitter* and *Babu Tarak Nath Sadhu* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This reference has now been returned with the further evidence recorded by the

learned Second Presidency Magistrate under our order of 3rd January 1916. The learned Magistrate has also, in accordance with that order, recorded an opinion. We regret, however, to find out that he has not taken steps to carry out our directions to the full extent. The additional evidence which has been recorded is of very much the same type as the evidence recorded in the first instance of which we had reason to complain, and the statements now made by the additional witnesses do not carry the case much further against any one of the six accused.

With regard to the statement of the learned Magistrate as to the procedure adopted in the Police Court for the proof of previous convictions we may say at once that we cannot accept the learned Magistrate's suggestion that Presidency Magistrates are absolved from the ordinary rules of evidence in taking proof of such previous convictions. Whenever it is required to prove a previous conviction against a man—whether it be for the purpose of enhancement of punishment under sec. 75, I. P. C., or in proceedings under Chapter VIII of the Criminal Procedure Code, such previous conviction must be proved strictly and in accordance with law. Unless they are so proved, no Court —whether it be that of a Presidency Magistrate or not—can properly take such previous convictions into consideration against an accused person.

In the present case, the learned Magistrate says that against the accused No. 1, Sheikh Abdul five previous convictions have been proved, against No. 3, Abdul Rahim one previous conviction, against No. 5, Isak Khan two previous convictions, and against No. 6, Sheikh Bombia eight previous convictions. Apart from the proof of previous convictions with which we will deal in discussing the case of each accused, additional evidence was directed to proving instances of picking pockets aganst the accused or some or one of them. Speaking generally, we may say that, at the second hearing, no attempt was made in the Court below to fix these witnesses to any particular time or detail by which their statements might be tested. Their statements are of the vaguest possible character.

Taking the case of each accused in turn, we start with Sheikh Abdul who has a number of *aliases*. He is said to have been convicted five times. The last conviction was on 20th January 1914 when he was sentenced to one year's rigorous imprisonment under sec. 379, I. P. C. He therefore emerged from jail presumably in January 1915. Since then, there is no evidence of his having committed any offence except the statement of Abdul Wahid (P. W. 40) who says that he saw the first accused pick a pocket once about seven or eight months ago near the statue of Kristo Das Pal, when he was accompanied by accused No. 2. This witness admits that, though he saw accused No. 3 throw the purse which had been stolen into Jumman's shop, he did not inform the person whose pocket had been picked. That man, he says, raised a hue and cry; and yet the witness went away without saying anything. This is evidence on which no Court could possibly place any reliance. Another witness Abdur Rahim (P. W. 28) speaking of the accused picking pockets at the crossing of Harrison Road says that he last saw the first three accused picking a pocket about a year and half ago. Allowing due latitude for the statement of a witness of this class when speaking of time, it is impossible that he could have seen the first accused picking a pocket about a year and half ago (he was giving evidence on 24th January 1916),

inasmuch as the first accused was safely in jail for almost the whole year 1914. This evidence, therefore, cannot be accepted. It has been held in this Court that accused persons should be given some chance of reforming their characters and that they should not be proceeded against under this section soon after they have emerged from jail. In this case the first accused had been out of jail for about eight months only when the present proceedings were started. There is no definite evidence of his having committed any offence during those eight months. Though he may be and possibly is a man of bad character we do not think that, on evidence such as this, an order under sec. 118, Cr. P. C., ought to be passed against him.

The cases against the other accused are much weaker than against accused No. 1. Against Sheikh Doma and Sheikh Cheena no previous convictions at all are alleged. The learned Magistrate himself, who bound down Sheikh Cheena in the first instance, now, on the single statement of the witness Moulvi Abdul Hamid (P. W. 31) who says Cheena is a good man, recommends that he should be discharged. Against these two men the evidence is wholly insufficient to support the order. With regard to Abdul Rahim it appears that he was imprisoned under sec. 379, I. P. C., for three weeks on 10th May 1910, *i.e.*, nearly six years ago. Isak Khan was imprisoned under the same section for two weeks on 12th April 1913 and for three months on 13th October 1914. So far as the period which has elapsed between his last release from jail and the commencement of these proceedings he stands on much the same footing as accused No. 1. Against these two men there is nothing but general statements of witnesses who say that they have seen them picking pockets. They have, however, never taken steps to bring those cases of theft home to the accused. The learned Presidency Magistrate considers that the evidence of Superintendent Farrow (P. W. 41) is of great importance. We are unable to see that it carries the case against the accused of whom he speaks, *i.e.*, Nos. 1, 3 and 6, much further. He says that he often wanted to find them after a man's pocket had been picked but never succeeded. We think, therefore, that the evidence against these two men is also insufficient to justify an order under sec. 118, Cr. P. C.

We come to the case of accused No. 6, Sheikh Bombia, who is said to be a bad character, who left Bombay because that place was too hot to hold him, and is now carrying on the profession of a thief in Calcutta. This man is said to have posed under a number of *aliases* giving sometimes Mahomedan and sometimes Hindu names. No less than 8 previous convictions are alleged against him and the learned Magistrate considers that they have been proved. We may say at once that, with the exception of the order under sec. 109, Cr. P. C., which was passed against this accused at Howrah on 22nd May 1912, when he was sentenced to one year's rigorous imprisonment for being without visible means of subsistence, none of the previous convictions alleged has been properly proved. It was sought to prove the 7 previous convictions which were all in Bombay by the evidence of two witnesses, Suresh Chunder Mukerji (P. W. 35) and K. A. Kumudaker (P. W. 37). The first of these witnesses was a certified expert in finger prints and he produced what has been marked as Ex. 4 (1) from the Central Bureau. That purports to be a

register of the thumb impressions of the accused on the first page and on the reverse his descriptive roll and a list of his previous convictions. No evidence has been recorded as to how this paper comes to be made and lodged in the Central Bureau nor from what particulars the previous convictions on the reverse are recorded and certified. There is, therefore, nothing on this paper except the two certificates at the foot to show that the person convicted 7 times in Bombay is the same man as was convicted at Howrah on 22nd May 1912. The witness K. A. Kumudaker is a clerk in the common prison at Bombay. He produced an extract from the jail register showing previous conviction of one Mahomed Hussain *alias* Ambalal Amritlal *alias* Faiz Mahomed signed by the Superintendent, and certified copies—Exs. 9 (1 to 5) of previous convictions of the same man. There is nothing, however, to show that the man who was convicted at Howrah is the same man who was convicted at Bombay. There is a gap here in the evidence to which the learned Magistrate has not alluded and which, when he expresses the opinion that the previous convictions have been proved, he has obviously disregarded. We may notice that the witness K. A. Kumudaker was directed by the learned Magistrate to examine the sixth accused Sheikh Bombia to see if the marks which had been attributed to the convict in Bombay were to be found on the accused Sheikh Bombia and he expressed the opinion that they were. This was not the proper method of identifying those marks. But there are other difficulties in the way of the proof of these previous convictions. We notice, in the first place, that the first conviction mentioned in Ex. 4 (1) is said to have been on 23rd August 1901. The certified copy from Bombay gives the date as 28th August 1901. This, however, may be a slip in copying. In the extract Ex. 4 (1) produced from the Central Bureau the age of the accused person is given as 27 years and it is recorded that he has no particular mark. If he was 27 years of age in 1912 and his first conviction was in 1898 it follows that he must have been a boy of about 13 years of age when he commenced his career of crime. The Bombay certificates, however, put him down as 18 in 1898, 25 in 1901, 25 again in 1902 and 30 in 1904. If he appeared to be 30 in 1904 it is difficult to see how he could appear to be only 27 in 1912. With regard to the marks, though no particular mark was attributed to him in the Alipur Jail in 1912, the Bombay convictions all give very definite marks, such as a scar on the right eye-brow, a scar on the right temple, a scar on the right leg—which marks purport to have been compared by the witness K. A. Kumudaker. They can hardly have been overlooked when his descriptive roll was made out at Alipur in 1912. It may be that the main Sheikh Bombia is the same person as was convicted on previous occasions in Bombay; but it would be idle to maintain that that has been satisfactorily proved in the present case. Some two years elapsed from his release from jail on the Howrah conviction and the commencement of proceedings in the present case. Whether this would be a sufficient time for reformation we do not express an opinion. It was held in the case of *Junab Ali* v. *The Emperor* (1), that 15 months would not be a sufficient period in which to give a convict an opportunity of reform.

(1) I. L. R. 31 Cal. 783; s. c. 8 C. W. N. 602 (1904).

THE KING-EMPEROR *v.* SHEIKH ABDUL.

Against this accused there are no definite acts of picking pockets alleged, certainly nothing which would point to his having committed that offence on any particular occasion or with regard to any particular individual. The evidence against him is as general and consequently as vague and as weak as that against the other five accused.

We regret to have to come to this conclusion in this case because there are grounds for suspecting that these men are members of a gang; but having regard to the way in which the evidence against them has been recorded and the general state of the record we are quite unable to confirm the Magistrate's order under sec. 118, Cr. P. C. We accordingly set it aside and direct that the six accused be released. In the case of those who are on bail their bail-bonds will be discharged.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. M. A. No. 43 OF 1916.

CHITTY, J.
WALMSLEY, J.
1916,
4, April.

NISHI KANTA LAHIRI, Accused, Petitioner,
v.
THE CROWN, Opposite Party.

Criminal Procedure Code, secs. 435, 436—Commitment to the Court of Sessions by the High Court in revision—Indian Arms Act, secs. 19F, 20.

Where in a case proceeded with under sec. 19F, the evidence recorded by the Magistrate disclosed an offence under sec. 20 of the Arms Act, the High Court directed the commitment of the case to the Court of Sessions.

This was a Rule granted on the 27th March 1916, against an order of D. Swinhoe, Esq., Chief Presidency Magistrate, Calcutta, dated 20th March 1916.

The material facts will appear from the petition on which the rule was issued and which was as follows :—

" That your Petitioner is a student of the First Year Class, Bangabashi College, Calcutta and was residing in a students' mess at 62/2, Harrison Road.

" That on the night of 29th January last at about 10 P.M. the Police went to the above-mentioned house and found two packets of Mauser Cartridges lying on the floor of a room in the third storey occupied by your Petitioner and two other students and underneath the *taktaposh* of your Petitioner.

" That your Petitioner was arrested by the police and subsequently your Petitioner was placed before the Chief Presidency Magistrate on a charge under secs. 19F and 20 of the Indian Arms Act.

" That in the charge-sheet submitted by the police, the charges were as follows :—

(*a*) " That on or about the 29th of January at No. 62/2, Harrison Road, Calcutta, you were in possession of 40 rounds of Mauser Cartridges in contravention of the provisions of sec. 5 of the Indian Arms Act and thereby committed an offence punishable under sec. 19F of the said Act (XI of 1878).

(*b*) That on or about the time and place aforesaid you were in possession of 40 rounds of Mauser Cartridges in such a manner as to indicate an intention that such act may not be known to any public servant as defined in the Indian Penal Code, to wit, Deputy Commissioner of Police, Special Branch, Calcutta, and thereby committed an offence punishable under sec. 20 of the Arms Act.

" That on the 14th February 1916, the case was taken up by the learned Chief Presidency Magistrate and the Public Prosecutor while opening the case for the

prosecution, intimated to the Court that evidence might be recorded as in a Sessions case inasmuch as the facts disclosed an offence under sec. 20 of the Arms Act which was exclusively triable by a Court of Session.

"That on the said 14th February 1916, your Petitioner applied for bail, which was refused, inasmuch as sec. 20 of the Arms Act is non-bailable.

"That according to the evidence for the prosecution

(*a*) The two packets of cartridges were in a bag belonging to your Petitioner and when the police first entered the room the bag was against the northern wall opposite your Petitioner's bed and your Petitioner brought that bag and put it underneath his bed surreptitiously, but accidentally only one of the Police Officers saw it:

(*b*) and afterwards when in answer to Mr. Lowman (P. W. 1) Deputy Commissioner of Police, Special Branch, your Petitioner said that he had a bag and Mr. Lowman asked your Petitioner to show it to him, your Petitioner knelt down in front of the *tucktaposh* and after putting his hand into the bag took out the two packets from the bag and placed them on the floor behind the bag and then showed the empty bag to Mr. Lowman and Mr. Lowman then stepped down and got partly underneath the *tucktaposh* and found the two packets of Mauser Cartridges concealed there.

"That on the 8th March 1916 after the close of the prosecution evidence the learned Presidency Magistrate adjourned the case to 17th March for committing it to the Sessions.

"That on the 17th March 1916, the Public Prosecutor submitted to the Court that the case should not be committed to the Sessions, but should be tried by the learned Magistrate himself on the ground that the evidence did not disclose an offence under sec. 20 of the Arms Act, but the learned Magistrate after hearing the Public Prosecutor at length expressed his desire to commit the case to the Sessions and adjourned the case to the 20th March for passing formal orders.

"That on the 20th March the learned Presidency Magistrate heard both sides again and decided to try the case himself and not to commit it to the Sessions.

"That being aggrieved by the said order of the 20th March 1916, your Petitioner begs to move your Lordships on the following amongst other grounds.

"For that upon the allegations of the prosecution as also upon the evidence adduced by them, a *primâ facie* case under sec. 20 of the Arms Act, having been made out the learned Magistrate has no jurisdiction to proceed to try it himself."

Babus Monmothanath Mukerjee and *Birendra Kumar De* for the Petitioner.

Mr. Cannell and *Babu Tarak Nath Sadhu* for the Crown.

THE JUDGMENT OF THE COURT was as follows:—

This is a Rule calling upon the Chief Presidency Magistrate to show cause why the case against the Petitioner should not be committed to the Sessions on the ground that the case falls within sec. 20 of the Arms Act and that the Magistrate has, therefore, no jurisdiction to try it himself. We have heard the learned Deputy Legal Remembrancer who has shown cause on behalf of the Crown; but we must say that we fail to understand the attitude taken up. He has read us the evidence which has been recorded in this case. So far as the offence under sec. 19F is concerned, it rests mainly on the evidence of two Police Officers who are said to have found the ammunition in

NISHI KANTA LAHIRI *v.* THE CROWN.

the possession of the Petitioner. If that evidence is believed, it is abundantly clear that an offence under the first portion of sec. 20 was also committed. It would be for the Court to determine whether that evidence is to be believed. But, so far as the point before us is concerned, it is clear that that evidence indicates an offence under sec. 20; and we think that that being so, the case ought to be committed to the Sessions. We accordingly make the Rule absolute and direct that the Magistrate, after recording any further evidence that may be adduced, do commit the case to the Sessions.

S. C. M.

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 263 OF 1913.

SHARFUDDIN, J. ROE, J. 1916, 4, April.	NARAINBATI and ors., Defendants, Appellants, *v.* RAMDHARI SINGH and others, Plaintiffs, Respondents.

Hindu Law—Widow's estate—Legal necessity—Marriage of daughter's daughter when son-in-law gharjamai, if legal necessity—Construction—Mortgage of widow's "right and interest" if covers more than life-interest.

Where A, a Zemindar's widow, married her only daughter S to a cultivator in order that the son-in-law may come and live in the mother-in-law's house, and the issue of the marriage was a daughter:

Held—*That though A might be under a moral duty to see that the girl was properly married, the expenses of the marriage could not be charged on her husband's estate as a legal necessity.*

The fact that a Hindu widow says she is mortgaging "her right and interest" in her husband's estate does not necessarily indicate that she was mortgaging only a life-interest.

This was an appeal against the judgment and decree passed by Moulvi Abdul Jubber, Officiating Second Subordinate Judge of Monghyr, dated 29th April 1913.

The facts of the case were as follows:—Jugal Pershad Singh and Kamla Pershad Singh were two brothers who lived separately in mess and property. Kamla Pershad had two wives Anupbati and Sunderbati. After the death of Kamla Pershad each widow lived separately from the other and they enjoyed their property separately. Anupbati had a daughter named Surjabati who was married with one Lalji. The son-in-law was poor and so the daughter lived in the house of Anupbati. Surjabati had a daughter named Adyabati. Both Lalji and Surjabati died before Adyabati attained marriageable age. Adyabati lived with her grandmother Anupbati. In order to marry her granddaughter Anupbati borrowed Rs. 1,500 at 12 per cent. per annum with compound interest from the Plaintiff No. 1 Ramdhari Singh and executed the mortgage-bond in suit on 5th Ashar 1305 Fusli corresponding with 9th June 1898. The present suit was instituted on 18th May 1912 by Ramdhari Singh and two other members of his joint family for recovery of the mortgage money together with interest amounting to Rs. 7,405 by sale of the mortgaged property against Mussammat Narainbati Kumari, mother-in-law of Anupbati and Mussammat Rajbati Kunari, widow of Jugal Pershad Singh as the mortgagor Anupbati died in the month of Aghan 1319 Fusli, corresponding to November 1911.

The defence *inter alia* was that the mortgage-bond was not genuine and that there was no passing of the consideration money. It was further alleged that Anupbati lived

jointly with Sunderbati the other widow of Kamla Pershad and as such she had no right to mortgage the joint property of her husband. It was also alleged that the loan was contracted without legal necessity and so the Plaintiffs' claim was not maintainable.

The following issues were framed, *viz.*, (1) whether the bond in suit was genuine; (2) whether any consideration passed in respect thereto; (3) whether the property in possession of Anupbati was separate from that of Sunderbati; and (4) whether there was any legal necessity for the loan.

The learned Subordinate Judge found all the facts involved in the first three issues in favour of the Plaintiffs and in deciding the fourth issue he found that although daughter's daughter was not an heir, she was entitled to maintenance and that the expenses incurred for her marriage constituted a legal necessity and so he decreed the suit in full.

The Defendants thereupon preferred the above appeal; it was contended that the Court below was wrong in its conclusions on all the above issues.

Messrs. P. R. Das, N. C. Ray and *Roy Gurusaran Prosad* appeared for the Appellants.

Messrs. Pugh, Kulwant Sahai and *Ambica Prosad Upadhyay* appeared for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SHARFUDDIN, J.—This is an appeal from the judgment and decree of the Subordinate Judge of Monghyr, dated the 29th April 1913. The suit was instituted on the basis of a mortgage-bond executed by a lady named Anupbati on the 5th Bysack 1305, corresponding to the 9th June 1898. Before I refer to the facts of the case it is necessary to mention here the relationship of the parties concerned. One Maharaja Singh was the ancestor of the Defendants. He was married to one Narainbati, who is the Defendant No. 1 in the suit. He had two sons, namely, Jugal Prosad and Kamla Prosad. Jugal Prosad is Defendant No. 2 in the suit. Kamla Prosad had two wives, namely, Sunderbati and Anupbati. This Anupbati is the mortgagor of the bond in question. By Anupbati, Kamla Prosad had a daughter, named Surajbati. This daughter Surajbati was married to one Lalji Singh, son of Tota Singh, and Adyabati was the daughter of Surajbati and Lalji. Anupbati mortgaged some shares in two or three villages to one Ramdhari Singh, who is the Plaintiff in the suit. By this mortgage the Plaintiff advanced to Anupbati a sum of Rs. 1,500 and the mortgage-bond recites that this loan was for the purpose of performing the marriage of Adyabati, her daughter's daughter. The Plaintiff brought the suit for the realisation of Rs. 7,000 and odd, which includes the principal of Rs. 1,500 and interest and double interest. The Defendants contested the suit on the ground that Anupbati had mortgaged only her life-interest, and she being dead, the present suit is not maintainable against the present Defendants. Another contention on behalf of the Defendants was that the claim was barred by reason of limitation, and that in accordance with the Hindu Law, the performance of the marriage of Adyabati cannot be treated as a charge on the estate of Kamla Prasad. The question of limitation arises in this way. The present suit has no doubt been instituted more than 12 years after the due date as mentioned in the bond. The due date mentioned in the bond is the month of Bysack 1307 Fusli. The present suit was instituted on the 18th May 1912, that is, more than 12 years after the date fixed for the repayment of the bond. But there

is an endorsement on the back of the bond showing payment of a portion of the interest on the 5th Asar 1314 Fusli, a sum of Rs. 100 through Manohar, a cook. If the money was really paid as indicated by the endorsement, the limitation would begin to run, not from the due date as mentioned in the bond, but from the date of the endorsement. On behalf of the Defendant-Appellants it has been conceded that if this endorsement is a genuine one, the suit would be saved from limitation. The evidence with regard to the endorsement is, I find, in the deposition of Ramdhari Singh, Plaintiff. He said, Manohar the cook of Anupbati paid Rs. 100 on account of the interest of the bond to her. "I endorse it on the bond." Practically there has been no cross-examination on the question of the payment of the Rs. 100. The cross-examination on that point consists of about two or three lines, wherein it was suggested that Manohar was in service under the Plaintiff. The Plaintiff has denied it; no evidence has been put forward on behalf of the Defendants to shew that Manohar was never in the employ of Anupbati, and that he was in service under the Plaintiff. Mr. Das, appearing for the Appellants, admitted that there was no evidence to contradict the statement of the Plaintiff about the payment of Rs. 100, and it is conceded that that was a positive statement which has not been rebutted by the defence, and the Court may take the payment of Rs. 100 as a fact. I am of opinion, therefore, that the payment of Rs. 100 on the 5th Asar 1314 saved the claim from limitation.

The next point urged, is that Anupbati mortgaged only her life-interest. Our attention has been drawn to certain expressions in the bond itself. At two places in the bond it is stated, that she mortgaged her shares in two or three of the villages. In that connection she says, "my right and interest therein." She means whatever right she had, and this does not indicate necessarily that she had mortgaged only a life-interest. But she further in the same document says, "I, the declarant, or my heirs and successors shall not, until repayment of this bond with principal and interest, etc." This really shows that what she intended to mortgage was a heritable estate and not a life-estate. I think this point also fails.

Then the question as to whether in a Hindu family a daughter's daughter can have any claim for maintenance from the estate left by a maternal grandfather. A passage from Mayne was referred to in this connection, which lays down a rule of law based on the pronouncement of the Judicial Committee. That author at page 878, 3rd Ed., says, "it is admitted on all hands that if there be collaterals of the husband the widow cannot, of her own will, alienate the property, except for special purposes, a religious or charitable purpose or those which are supposed to conduce to the spiritual welfare of her husband. She has a larger power of disposition than that which she possesses for the purely worldly purposes, and to support an alienation for the last she must show necessity." Adyabati's mother was married to one Lalji, who was the son of Tota Singh. There can be no doubt that in accordance with the Hindu Law, the marriage of a daughter is a religious act, and the estate should be charged with the costs of marriage of the daughter, and the daughter has also the right to be maintained by the estate. But once she has married she enters into the family of her husband. Surajbati, therefore, after her marriage became a member of the family of Tota Singh, her father-in-law, and it was therefore the duty of Lalji and his father Tota Singh to see that Adyabati,

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Withdrawal of Counsel.

We reproduce below the observations of our contemporary of the *English Law Journal* on a conflict that very unfortunately took place in the course of the hearing of the libel action of *Leigh* v. *Gray's Inn Press Ld.* on the 28th of March last regarding the admissibility of the whole article which is said to have contained the alleged libel to show that it was not the Plaintiff's action but in reality the action of the Railway Company to prevent the women clerks from joining the Railway Clerks' Association. We reproduce also from the *Times* what transpired in Court. We thoroughly agree with our legal contemporary that the withdrawal of a counsel from a case is an extreme remedy which may in a very exceptional case be resorted to by counsel but should never be exercised lightly. It would not be proper for outsiders to say whether the judge or counsel was in the wrong because it would involve the expression of opinion with regard to the admissibility of evidence in a pending case. But we cannot help admiring the judicial equanimity and scrupulous fairness with which the trial Judge terminated the proceedings before him. Mr. Justice Bray must have felt that he had taken a view of the matter which might not be fair to the defendants and informed the parties to the suit that he would not try the case himself and that it would be tried by some other Judge.

The comments of the *English Law Journal* above referred to are as follows :—

Even judges and barristers are human, and conflicts between strong personalities cannot wholly be avoided in the courts, though, fortunately for the dignity of both the Bench and the Bar, they are rare. The latest conflict, in which Mr. Justice Bray, whose relations with the Bar are usually most agreeable, and Mr. Marshall-Hall, K.C., whose relations with the Bench are hardly so fortunate, were concerned, resulted in the withdrawal of Mr. Marshall-Hall and his junior from the case. Upon the technical point of evidence on which the learned judge and counsel differed we need not comment. It is the kind of point on which the Bench and the Bar not infrequently fail to agree without disturbing the cordial relations which, happily, are usually maintained between them. Nor is it necessary to question the right of counsel to withdraw from a case in which, exercising a calm judgment, they believe that the interests of their clients or a proper regard for their own dignity make it desirable for them to pursue that course. It is, indeed, one of the most powerful weapons which the Bar, jealous of its status, can exercise. The late Mr. Benjamin once exercised it with dignity when an argument he was addressing to the House of Lords was, as he thought, being unduly interrupted by a Law Lord who was too much given to the Socratic method in judicial proceedings. But it is a weapon which ought to be employed only in extreme cases, and a member of the Bar who uses it without sufficient reason does injury not only to his own reputation but also to the profession to which he belongs.

The following account of the proceedings relating to the incident is given in the *Times* of the 29th of March last :—

MR. MARSHALL-HALL then read the other portions of the article in the *Railway Clerk*, in which the paragraph containing the libel complained of by the Plaintiff appeared. They were not set out in the statement of claim and did not refer to the Plaintiff, but to occasions when pressure was alleged to have been used by the Great Central Company to prevent the girls from joining the Railway Clerks' Association.

When Mr. Marshall-Hall had concluded the reading of these passages MR. JUSTICE BRAY said :—"If I had known that what you proposed to read had nothing to do with the Plaintiff I should not have allowed you to read it. I consider it most irregular of you, Mr. Marshall-Hall, and a gross abuse of the process of the Court."

MR. MARSHALL-HALL.—I have to stand still and listen to what your Lordship says to me, and as I

cannot conduct my case according to my instructions, which are that this is not a *bonâ fide* action by the Plaintiff, but an action by the railway company in consequence of the attacks made on it, I really think that I had better retire and let my learned friend, Mr. McCardie, conduct the case.

MR. MCCARDIE.—I associate myself with my learned leader's conduct of the case, and if he retires I retire also.

MR. JUSTICE BRAY.—I am sorry to hear it.

Mr. Marshall-Hall and Mr. McCardie then left the Court.

MR. BARRINGTON-WARD.—I regret the course which my learned friends have adopted very much.

MR. JUSTICE BRAY.—I shall adjourn the case, I am placed in a very awkward position in which counsel have no right to put me. I think the jury ought to be discharged.

MR. BARRINGTON-WARD.—I agree that the matter is very deplorable, and I think we ought to start *de novo*.

Two of the Defendants who were in Court then said that neither they nor the other Defendant whom they represented had any objection to the jury's being discharged.

The jury was then discharged and the case was adjourned till Tuesday.

MR. JUSTICE BRAY.—I shall leave the costs to be dealt with by the Judge who will try it. I shall not try it.

HOW CAN OCCUPANCY RIGHT BE ACQUIRED?

(*Continued from page cxxxi.*)

WASTE LAND.—When a lessee reclaims any *waste* land he can acquire occupancy right under the twelve years' rule, but when a landlord reclaims any waste land, no raiyat can acquire occupancy right in the same during a period of 30 years from the date when the raiyat is introduced and contracts barring the acquisition of the right during the period are valid, Act VIII of 1885, sec. 178. Provisos (*i*) and (*ii*).

DISPOSSESSION BY LANDLORD.—ITS EFFECT.—The continuity of a raiyat's occupation may, however, be broken by wrongful act on the part of the landlord, such as forcible ouster. In such a case after the raiyat has recovered possession, it was held that if the eviction were wrongful, it would not be such an interruption as would prevent the raiyat from acquiring the right of occupancy, but it was for the raiyat to shew that the eviction was wrongful, *Mahomed* v. *Nur*, 24 W. R. 324: *Latifunnissa* v. *Pulin*, W. R. Sp. F. B. 91: *Radha* v. *Rakhal*, I. L. R. 12 Cal. 82. Similarly when the landlord enters into the land alleging its abandonment by the raiyat and the raiyat afterwards succeeds in recovering possession of the same by a suit under sec. 87 of the Bengal Tenancy Act, the continuity of his possession is not deemed to have broken during the period he is out of possession and he shall be deemed to have continued to be a settled raiyat notwithstanding his having been out of possession more than a year, Act VIII of 1885, Sec. 20 (6).

PRESUMPTION OF CONTINUOUS HOLDING IN FAVOUR OF RAIYAT.—In view of the difficulty under which the raiyats ordinarily laboured in giving evidence of the continuity of their holding the legislature has enacted that "that if in any proceeding under the Act it is proved or admitted that a person holds any land as a raiyat, it shall as between him and the landlord under whom he holds the land, be *presumed that he held it continuously for twelve years*, the *onus* being on the landlord to establish the contrary and this presumption applies to a proprietor's private land as well as to ordinary raiyati land, Act VIII of 1885, Sec. 20 (7). This presumption can only arise in the case of a raiyat who has other occupancy holdings in the same village when those other occupancy holdings are held under the same landlord, *Kuldip* v. *Chatur*, 3 C. L. J. 285, and does not apply to the occupants of *char* and *diara* lands, *Beni* v. *Chature*, I. L. R. 33 Cal. 111: 4 C. L. J. 63.

HOLDING SAME LAND IN THE SAME VILLAGE, IF NECESSARY.—Under Act X of 1859 and Bengal Tenancy Act VIII of 1869 it was necessary for a raiyat to have been in occupation of the *same* land for the statutory period of twelve years before he could acquire a right of occupancy, *Umar* v. *Bakshi*, 22 W. R. 228, and if he took up fresh land in the village, the fact that he had held some other land in the village for more than twelve years did not give him any right of occupancy in his new acquisition till he had held it for twelve years. Thus the acquisition of the right depends upon *possession for* a period of at least *twelve years of the same plot* of land. The right could be acquired only in the *particular* piece or pieces of land held and cultivated by a raiyat for these required number of years. That is to say raiyats who cultivated or held the *same* land for the statutory period acquired a right of occupancy in *that land* and *no other*, whether they were residents of the same village or not. Landlords sometimes took advantage of the law and prevented raiyats from acquiring a right of occupancy by shifting them or changing the lands of their holdings before the expiration of the statutory period. This devise has been put a stop to by the Bengal Tenancy Act.

under which in order to become a *settled raiyat* of the village a raiyat need only hold "as a raiyat" *some* land in the village continuously for a period of twelve years. It is not necessary that he should continuously hold the *same* land, Finucane and Ameer Ali's Bengal Tenancy Act, 1st Ed., 119.

The Bengal Tenancy Act has made a material addition as to the means of the acquisition of the right (except as to *utbandi*, *char* or *diara* lands). A settled raiyat of the village may now acquire the right in *every* piece of land he holds in the village in which he is a settled raiyat, even if the period of occupation be much shorter than twelve years, Act VIII of 1885, secs. 22, 21. For him the occupation for twelve years is not necessary. As soon as he touches a piece of land as a raiyat, he acquires an occupancy right in it, Sarada Charan Mitra's Land Law of Bengal, 326. He may hold one piece of land for five years, another for four and a third for three, and he then becomes a "settled raiyat" and acquires the right of occupancy in any piece or pieces of land so held by him at or after 12 years, Sarada Charan Mitra's Land Law of Bengal, 326. We have sufficiently discussed this point and no further discussion of it is necessary. But this rule does not apply to the case of *utbandi*, *char* and *diara* lands for which twelve years' occupation of the same piece of land is required by the Bengal Tenancy Act.

LAND SHOULD BE WITHIN VILLAGE.—The land must be within the boundaries of the village it matters not into how many estates the village may be divided. But the landlords even now can prevent their raiyats acquiring occupancy rights by shifting them from one village to another within their estates before the completion of the statutory period, Rampini's Bengal Tenancy Act, 4th Ed., 97.

HOLDING DIFFERENT PLOTS UNDER SAME OR DIFFERENT LANDLORDS.—The question whether a raiyat can become a "settled raiyat" by holding during twelve years different plots making up the aggregate periods in the same village under different landlords or whether he must hold his land under one and the same landlord has given rise to the same doubt, *Ibid*, 98.: *Kuldep* v. *Chatur*, 3 C. L. J. 285. But from the language used in the section it seems that a raiyat holding *different plots* of land in the *same village under different landlords for the statutory period* fulfils the conditions required by law, Amir Ali—Finucane's Bengal Tenancy Act, 1st Ed., 120.

RADHA RAMAN MUKERJEE, M.A., B.L.

(To be concluded.)

CURRENT INDIAN CASES.

(CIVIL.)

Civil Procedure Code, Or. 21, r. 31.

JALDU VENKATA SUBBA RAO *v.* THE ASIATIC STEAM NAVIGATION CO. (T. B.), I. L. R. 39 Mad. 1.

In order to entitle the Plaintiff to obtain delivery of specific moveable property by suit and enforce the decree so obtained by the stringent methods provided in Or. 21, r. 31, C. P. C., it is necessary that he should allege and prove facts which entitle him to compel the delivery of the specific moveables under the provisions of sec. 11 of the Specific Relief Act because unless he does so he cannot have a decree for the return of the specific moveable property.

Transfer of Property Act, sec. 76 (d).

VIGAYABHUSHANAMMAL *v.* C. N. EVALEPPU MUDALIAR, I. L. R. 39 Mad. 17.

In sec. 67 (*d*) of the Transfer of Property Act the legislature merely intended to protect the mortgagor from being harassed by a multiplicity of suits where the severance of the interests of the mortgagees has taken place without his consent. The legislature did not intend to enact that if the severance of the interests of the mortgagees has taken place in any other lawful mode legally binding on the mortgagor (as for instance by the decree of a Court of Justice in a suit to which the mortgagor is a party and which has become binding on him though he has not given his consent to the passing of the decree which has the legal effect of causing the severance) the mortgagor may still resist a suit for sale for recovery of a portion of the mortgage money on the basis of such severance.

Civil Courts—Jurisdiction.

SRIMATU KADAMBI JAGANNATH *v.* PIDIKITI KUTUMBARAYUDU, I. L. R. 39 Mad. 21.

A party seeking to oust the jurisdiction of the ordinary Civil Courts must establish his right to do so.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—Before Ridley and Avory, JJ. *Foster's Agency (Ltd.)* v. *Romaine*. 23rd February 1916.

A party is not entitled to break contract for fear of submarines.

The Plaintiffs introduced the Defendant, who was a music-hall artist, to a company in Australia, and obtained for her an engagement to perform there in or about September 1915 on certain terms relating to commission, etc. It was agreed that if the Defendant broke her engagement for a reason other than certified illness, the Plaintiffs would be entitled to their commission. The Defendant subsequently refused to go to Australia for fear of submarines. The Plaintiffs sued for their commission, but the County Court disallowed the claim on the ground, among others, that the postponement of the performance by the Defendant was reasonable under the existing circumstances. On appeal it was urged on behalf of the Plaintiffs that the reason assigned by the Defendant was no justification for the breach of the contract. The Defendant, on the other hand, contended that at the time of the performance of the agreement an extraordinary peril had arisen, and that it afforded a sufficient defence.

The Court allowed the appeal. Mr. Justice Ridley observed :—

It was impossible for the rights of the Appellants to be overridden by any arrangement which the Respondent might see fit to make with the Australian company. The principle to be applied was that of *Ford* v. *Cotesworth*, L. R. 4 K. B. 134 and other cases; the general rule was that one who contracted to do a thing must do it or pay damages for not doing it. There were cases such as *Krell* v. *Henry*, (1903) 2 K. B. 746 and *Appleby* v. *Myers*, (L. R., 2 C. P., 651) where the performance of the contract was impliedly conditional on the happening of some event or the continued existence of some thing, but this was not a contract of that kind. It was an agreement which was made after the war began, and nothing was inserted in it by way of condition.

The appearance of the German submarines was a reasonable ground for the Respondent's suggesting that she should not go to Australia, and if the other parties had agreed to her not going all would have been well; but the presence of the submarines did not give her the right to say that she would not go. It would be quite impossible to allow people to refuse to perform contracts on their own estimate of the risks to be incurred in the performance.

Messrs. Schiller, K.C., and *Hastings* for the Appellants.

Messrs. McCall, K. C., and *O'Conner* for the Respondent.

B. D.

PRIVY COUNCIL.

[Appeal from Bengal.]

Lord Sumner.
Lord Parmoor.
Sir John Edge.
Mr. Ameer Ali.
Sir Lawrence Jenkins.
1916,
4, April.

Russick Lal Sadhukhan and others, Appellants,
v.
Kanai Lal Jalan, Respondent.

Land Acquisition Act, I of 1894—Case involving the question of Appellant's right to land, and connected with a pending appeal—Special leave granted.

This was an application for special leave to appeal to His Majesty in Council from a judgment of the Calcutta High Court, dated 27th March 1914. The Appellants' right to the disputed land was questioned in a civil suit, and also in proceedings under the Land Acquisition Act I of 1894, under which a portion of the disputed land was acquired. The Court of first instance held that the Appellants' tenure was a permanent one, and that they were entitled to compensation. Against those decisions there were two appeals which were heard together and decided by the High Court, against the petitioners. The High Court allowed the petitioners to appeal to His Majesty in Council from the decree made in the civil suit, but refused to grant the necessary certificate for appealing from the order made in proceedings held under the Land Acquisition Act.

Mr. A. M. Dunne for the Petitioners submitted that special leave ought to be granted to the petitioners, and that the matter was not affected by the decision in *Rangoon Botatoung Co., Ld.* v. *The Collector, Rangoon*, B. R. 39 I. A. 197.

Their Lordships granted the petition.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

B. D.

the daughter of Lalji, was married. On behalf of the Respondent it has been pointed out that Anupbati having only a daughter, namely, Surajbati, was anxious to keep the daughter in her own house even after her marriage, and that, therefore, Lalji, a poor cultivator's son, was selected as the husband of Surajbati, so that he may come and live in his mother-in-law's house as a *ghurjamai* and that since this marriage of Surajbati she always remained in her mother's house, and that therefore it was the duty of Anupbati to see that Surajbati's daughter was properly married. Tota Singh was a cultivator, and from the evidence it appears that he had about 20 bighas of cultivation; merely because Adyabati remained with her grandmother Anupbati is no ground, according to Hindu Law, to charge the estate of Kamla Prosad with the cost of her marriage. It may be a moral duty to see that this girl was properly married, but I am not convinced that this can at all be considered as legal necessity of a nature that would bind the estate. That being my opinion the appeal is decreed and the suit is dismissed with costs.

ROE, J.—I agree that the appeal should be decreed and the suit dismissed with costs. All that I wish to add to the judgment of my learned brother, is that, throughout Mr. Pugh's argument an attempt has been made to make a widow's estate liable for expenses incurred in discharging a moral obligation brought upon the widow's family by reason of pressure of local Hindu opinion. This argument is based upon the decision in the case of *Tatayya* v. *Ramakrishnamma* (1). There is no doubt, as my learned brother has pointed out, that legally there was no obligation to maintain the child Adyabati. This is perfectly clear from the case *Mokhoda Dasi* v. *Nunda Lal Haldar* (2). The point Mr. Pugh takes is that there would have been grave dissatisfaction among the Hindu community if this child had not been married from the house of Anupbati with the ceremonial befitting the granddaughter of a zemindar. I hold that this moral obligation was brought upon the widow Anupbati by her own voluntary act in bringing the child Anupbati to her own house. That being a clearly voluntary act, all the consequences of that initial voluntary act must be considered in themselves voluntary obligations and not legal obligations for which the estate of Kamla Prosad could be encumbered. It is to be noted, moreover, that this case of *Tatayya* v. *Ramakrishnamma* (1) does not go nearly as far as Mr. Pugh contends. A widow can only alienate the deceased husband's estate for some purpose connected with his spiritual welfare. The marriage of a daughter's daughter is not a matter in which, outside Bengal, the maternal grandfather is concerned. So long as Tota Singh was alive and in a position to arrange for his son's daughter's marriage, that marriage was a matter for Tota Singh to arrange. It is in evidence that Tota Singh gave the girl away. Any assistance rendered by Anupbati was voluntary assistance. It conferred no spiritual benefit on her deceased husband. The alienation was a voluntary alienation, not an alienation for legal necessity.

A. K. R. *Appeal decreed.*

(1) I. L. R. 34 Mad. 288 (1910).

(2) I. L. R. 28 Cal. 278, 288 (1901).

[PRIVY COUNCIL.]
[APPEAL FROM BENGAL.]

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.
1916,
16, March.

SHEOPARSAN SINGH and ors., Appellants,
v.
RAMNANDAN PRASHAD NARAYAN SINGH, since deceased, and ors., Respondents.

***Specific Relief Act** (I of 1877), sec. 42—Probate, application for—Caveat—Probate granted upon finding that Will genuine and caveator had no* locus standi *to oppose—Suit by caveator for declaration that he has sufficient interest to apply for revocation of probate, if lies—Probate Court's decision on matter within its jurisdiction if reversible by another Court—Strict fulfilment of statutory conditions, when declaratory decree prayed for, necessary —*Res judicata*—Decisions of Probate Court on matters other than genuineness of Will if conclusive —Rule of* res judicata, *not a technical rule.*

On B's death leaving two widows, but no male issue, R applied for probate of what he alleged was B's Will. The widows did not oppose the application but the present Plaintiffs amongst others lodged caveats. The matter was thereupon heard as a suit with R as Plaintiff and the caveators (including the present Plaintiffs) as Defendants, and the Court held that the Plaintiffs had no right to oppose the application and that the Will propounded was genuine. The Plaintiffs then brought this suit against R and others for a declaration that they were the nearest reversioners according to Hindu Law of B and as such entitled to apply to the Probate Court to get the probate to R revoked.

Held—*That the declaration could not be made under sec. 42 of the Specific Relief Act as, having regard to the decision that the Will was genuine, the Plaintiffs were not entitled to "a legal character or to a right as to property."*

That the Will having been affirmed in a Court exercising appropriate jurisdiction, the propriety of that decision could not in the circumstances of the case be impugned by a Court exercising any other jurisdiction.

The Court's power to make a declaration without more is derived from sec. 42 of the Specific Relief Act, and regard must be had to its precise terms.

The application of the rule of res judicata *by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.*

This was an appeal from a decree of the Calcutta High Court (Caspersz and Chatterjee, JJ.) reversing a decree of the Subordinate Judge of Mozufferpur.

One Bachu Singh died in 1899, leaving two widows, Musammat Ram Rachan Kunwar and Musammat Ram Kishori Kunwar, but no male issue. In 1902 Ram Nandan Singh (Respondent) applied to the District Judge for probate of an alleged Will of Bachu Singh. The two widows did not oppose, but caveats were entered by various parties including the Appellants. The application was therefore tried as a contentious cause, and the Court found first, that the present Appellants were not reversioners and therefore had no *locus standi* to oppose the application for probate; *secondly*, that the Will was genuine and duly executed. Probate thereof was issued to Respondent.

Thereafter Appellants instituted a regular suit in the Court of the Subordinate Judge, praying for a declaration that they were the next reversioners to the estate of the late Babu Bachu Singh according to Hindu law.

The suit was decreed by the trial Judge, but dismissed on appeal. The High Court held that it was barred by the rule of *res judicata*. They also held that no declaration ought to be made for the following reason:—

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"Supposing the Plaintiffs were to get a declaratory decree, as prayed, would not the District Judge be precluded from trying the issue whether the Will had been duly executed? He might say "This Court has granted probate after a contest. The estate is in the hands of the executor. No reversionery interest subsists. The case does not come within any of the circumstances constituting " just cause " for revocation as defined in sec. 50 of the Probate and Administration Act." No legal machinery exists to compel such a Court of Probate to accept the decision of another Civil Court, on a matter already heard and determined by the former Court. The declaration in favour of the Plaintiffs would be infructuous, or, if accepted by the District Judge as a basis of fresh proceedings, the Defendant might again revive the question of *locus standi*, and a third contest would ensue."

Hence this appeal.

Mr. L. DeGruyther, K.C. (with him *Sir William Garth*).—The question is whether what took place before the District Judge was a suit within the meaning of sec. 13 of the Civil Procedure Code. No question of title is intended to be raised before the Probate Court. The effect of a grant of probate is expressly limited by sec. 59 of the Probate and Administration Act, 1881 (Act V of 1881) to property within the province in which it is granted, and it is laid down that the grant shall be conclusive as to the representative title " against all debtors of the deceased, and all persons holding property which belongs to him." There is no estoppel.

Mirza Kurratulain Bahadur v. *Nawab Nuzhat-ud-Dowlah Abbas Hosein Khan* (4).

(4) L. R. 32 I. A. 244 to 258 : s. c. 9 C. W. N. 938 (1905).

The only question here is whether sec. 13 of the Civil Procedure Code, 1882, bars the present suit. This is a question of the construction of that Act.

Rajah of Pittapur v. *Raja Rao Buchi* (5).

Sec. 13 does not cover the present case. That section was construed in *Gokul Manhar* v. *Pudmanund Singh* (6), where it is laid down that the Court whose decision is relied on by way of *res judicata* must be a Court competent to try the subsequent suit or issue. The question here as to adoption could not have been raised in the Probate Court : that Court was not competent to try it. On this point of *res judicata* the Code of Civil Procedure excludes all other law. The first Court must be a Court of concurrent jurisdiction to try the second suit.

Misir Raghobardial v. *Rajah Sheo Baksh Singh* (7).

In *Arunmoyi Dasi* v. *Mohendra Nath* (8), the Calcutta High Court decided that the principle of *res judicata* did not apply in a case like this; that a proceeding under the Probate and Administration Act is not a " suit," and that the only question which the Probate Court has to determine is whether the Will is true or not. This was followed in *Jagannath Prasad Gupta* v. *Runjit Singh* (9). *Ganesh Jagannath Deo* v. *Ramchandra* (10) is the converse case; there it was held that the refusal of the District Court to grant probate did not bar a regular suit.

Since the case now under appeal, there has been a contrary decision in Calcutta.

(5) L. R. 12 I. A. 16 at p. 20 (1884).
(6) L. R. 29 I. A. 196 at p. 202 : s. c. 6 C. W. N. 802 (1902).
(7) L. R. 9 I. A. 207 (1882).
(8) I. L. R. 20 Cal. 868 (1893).
(9) I. L. R. 25 Cal. 844 at p. 860 (1897).
(10) I. L. R. 21 Bom. 698 (1896).

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Lalit Mohan Das v. *Radharaman Saha* (11), in which Caspersz, J., one of the Judges who gave the present judgment under appeal, took part.

The proceedings in the Probate Court are not final. Sec. 50 of the Probate and Administration Act, 1881, provides for the revocation of probate for "just cause." The High Court's view that the declaration sought for would be infructuous is erroneous; the District Judge might say on the declaration being given "I granted probate because of the allegation that this man was the adopted son; I now find that he was not."

[LORD CHANCELLOR.—Could you use the decree for any purpose except to apply for revocation?]

Yes, the declaration would be of use to us when, *e.g.*, the widow died and we applied to succeed her. But I admit that we mean to use it to revoke the probate.

If our suit is entirely dismissed, we could never establish our title as next heirs.

Mr. A. M. Dunne for Respondent. The result of the grant of probate is that the estate vests in the executor. The grant is a judgment *in rem* and establishes the Will. When a caveat is entered the proceeding becomes a contentious cause and assumes the form of a suit. The Court tries issues properly fixed, such as "Are you kin?" "Was the Will executed?" The issues were tried and decided, and an appeal dismissed. Appellant can apply for revocation, but if he could go back to the Probate Court after getting a declaration in this suit there would be no finality. The plaint itself shows that the Appellant would use the declaration for the purpose of revocating probate. No declaratory relief could be given for that purpose.

(11) 15 C. W. N. 1021 (1911).

The Court of the District Judge was competent to try the present suit. The District Judge could have transferred the suit to himself for trial. The judgment of the Probate Court is conclusive between the same parties. *Barrs* v. *Jackson* (12).

The Plaintiff here could have got both declaration and consequential relief, but knowing that he would be barred there, he goes for one relief only.

The principle on which *Barrs* v. *Jackson* (12) proceeded was that laid down by the House of Lords in *Bouchier* v. *Taylor* (13).

[*Mr. DeGruyther* referred to *Concha* v. *Concha* (14) where *Bouchier* v. *Taylor* (13) was considered.]

[THE LORD CHANCELLOR.—Lord Bowen in the lower Court, *DeMora* v. *Concha* (15), points out that probate merely establishes due execution of the Will, nothing else.]

The issue was not necessarily involved in the judgment *in rem*, but it was necessarily involved in Appellants' case, in which they sought to obtain a judgment *in rem*. But whatever the law in England may be, is really immaterial: this case turns upon sec. 13 of the Civil Procedure Code. The issue here was directly and substantially raised and decided: the parties were the same: and the District Judge was competent to try the subsequent suit. That Judge is invested with jurisdiction in several matters. To call that Court a Probate Court as if it were a special Court is a misnomer. If this argument were sound you would never have *res judicata* except in the same Court. The jurisdiction required is not a local jurisdiction, but a jurisdiction of competency.

(12) 1 Phillips Ch 582 (1845).
(13) 4 Brown P. C. 708 (1776).
(14) 11 A. C. 541 at p. 555 (1886).
(15) 29 Ch D. 268 (1885)

SHEOPARSAN SINGH *v.* RAMNANDAN PRASHAD NARAYAN SINGH.

[*Sir Lawrence Jenkins.*—The words of sec. 13 are "a Court of jurisdiction competent to try," etc. Local jurisdiction is disregarded.]

The District Judge is not set up as a Probate Court, but is given jurisdiction *qua* District Judge.

You must look at competency in jurisdiction: the Court must be a Court which if it had jurisdiction in other respects would be competent to try the second suit.

Mussammat Edun v. *Musammat Bechun* (16), *Rajah of Pittapur* v. *Raja Rao Buchi* (5) and *Run Bahadur Singh* v. *Lucho Koer* (17).

Mr. DeGruyther, K.C., in reply.—*Barrs* v. *Jackson* (12) was long prior to the Probate Act, 1857, sec. 23 of which deprived the Ecclesiastical Court of jurisdiction to decide the question of distribution. When that case was tried the Ecclesiastical Court had such jurisdiction, and hence it was held that its decision bound the Court of Chancery. *Flitters* v. *Allfrey* (18). You go back to the decision of the first Court to consider not whether it had jurisdiction to decide that case, but whether it had jurisdicion to try the second suit.

Gokul Manhar v. *Pudmanund Singh* (6).

Next, to be *res judicata* the decision must be a decision in a suit. Suits and applications are distinct forms of procedure. Sec. 647 of the Civil Procedure Code recognises that there are proceedings in Courts of Civil Jurisdiction which are neither suits nor appeals. Instances are proceedings under the Succession Certificate Act, under the Guardians and Wards Act, under this very Probate and Administration Act, and under the Land Acquisition Act of 1894. In each class of these, questions constantly arise where it becomes necessary incidentally to determine the question of title, but such incidental decision will not constitute a *res judicata*.

Run Bahadur Singh v. *Lucho Koer* (17) decided that a District Judge's decison under the Succession Certificate Act would not be *res judicata* in a subsequent suit.

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—This is an appeal against a decree of the High Court at Calcutta, dated the 19th April 1910, reversing the decree of the Subordinate Judge of the First Court, Mozufferpur, dated the 21st December 1907.

The expressed purpose of the litigation is to obtain a declaration that the Plaintiffs are the next reversioners to the estate of Babu Bachu Singh according to Hindu law, and, as such, entitled to apply for a revocation of probate.

The facts may be shortly stated. On the 12th November 1899, Bachu Singh died, leaving two widows, the Defendants Mussamut Ram Rachan Kunwar and Mussamut Ram Kishori Kunwar, but no male issue. On the 22nd September 1902, the Defendant Ram Nandan Singh applied in the Court of the District Judge of Mozufferpur for probate of a writing alleged by him to be the last Will of Bachu Singh. In that writing he is described as Bachu Singh's *kartaputra*.

The two widows, though heiresses of the deceased Bachu Singh, did not oppose the application. Caveats, however, were lodged by three groups of persons, and the Plaintiffs in this suit were the members of one of these groups. There thus arose a contention as to the grant of probate,

(5) L. R. 12 I. A. 16 at p. 20 (1884).
(6) L. R. 29 I. A. 196 at p. 202: s. c. 6 C. W. N. 802 (1902).
(12) 1 Phillips Ch. 582 (1845).
(16) 8 Suth. W. R. 175 (1867).
(17) L. R. 12 I. A. 23 at p. 36 (1884).
(18) L. R. 10 C. P. 29 (1874).

(17) L. R. 12 I. A. 23 at p. 36 (1884).

and the proceedings thenceforth took, as nearly as might be, the form of a suit according to the provisions of the Code of Civil Procedure, in which the petitioner, Ram Nandan Singh, was the Plaintiff, and the Plaintiffs in this suit, with others, were the Defendants. In due course issues were framed, and they raised the two material and essential questions, first whether the present Plaintiffs, as persons by whom the caveat had been entered, had, as it was termed, any *locus standi* to oppose the application for probate, and secondly whether the Will propounded was the genuine and duly executed Will of Bachu Singh.

After evidence, oral and documentary, it was held on the first issue that the caveators had failed to prove their interest, and on the second issue that the Will was proved. In accordance with this finding it was ordered that "probate be granted to Ram Nandan Prashad Singh, petitioner, executor."

From the order sheet it appears that Ram Nandan was held to be an executor by implication. The present Plaintiffs preferred an appeal to the High Court. The appeal was heard and dismissed with costs on the 8th February, 1905. No appeal was preferred to His Majesty in Council. But on the 7th August, 1905, the present suit was instituted in the Court of the First Subordinate Judge of Mozufferpur. The plaint states the material facts, save that it erroneously alleges that letters of administration with the Will attached were granted to Ram Nandan. It is then averred in para. 9 as follows:—

"These Plaintiffs have been advised that so long as these letters of administration are in force they have no claim to the reversionary right to the estate of the deceased; and, furthermore, that they cannot apply for the revocation of the said letters of administration until what time they obtain a declaratory decree from the Civil Court to the effect that they are the nearest reversioners according to Hindu law of the deceased Bachu Singh, and therefore entitled to his estate in case of an intestacy after the death of the Defendants second party."

The Defendants second party were the two widows. The prayer of the plaint as originally framed was in these terms:

"that it be declared that the Plaintiffs are the next reversioners to the estate of the late Babu Bachu Singh according to Hindu law."

By a subsequent and significant amendment these words were added,

"and as such are entitled to apply to the Probate Court to get the probate or letters of administration granted to Ram Nandan Singh revoked."

Before the hearing Mussamut Ram Rachan Kunwar died, and by an order of the 4th February, 1907, her co-widow was substituted in her place as legal representative.

On the 6th November the following issues were framed:

1st. Is the suit maintainable?

2nd. Is the suit barred by section 13 of the Code of Civil Procedure?

3rd. Is the suit bad for non-joinder of parties?

4th. Is the suit barred by limitation?

5th. Are the Plaintiffs the nearest reversionary heirs of Rup Narayan Singh, *alias* Bachu Singh?

6th. Is the Defendant No. 1 the Kartaputra of the said Rup Narayan Singh?

On these issues the findings of the Subordinate Judge were in the Plaintiffs' favour, and by the decree it was declared that the Plaintiffs were the *gotias* of and reversioners to the estate of Babu Bachu Singh. In the plaint there was no prayer as to their *gotiaship*.

An appeal to the High Court was preferred by Ramnandan Prashad Singh. It succeeded on the ground that the suit

was barred by the rule of *res judicata*. But though the High Court held that the case was governed by sec. 13 of the Code of Civil Procedure, it tried the issue, which, in that view, was withdrawn from its consideration by the terms of the section.

From this decree the Plaintiffs have preferred the present appeal.

The contest before their Lordships has been confined to the two issues :—

1st, Is the suit maintainable?

2nd. Is the suit barred by sec. 13 of the Code of Civil Procedure?

The first of these problems takes the more specific form of an enquiry whether in the circumstances of this case the Plaintiffs are entitled to claim from the Court a mere declaratory decree of the character proposed.

The Court's power to make a declaration without more is derived from sec. 42 of the Specific Relief Act, and regard must therefore be had to its precise terms. It runs as follows :—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided that no Court shall make any such declaration where the Plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

A Plaintiff coming under this sec. must therefore be entitled to a legal character or to a right as to property. Can the Plaintiffs predicate this of themselves? Clearly not; and this is, in effect, stated in the plaint, where they described themselves as entitled to Bachu Singh's estate *in case of an intestacy* after the death of the Defendant widows (para. 9).

But as things stand there is no intestacy : Bachu Singh's Will has been affirmed in a Court exercising appropriate jurisdiction, and the propriety of that decision cannot in the circumstances of this case be impugned by a Court exercising any other jurisdiction.

It is not suggested that in this litigation the testamentary jurisdiction is, or can be, invoked, and yet there can be no doubt that this suit is an attempt to evade or annul the adjudication in the testamentary suit, and nothing more.

This is apparent from the plaint, from the amendment made in the High Court after Ramnandan had died, and from the very circumstances of the case.

This use of a declaratory suit illustrates forcibly the warning in *Sree Narain Mitter* v. *Kishen Soondory Dassee* (1) where it was said :

"There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

Here, however, no question of discretion arises; the suit fails at the very outset, for the Plaintiffs, while the Will stands, as stand it must for the purposes of this suit, are not clothed with a legal character or title which would authorise them to ask for the declaratory decree sought by their plaint. The suit therefore should be dismissed because it is misconceived and incompetent.

Some reference was made in the course of the argument to a reversioner's right to sue where a widow with the particular interest was committing acts of waste to the prejudice of those who might succeed to the inheritance on her death. But such a position of necessity assumes the absence of an immediate and absolute testamentary disposition.

(1) L. R. I. A. Sup. Vol. 149 at p. 162 (1873).

In this connection there is an instructive comment in *Kathama Natchiar* v. *Dorasinga Tevar* (2), where it was said in reference to such suits :

"Suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that if such a suit as that is brought it must be brought by the reversioner with that object, and for that purpose alone, and that the question to be discussed is solely between him and the widow; that he cannot, by bringing such a suit, get, as between him and a third party, an adjudication of title which he could not get without it."

There has been much discussion at the Bar as to the application of the plea of *res judicata* as a bar to this suit. In the view their Lordships take the case has not reached the stage at which an examination of this plea and this discussion would become relevant. But in view of the arguments addressed to them their Lordships desire to emphasise that the rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time.

"'It hath been well said,' declared Lord Coke, '*interest reipublicæ ut sit finis litium*,' otherwise great oppression might be done under colour and pretence of law."—*Priddle* v. *Napper* (3).

Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus : "If a person though defeated at law sue again he should be answered, 'You were defeated formerly.' This is called the plea of former judgment." [See "The Mitakshara (Vyavahar)," Bk. II, ch. i, edited by J. R. Gharpure, p. 14, and "The Mayuka," Ch. 1, sec. 1, p. 11 of Mandlik's edition.]

And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

Their Lordships have not failed to observe that Ram Nandan Prashad Singh died before the hearing in the High Court, but they refrain from pronouncing any opinion as to its legitimate consequence in this suit, for this formed no part of the discussion before them. They have dealt with this litigation, as it was presented to them, apart from the possible effect of Ram Nandan's death.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of such of the Respondents as have appeared.

B. D. *Appeal dismissed.*

(2) L. R. 2 I. A. 169 at p. 191 (1875).
(3) 6 Coke 9A (1777).

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

VISCOUNT HALDANE.	JAMSHED KHODARAM IRANI, Appellant,
LORD PARMOOR.	*v.*
LORD WRENBURY.	BURJORJI DHUNJIBHAI Contractor, Respondent.
SIR JOHN EDGE.	
MR. AMEER ALI.	
1915, 6, December.	

Indian Contract Act (IX of 1872), sec. 56—Contract to sell land—Time if of the essence of the contract—Principles of equity applicable to such cases.

Sec. 55 of the Indian Contract Act does not lay down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law, equity which governs the

rights of the parties in cases of specific performance of contracts to sell real estate looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place really and in substance intended more than that it should take place within a reasonable time.

LENNON *v.* NAPPER (1), ROBERTS *v.* BERRY (2), TILLEY *v.* THOMAS (3) *and* STICKNEY *v.* KEEBLE (4).

The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain and that to disregard them would be to disregard nothing that lay at its foundation. Primâ facie *equity treats the importance of such time limits as being subordinate to the main purposes of the parties and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the Plaintiff as regards the time limit specified.*

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction.

Equity will further infer an intention that time should be of the essence from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into.

This was an appeal from a decree of Scott, C. J., and Chandavarkar, J., which reversed a decree of Macleod, J.

The facts of the case sufficiently appear from the judgment.

Sir Robert Finlay, K.C. (with him *Mr. Kenworthy Brown*) for the Appellant.

Time was not of the essence of the contract. Sec. 55 of the Indian Contract Act governs the case. The law laid down in that section is the same as the English law as regards contracts to sell land. *Stickney* v. *Keeble* (4).

Mr. Leslie Scott, K.C. (with him *Mr. Raikes*) for the Respondent.

Time was of the essence of the contract here. You must look to the substance of the contract in determining this question. *Stickney* v. *Keeble* (4) is not exhaustive as to the cases where equity will treat time as of the essence of the contract. See *Inglis* v. *Buttery Co.* (5).

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—The question in this Appeal is whether the appellant, who was the Plaintiff in an action for specific performance, is entitled to the relief he

(1) 2 Sch. & Lef. 682 (1803).
(2) 3 DeG. M. & G. 284 at p. 289 (1853).
(3) 3 Ch. App. 61 (1867).
(4) [1915] A. C. 386 (1914).
(5) 3 A. C. 552 (1878).

has claimed. Macleod, J., decided that he is so entitled, but the High Court in appeal at Bombay reversed the decision and dismissed the action.

The facts may be stated briefly. The Government of Bombay, in 1898, granted to one Mothabai Bhikaji a reclamation lease of over 2,000 acres of land near Bombay for a term of 999 years. The lease provided that the lessee should reclaim the land and bring it under cultivation within a period which was ultimately extended to the year 1910. He was also to maintain the reclamation throughout the term, and keep up certain roads, and make and maintain certain waterways and boundary marks, to the satisfaction of the local Collector. The lessee was, further, not to assign or underlet, until the reclamation was complete, without the consent in writing of the Collector. In case of breach of any covenant or condition, or provision of the lease the lessor had the right to re-enter and determine the lease. The lease was transferred in 1908 to the Respondent, who had purchased it from the lessee.

On the 8th July 1911 the Respondent agreed in writing by a document in Gujrati, a translation of which was before their Lordships, to sell the leasehold interest to the Appellant for Rs. 85,000, and the Appellant paid Rs. 4,000 of this sum as a deposit or earnest. This agreement provided, by Clauses 1 and 2, that the title was to be made marketable; that the conveyance was to be prepared and received within two months from the date of the agreement; that on signing the document of sale Rs. 80,500 were to be paid, and after its registration the remaining Rs. 500. The 5th Clause provided that on payment of the Rs. 81,000, as provided by Clause 2, the document of sale or conveyance was to be executed, but should the purchaser not pay the amount within the fixed period above mentioned, he was to have no right to the deposit or earnest money of Rs. 4,000 paid on account, and any claim of his was to be void, and the vendor was, after that date, to be at liberty to resell.

There was a subsidiary agreement that the Respondent should buy certain land belonging to the Appellant for Rs. 30,000, to be deducted from the Rs. 81,000, but on this nothing turns.

The Appellant's solicitors proceeded to investigate the title, and they made requisitions. Of these requisitions some related to the rights of one Chimanlal, who had professed to make a title as heir to his father one of certain mortgagees of the interest of Mothabai Bhikaji. Another of the requisitions was for a certificate or letter from the Collector stating that all the covenants and conditions of the lease had been performed and fulfilled. This requisition was made on the 3rd October 1911, more than two months after the date of the contract. The Respondent did not comply with these requisitions but on the 6th October, through his solicitors, asserted a right to put an end to the contract on the ground that time was of its essence, and to forfeit the deposit on the ground that the Appellant had failed to complete his purchase within the date fixed.

If these requisitions were made in time their Lordships are of opinion that they were proper, and that they were not adequately answered. If time was not of the essence of the contract it is clear that they were legitimately made, however the matter might stand as to one or other of them if time were of the essence. This last question therefore lies at the root of the controversy, and the answer to it is decisive of the appeal.

The law applicable to the point is contained in sec. 55 of the Indian Contract Act, 1872, which provides that "when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon* v. *Napper* (1) which was adopted by Knight-Bruce, L.J., in *Roberts* v. *Berry* (2). The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley* v. *Thomas* (3) and by the House of Lords in the recent case of *Stickney* v. *Keeble* (4). Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley* v. *Thomas* (3).

"The construction is and must be in equity, the same as in a Court of Law. A Court of Equity will indeed relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract; either for completion or for the steps towards completion, if it can do justice between the parties, and if [as Lord Justice Turner said in *Roberts* v. *Berry* (2)], there is nothing in the 'express stipulations between the parties, 'the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. That is what is meant, and all that is meant, when it is said that in equity, time is not of the essence of the contract. Of the three grounds mentioned by Lord Justice Turner 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, trusts, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."

Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Primâ facie*, equity treats the importance of such time limits as being subordinate to the main purpose of

(1) 2 Sch. and Lef. 682 (1803).
(2) 3 DeG M. & G. 284 at p. 289 (1853).
(3) 3 Ch. App 61 (1867)
(4) [1915] A. C. 386 (1914).

(3) 3 Ch App 61 (1867).

the parties, and it will enjoin specific performance notwithstanding that from the point of view of a court of law the contract has not been literally performed by the Plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which courts of equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. *Tilley* v. *Thomas* (3), where specific performance was refused, illustrates this class of transaction. But in such a case the intention must appear from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into.

Applying these principles to the agreement before them, their Lordships are of opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain. They do not think that the subject-matter or the character of the lease sold were such as to take the case out of the class to which the principle of equity applies. They are also unable to hold that the Plaintiff bound himself by his correspondence subsequent to the agreement to a new agreement that time, if it was not originally of the essence, should be made so. As to the language of the agreement itself, without dwelling on a possible point in the Plaintiff's favour which does not appear to have been raised in the Court below, that the only time limit mentioned refers to his preparation and reception of the conveyance, as distinguished from completion, they agree with Macleod, J., in the view that there is nothing said in it sufficient to exclude the equitable canon of interpretation. And they agree in his conclusion that the Defendant had no justification in claiming in the circumstances to treat time as of the essence. They are unable to concur in the opinion of the learned Judges of the High Court in appeal that there was evidence that the Plaintiff had not money with which to pay the price, or that the subsequent correspondence and dealings between the parties modified the right of the Plaintiff to insist on his right to complete the purchase.

These conclusions render it unnecessary to consider the other points dealt with in the High Court and elaborately argued at their Lordships' Bar. The result is that they think that the appeal ought to be allowed and the judgment of Macleod, J., restored, and that the Respondent should pay the costs of this appeal and in the Courts below. They will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Latteys* and *Hart* for the Appellant.

Solicitors: *Messrs .T. L. Wilson & Co.* for the Respondent.

B. D.

(3) 3 Ch. App 61 (1867).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 59 OF 1911.

N. R. CHATTERJEA, J
RICHARDSON, J.
1916,
Heard, 4, January.
Judgment, 7, March.

MATHURA MOHAN SAHA and ors., Plaintiffs, Appellants,
v.
NABIN CHANDRA DUTT & ors., Defendants, Respondents.

Putni, *sale of, in execution of decree or arrears of rent—Purchaser if liable for arrears previous to confirmation of sale*

The Plaintiffs purchased a putni taluq *at a sale held in execution of a decree for arrears of rent due thereon. Some of the* putnidars *applied to set aside the sale and while the proceedings for setting aside the sale were pending the zemindar brought a suit against the recorded* putnidars *for arrears of rent subsequent to the period covered by the decree in execution of which the sale was held at which the Plaintiffs purchased the* taluq. *The Plaintiffs were made parties to this suit which was decreed and in execution of the decree the* putni *was put up for sale and the Plaintiffs whose purchase at the previous sale had been by that time finally confirmed deposited the decretal amount and saved the* putni *from sale.*

Held—*That in the absence of anything to denote the contrary, a sale of a tenure held in execution of a decree for its own arrears of rent passes it free from liability for previous arrears and the Plaintiffs were not liable for the arrears of rent for the period prior to the date of confirmation of sale at which they purchased the* putni.

This was an appeal preferred on the 3rd March 1911 against the decree of Babu Satkari Haldar, Officiating Subordinate Judge of Zillah Tipperah, dated the 28th November 1910.

The facts of the case will sufficiently appear from the judgment.

Dr. Sarat Ch. Basak and *Babus Bepin Ch. Bose* and *Sridhar Das Gupta* for the Appellant.

Babus Kumar Sunker Roy, Upendra K. Roy and *Shib Ch. Palit* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for the recovery of Rs. 6,249-2-0 which was paid by the Plaintiffs in order to save a *putni taluq* from being sold in execution of a decree for arrears of rent, under the following circumstances.

The Plaintiffs on the 5th June, 1906 purchased the *putni taluq* for Rs. 11,000 at a sale held in execution of a decree for arrears of rent due thereon up to Assar *kist* of 1312 B. S. Some of the *putnidars* applied to set aside the sale on the 26th June, 1906. The application was dismissed for default on the 23rd March 1907, when the sale was confirmed, but the application was subsequently revived and eventually dismissed on the 27th January 1908. While the proceedings for setting aside the sale were pending, and on the 19th March 1907, the zemindar brought a suit for arrears of rent of the last three *kists* of 1312 and the whole of the year 1313 B. S. against the recorded *putnidars* (Defendants 1 and 2 in that suit), and the Plaintiffs who had purchased the *putni* also were made parties to the suit as Defendants 3 to 10.

The present Plaintiffs (Defendants Nos. 3 to 10 in that suit) contended that they had not obtained possession of the auction purchased property and the zemindar was not entitled to any relief against them, nor to lay any claim over the sale proceeds.

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On the 6th July 1907, the Court made a decree which, after directing that the Defendants do pay to the Plaintiffs the amount of rents, cesses, damages and costs decreed, proceeded as follows :— "That the decretal amount be at first realised by the sale at auction of the property in arrears; but if the entire amount be not realised by the sale at auction of that property, Plaintiffs shall be able to realise the amount claimed from the surplus sale proceeds of that *taluq* as realised on the 6th June, 1906 by Mathura Mohun Saha and others (the present Plaintiffs) and from the Defendants Nos. 1 and 2 personally, and it is further ordered that on the confirmation of the sale the Defendants Nos. 3 to 10 shall remain liable for the amount of deficit, in proportion to their liability from the date of the sale or from the date of confirmation of the sale. But they shall not be liable in any other way. But even if the sale be not confirmed, the Defendants Nos. 1 and 2 shall remain personally liable."

In execution of that decree the *putni* was put up for sale, and the Plaintiffs whose purchase at the previous sale had been by that time finally confirmed deposited the decretal amount (Rs. 6,066-1-6) and saved the *putni* from sale. It appears that out of the Rs. 11,000 the proceeds of the sale at which the Plaintiffs had purchased, Rs. 7,438 is still left in deposit as the surplus sale proceeds, and the Plaintiffs in the present suit which was brought against the former *putnidars* (both recorded and unrecorded) seek to recover the amount paid by them together with interest and costs (Rs. 6 249-2-0) from the Defendants and from the surplus sale proceeds.

The Court below held that the Plaintiffs are not entitled to recover the sum paid by them, and they have appealed to this Court.

The first question for consideration is whether the Plaintiffs were liable for the arrears of rent which were paid up by them. Now the said arrears were for a period prior to the date of the confirmation of the sale at which the Plaintiffs purchased the *putni*, during which the former *putnidars* were in possession. The Court below was of opinion that as rent is a first charge on the *putni* the Plaintiffs purchased it charged with the rent due in respect of it at the time of their purchase, and relying on the cases of *Maharani Dasya* v. *Harendra Lal Rai* (1), *Peary Mohun* v. *Sreeram Chandra* (2) and *Manindra Chandra Nundy* v. *Jamahir Kumari* (3), held that it was the Plaintiffs who were bound to satisfy the rent decree.

We are of opinion, however, that the principle laid down in those cases do not apply to the present case. The purchaser in those cases purchased the tenure at a sale held in execution of a decree, other than a decree for rent, and such a purchaser in the absence of anything to denote the contrary must be taken to have purchased it charged with the rent which might be due in respect of it at the time of his purchase. In the present case, the tenure was sold in execution of a decree for arrears of rent, and where a tenure or holding is sold in execution of a decree for its own arrears of rent it passes to the purchaser freed from all liabilities for its previous arrears. See *Faez Rahaman* v. *Ram Sukh Bajpai* (4). See also the case of *Haradhan Chattoraj* v. *Kartik Chandra Chatto-*

(1) 1 C. W. N. 458 (1896).
(2) 6 C. W. N. 794 (1902).
(3) I. L. R. 32 Cal. 643 : s. c. 9 C. W. N. 670 (1905).
(4) I. L. R. 21 Cal. 169 (1893).

padhya (5), in which the purchaser of the tenure purchased it with a notice that it was saddled with liability for previous arrears, and the case of *Faez Rahaman* v. *Ram Sukh* (4) was distinguished on that ground.

We are of opinion that in the absence of anything to denote the contrary, a sale of a tenure held in execution of a decree for its own arrears of rent passes it free from liability for previous arrears. That being so, the Plaintiffs were not in fact liable for the arrears of rent for the period prior to the date of confirmation of sale at which they purchased the *putni*.

The next question for consideration is, what is the effect of the decree in the second rent suit to which the Plaintiffs were parties. At the date of that decree, the sale held in execution of the previous decree (at which the Plaintiffs purchased) had not been confirmed, and proceedings for setting aside that sale were then pending.

The decree is not a well-drawn instrument. It begins apparently by imposing a joint and several liability on the two sets of Defendants (the Plaintiffs and the Defendants in the present suit). No doubt it goes on to say that the tenure shall be sold in the first instance, but it also appears to recognise a primary personal liability on the part of the Defendants in the present suit. It also leaves open the question whether on the sale of the tenure being confirmed any personal liability on the part of the Plaintiff is to arise as from the 5th June, 1906, the date of the sale (in which case the Plaintiffs would be liable for a considerable portion of the arrears covered by that suit July 1905 to March 1907), or as from the 23rd March 1907, the date of the confirmation of the sale.

The case is not free from difficulty, but in our opinion regard being had to the circumstances and especially to the circumstance that the sale was not finally confirmed when the decree was made, the decree does not preclude the Plaintiffs from succeeding in the present suit on the ground that it placed the burden of the debt due to the landlords once for all on the land. That was the ground on which the learned Subordinate Judge dismissed the suit, and no doubt there is something to be said for the conclusion at which he arrived. On the whole, however, as it appears to us, the present suit may be regarded either as a suit for contribution on the footing that the decree in the rent suit treated the Plaintiffs and the Defendants as jointly and severally liable for the arrears claimed or as a suit for the determination of an issue as to the respective liabilities of the Plaintiffs and the Defendants, an issue which was not finally decided between them in the rent suit and which may therefore be legitimately raised in such a suit as the present.

In either of these two views of the nature of the present suit, the Plaintiffs are entitled to succeed.

The Defendants Nos. 39 and 40 in execution of their mortgage decree against the Defendant No. 13 (one of the former *putnidars*) attached his interest in the surplus sale proceeds to the extent of Rs. 472. The Plaintiffs in this Court do not object to the payment of Rs. 472 to the said Defendants Nos. 39 and 40 out of the surplus sale proceeds in the first instance.

The Plaintiffs will accordingly get a decree for Rs. 6,249-2-0 the amount paid by them, to be realised from the sur-

(4) I. L. R. 21 Cal. 169 (1893).
(5) 6 C. W. N. 877 (1902).

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plus sale proceeds of the sale held on the 5th June 1906.

Under the circumstances, each party will bear its own costs in both Courts.

S. C. M. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 325 OF 1915

WITH

RULE NO. 763 OF 1915.

D. CHATTERJEE, J.
BEACHCROFT, J.
1916,
Heard, 7, March.
Judgment, 17, March.

BROJENDRA KUMAR DAS and ors., Defendants, Appellants,
v.
GOBINDA MOHAN DAS and ors., Plaintiffs, Respondents.

Civil Procedure Code (Act V of 1908), Or. I, r. 10, cl. (2)—Scope and effect of, as to powers of Courts in striking off and adding parties—Dismissing suit for non-prosecution, when Plaintiffs compromise with only some of the Defendants—Court if bound to pass a decree embodying the terms of the compromise under Or. XXIII, r. 3—Appeal if lies, when no decree passed—Alternative remedy by way of revision under s. 115, C. P. C., if lies—Erroneous application of section of law, if open to revision under sec. 115, C. P. C.

In a suit for dissolution of partnership and for accounts, the Plaintiffs having received a large sum of money from some of the Defendants, filed a compromise petition and asked for dismissal of the suit. The other Defendants objected to the dismissal of the suit, praying that they might be made Plaintiffs and allowed to continue the suit, and the Plaintiffs, if necessary, might be made Defendants. The Court held that it had no power under the new Civil Procedure Code to make the transposition of parties asked for, and hence dismissed the suit for non-prosecution. The objecting Defendants then asked the Court to draw up a decree, so that they might appeal, but the Court did not draw up any decree.

Held—*That the Court had ample powers under the new Civil Procedure Code to make transposition of parties and it ought to have done that.*

That it was not bound to pass a decree under Or. XXIII, r. 3, and no appeal lies against the order of dismissal.

That the lower Court, having failed to exercise the discretion vested in it under Or. I, r. 10, failed to exercise a jurisdiction vested in it in refusing to make the transposition prayed for, and hence that order is liable to be set aside on revision by the High Court.

KRISHNABAI *v.* SONUBAI (1), EDULJEE *v.* VULLEEBHOY (2) *and* SAIYAD ABDUL HAK *v.* GULAM JILANI (3) *followed.*

This was an appeal preferred against the judgment of Babu R. C. Sen, Subordinate Judge, 1st Court of Barisal of Zillah Backergunj, dated the 3rd of March 1914.

The Plaintiffs, who are some of the Respondents, brought a suit for dissolution of partnership and for accounts in 1909, and in 1914, after receiving a large sum of money from some of the Defendants, who are the remaining Respondents, filed a compromise petition in the lower Court, praying that the suit might be dismissed. Thereupon the other Defendants, who were no parties to the compromise, filed three petitions to the effect that the prayer for dismissal of the suit was intended to injure them and to stifle enquiry into the partnership matters, that they might be transferred to the category of Plaintiffs and allowed to continue the suit after amending the plaint, that their written statements might be treated as parts of the plaint, and that the Plaintiffs might be included in the category of Defendants, if they did not wish

(1) 2 Bom. H. C. R. 310 (1865).
(2) I. L. R. 7 Bom. 167 (1883).
(3) I. L. R. 20 Bom. 677 (1895).

to continue as Plaintiffs. The Subordinate Judge, however, held that the petitions of the objecting Defendants would not be granted chiefly for three reasons: *firstly*, they had claimed adversely to the Plaintiffs and to each other, hence if they were to be allowed to continue the suit as Plaintiffs, it would alter the original character of the suit; *secondly*, the words "the Court may at any time . . . order that any Plaintiff be made a Defendant, or that any Defendant be made a Plaintiff," in sec. 32 of the old Civil Procedure Code, have been omitted from the corresponding section [Or. I, r. 10, cl. (2)] in the new Civil Procedure Code, which signifies that under the new Civil Procedure Code, a Court is not competent to transpose parties; *thirdly*, the objecting Defendants did not want that the Plaintiffs should continue to be in the suit as pro-Defendants, and hence the suit, if continued, would be an altogether new suit against the principal Defendants, in which the present Plaintiffs would have no interest or concern. The Subordinate Judge therefore dismissed the suit for non-prosecution, and rejected the prayers for amendment of plaint, etc.

Thereupon the objecting Defendants preferred an appeal to the High Court and along with the appeal put in a petition under sec. 115, C. P. C., as an alternative measure, to have the Subordinate Judge's orders set aside under the High Court's revisional powers, in case it was held that an appeal did not lie, and obtained a Rule.

The Appeal and the Rule came on for hearing together.

Mr. B. Chuckervarty (with *Babus Upendra Lal Roy, Bhupendra Chandra Guha* and *Jitendra Nath Roy*) for the Appellants and Petitioners.—There are two matters before your Lordships, the Appeal and the Rule. The Appellants had obtained another Rule as to why the appeal should not be registered without a decree or why a decree should not be drawn up in this case. That Rule was, however, discharged on the ground that it was premature at the time, as nobody had till then raised any objection. The Subordinate Judge was wrong in not drawing up a decree. The objecting Defendants had filed a petition before the Subordinate Judge praying that a decree might be drawn up, so that they might appeal from the decree, but the Subordinate Judge refused to draw up any decree. At least under Or. XXIII, r. 3, he ought to have drawn up a decree embodying the terms of the compromise. He refused to draw up a decree wrongly, and I submit, an appeal lies without the decree.

If it be held that an appeal does not lie, then the same relief may be granted by way of revision. There are series of Rulings in which your Lordships have interfered in similar cases. The Subordinate Judge was wrong in thinking that he had no power under the new Civil Procedure Code to make the transposition prayed for. He had ample powers to do so under the new Code. The language of the section in the new Civil Procedure Code is more comprehensive, and the expression quoted by the Subordinate Judge was omitted not because it was intended to take away the Court's powers, but because the words were thought superfluous. He therefore failed to exercise the jurisdiction vested in him by law. The Subordinate Judge is further wrong in saying that the Appellants did not want the Plaintiffs to remain on the record. They specifically prayed that if the Plaintiffs did not like to continue as Plaintiffs they might be included in the category of Defendants. The

Subordinate Judge is also wrong in saying that they claimed adversely to the Plaintiffs and to each other. On the whole they support the Plaintiffs' allegations and are in agreement; they differ, as is inevitable in such cases, only in minor details, which matters very little. The Subordinate Judge is wrong on all the three grounds on which he has dismissed the applications of the Appellants for continuing the suit. It would be a great hardship and misfortune if seven years' labour and expenditure of so many thousands of rupees were to go for nothing, and the Appellants were to commence another suit anew.

Sir Rash Behary Ghosh (with *Babus Bepin Chandra Mullick, Sarat Chandra Dutt* and *Sib Chandra Palit*) for the Respondents and Opposite Party.—As regards the Subordinate Judge's observation that the new Civil Procedure Code does not contemplate transposition of parties, admits that he is wrong there—the omission (of the words about transposition of parties) is not "significant, as the Subordinate Judge says,—it was omitted because it was thought redundant.

The Subordinate Judge was not bound to draw up a decree in this case, and as regards Or. XXIII, r. 3, the Opposite Party, who were no parties to the compromise, had no right to ask for a decree under that order. No appeal lies in this case.

As regards the Rule, the only point for argument is that of jurisdiction. In this case no question of jurisdiction can arise. The Judge might have taken an erroneous view of a section of law, but that is no question of jurisdiction. Hence it is not open to revision.

The JUDGMENT OF THE COURT was as follows:—

D. CHATTERJEE, J.—The Plaintiffs brought the suit giving rise to these proceedings in 1909 for declaration of title to certain shares in a certain partnership business with its branches, for dissolution of the said partnership and for accounts. The suit went on for several years through various vicissitudes of fortune until in March 1914, the Plaintiffs made a compromise with the principal Defendants and on receipt of consideration from them made an application for withdrawing from the suit the said Defendants giving up costs. The petition of compromise stated the nature of the settlement but did not ask for any relief and in fact under the circumstances related no decree was required as the Plaintiffs stated that they had received the value for the rights given up by them under a deed of release.

Upon the said application being made by the Plaintiffs, the Appellants before us, *i.e.*, the Defendants who had not joined in the petition of compromise applied to be made Plaintiffs, to amend the plaint, and to continue the suit as one on their behalf. The learned Subordinate Judge refused their application on the ground that the present Civil Procedure Code did not authorise him to make the transposition asked for, that the applicants had not asked for retaining the original Plaintiffs on the record as Defendants, that there was conflict of interest between the original Plaintiffs and the Appellants, so that it could not be said that the old suit was to be continued. The suit was accordingly dismissed without costs as the objectors did not ask for costs. The Appellants then asked that a decree might be prepared so that they might appeal from the same but the learned Subordinate Judge refused their application saying that no decree was necessary as the suit had been dismissed for want of

*BROJENDRA KUMAR DAS *v.* GOBINDA MOHAN DAS.

prosecution. Against the said order the Appellants filed the above appeal and as an alternative obtained the above Rule.

If the Court below had been bound to make a decree and had not, we might have entertained the appeal.

We find however no reason to differ from the learned Subordinate Judge on this point. The Plaintiffs had settled their differences and received satisfaction out of Court by the execution of separate deeds and intimated to the Court that they would not proceed with the suit.

The Court was not required to give them any relief and the Court could not give them any. It is contended that the Court was bound to pass a decree under Or. XXIII, r. 3. The parties to the compromise, however, which had been effected out of Court did not ask for a decree, and the objectors, who were no parties to the same, could not ask for one, so that the only course left to the Court was to dismiss the suit, as it did, for want of prosecution, unless, of course, it saw its way to continue the suit at the instance of the objectors. There is no appeal against an order of this kind, and the appeal fails. As regard the Rule, it is contended that the learned Judge in refusing to make the transposition of parties and amendment asked for, refused to exercise a jurisdiction vested in him by law. It is true that the provision in S. 32 of Act XIV of 1882 that the Court might make a Plaintiff a Defendant and a Defendant a Plaintiff has been omitted from the present Code, but, I think, it was omitted as redundant as the provision of Or. I, r. 10 (2) for striking out or adding parties is sufficient to cover the case of such a transposition, being, in effect, the striking one party off the side of the suit in which he had been placed and re-adding him on the opposite side.

Such transpositions are frequent in partnership cases : see *Krishnabai* v. *Sonubai* (1) and *Eduljee* v. *Vulleebhoy* (2) and there is nothing in the Code to take away the power of the Court to make orders in that behalf when the circumstances require it. The Court below distinguishes the last case on the ground that the Applicants did not ask the Court to make the original Plaintiffs Defendants. I do not think that the distinction is legitimate because in the first place the original Plaintiffs had parted with all their interest in the partnership in favour of Defendants Nos. 1 to 15 and had therefore no subsisting interest in the suit : see *Saiyad Abdul Hak* v. *Gulam Jilani* (3), and in the second place the Applicants did not say that they did not want to have the original Plaintiffs as Defendants, and the Court had ample power under Or. I, r. 10, to make them Defendants if it thought necessary. The Court below was in error therefore in holding that it was not authorized to make the transposition under the new Code. It is true that the Court had a discretion in the matter and might refuse to make the order in the exercise of that discretion. The learned Judge however thought he had no jurisdiction and cannot therefore be said to have exercised the discretion which he had in the matter, with that consciousness of power and competence which is necessary to strengthen his hands in the use of the discretion. He has made other distinctions also on minor points which can be met by amendments. He has therefore, I think, refused to exercise a jurisdiction vested in him by law. The case of *Eduljee* v. *Vulleebhoy* (2) is exactly in point, and I think the learned Judge should have followed it and allowed the

(1) 2 Bom. H. C. R. 310 (1865).
(2) I. L. R. 7 Bom. 187 (1882).
(3) I. L. R. 20 Bom. 677 (1896).

Appellants to continue the suit which had passed through five years in Court and was ripe for hearing. It is true that the Appellants have subsequently filed an independent suit of their own which is pending but if that suit has to pass through another five years to be ripe for hearing, the proceedings may be endless. I think, therefore, the right order would be to dismiss the appeal as incompetent and to make the Rule absolute, and order the Court below to restore the suit to its file, make the necessary amendments and proceed to trial in accordance with law. No costs.

BEACHCROFT, J.—I agree.

Rule made absolute,

J. N. R. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE No. 4257 OF 1913.

RICHARDSON, J. MULLICK, J. 1915, Heard, 9 and 10, February. Judgment, 10, February.	SRIMATI ABJAN BIBI and ors., Plaintiffs, Appellants *v.* RAHAM ALI and others, Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), secs 49, 85—Under-raiyati lease for a term under nine years, if heritable on death of tenant within term.

A sub-lease granted by a raiyat for a term not exceeding nine years carries with it the ordinary incidents of a lease for a term of years—one of such incidents being that if the lessee dies before the end of the term, his heirs are entitled to succeed him in the tenancy.

MIDNAPORE ZAMINDARY COMPANY *v.* HRISHIKESH GHOSE (1), ARIP MONDAL *v.* RAM RATAN MONDAL (2) *and* JAMINI SUNDARI DASI *v.* RAJENDRA NATH CHAKERBUTTY (3) *referred to.*

This was an appeal from a decree of Babu Jadab Ch. Bhattacharjee, Subordinate Judge, Chittagong, dated the 15th September 1913, reversing a decree of Babu Debendra Ch. Biswas, Munsif, North Rouzan, dated the 30th April 1912.

The facts of the case will appear from the judgment.

Babu D. L. Kastagir for the Appellant.

Moulvi Abdul Jawad for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

RICHARDSON, J.—The Defendants in this suit are the heirs of an under-raiyat to whom the Plaintiffs as raiyats of the holding in which the land in suit is situated, granted, by a written and registered instrument, a lease for a term of nine years. The under-raiyat died some years ago and it has been found that the Defendants have since been in possession of the land leased to them and have been paying rent therefor to the Plaintiffs. The term of nine years have now expired and the suit was brought by the Plaintiffs for the purpose of ejecting the Defendants from the land comprised in the sub-lease. In the first Court the Plaintiffs obtained a decree. That decree was reversed by the learned Subordinate Judge in the Court of Appeal below and the suit was dismissed. The learned Subordinate Judge held that the sub-tenancy granted to the original under-raiyat came to an end with his death, that by the payment by, and acceptance of rent from his heirs, the Defendants created a new tenancy as between them and the Plaintiffs and that the Defendants cannot be ejected unless and until notice to quit has been served upon them in accordance

(1) I. L. R. 41 Cal. 1108: s. c 18 C. W. N. 828 (1914).

(2) I L. R. 31 Cal. 757: s. c. 8 C. W. N. 479 (1904).

(3) 11 C. W. N. 519 (1906).

with cl. (*b*) of sec. 49 of the Bengal Tenancy Act.

The question before us in this second appeal which is preferred by the Plaintiffs, is whether the learned Subordinate Judge was right in the view which he took of the case and of the respective rights of the parties. For the Appellants it has been urged that a raiyat is empowered by sec. 85 of the Bengal Tenancy Act if not expressly, at any rate by necessary implication, to grant to an under-raiyat by means of a written and registered instrument a sub-lease for a term not exceeding nine years. It is further argued that there is nothing in the Act which has the effect of cutting down a sub-lease for such a term to a sub-lease for the term of the under-raiyat's life if he should die before the expiry of the nine years. This reasoning is in some respects analogous to the reasoning adopted by the Full Bench in deciding the case of the *Midnapore Zamindary Company* v. *Hrishikesh Ghose* (1) where the question was whether the holding of a non-occupancy raiyat was or was not heritable. It may fairly be said that there is nothing in the Bengal Tenancy Act which expressly takes away the right of the heirs of an under-raiyat to succeed to the remainder of a term granted by the raiyat within the powers conferred on the latter by sec. 85 and apart from custom or express enactment there is no doubt that a lease for a term devolves upon the heirs of the original lessee. On behalf of the Defendants, the Respondents before us, our attention has been directed to the Full Bench case of *Arip Mondal* v. *Ram Ratan Mondal* (2) and also to the decision of Mr. Justice Mookerjee in *Jamini Sundari Dasi* v. *Rajendra Nath Chakerbutty* (3). Those cases, however, deal with the position which arises upon the death of an under-raiyat who holds under an annual holding or a tenancy from year to year. In such a case, no doubt, the only right which the Full Bench recognises as belonging to the heirs of the under-raiyat upon his death is a right to remain in possession of the land until the end of the then agricultural year for the purpose, if the land has been sublet, of realising the rent which might accrue during the year, or if not sublet, for the purpose of tending and gathering in the crops. The decision of the Full Bench seems, therefore, to deny to the heirs of the under-raiyat under an annual holding any right of succession properly so-called to the tenancy and so the decision was understood by Mr. Justice Mookerjee who observes "It follows from the decision of the Full Bench that the heirs of an under-raiyat under an annual holding do not acquire any interest in his holding by inheritance. That being so, it is contended for the Defendants that there is no real difference between the case of a tenancy for a term of years and the case of a tenancy from year to year, and that if a tenancy of the latter sort is not heritable, a tenancy for a term should also be held to be not heritable. In my opinion, weighing the arguments of both sides, the balance inclines in favour of the view propounded on behalf of the Plaintiffs. It seems to me that inasmuch as under the Act a raiyat is clearly at liberty to grant a sub-lease for a term not exceeding nine years, the lease so granted in the absence of anything to the contrary in the Act, carries with it the ordinary incidents of a lease for a term of years. One of the incidents of such a lease is that if the lessee dies before the end of the term, his heirs are entitled to

(1) I. L. R. 41 Cal. 1103: s. c. 18 C. W. N. 828 (1914).

(2) I. L. R. 31 Cal. 757: s. c. 8 C. W. N. 479 (1904).

(3) 11 C. W. N. 519 (1906).

succeed him in the tenancy. I do not say that there is no force in the arguments pressed upon us on behalf of the Defendants, but as I have said, on the whole, it seems to me that the view suggested on the other side should prevail.

I am therefore of opinion that this appeal should be allowed, the decree of the Subordinate Judge should be set aside, and the decree of the Munsif should be restored.

The Plaintiffs will be entitled to their costs throughout.

MULLICK, J.— I agree.

N. G. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

No. 235 OF 1916.

CHITTY, J.
WALMSLEY, J.
1916,
17, March.

BISHESSUR CHUCKERBUTTY and another, Petitioners.
v.
THE EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 144—Successive orders, propriety of—Revision by High Court of order under section after expiration of two months.

A Magistrate should not by successive orders under sec. 144, Cr. P. C., extend the period of two months prescribed by cl. (5) of the section.

SATISH CHANDRA RAY *v.* EMPEROR (1) *referred to.*

Case in which the High Court set aside an order under sec. 144, Cr. P. C., after the expiration of two months from the date of the order.

This was a Rule granted on the 28th February 1916 against an order of Babu Naba Gopal Chaki, Deputy Magistrate of Faridpur, dated 16th February 1916, making absolute the order of injunction passed under sec. 144, Cr. P. C., for stopping the new *hât* which the petitioners started close to the old one.

The petitioners started a rival *hât* on grounds belonging to themselves in a place called Dhewakhali. The police reported an apprehension of a breach of the peace and the Sudder Sub-divisional Magistrate of Faridpur issued an order under sec. 144, Cr. P. C., directing the closing of the new *hât* which was started within half a mile of the old one. After hearing both parties the Sub-divisional Magistrate made the order absolute. Against this order the petitioners moved the High Court but their application was rejected.

In the meantime the police reported that on receipt of the aforesaid order under sec. 144, Cr. P. C., the petitioners removed the new *hât* to another site and there was likelihood of a breach of the peace. Thereupon before the expiration of the previous order under sec. 144, Cr. P. C., the Sub-divisional Magistrate issued a fresh order under sec. 144, Cr. P. C., for stopping the new *hât*. This order was made on the 13th January 1916. Thereafter, on the 11th February 1916, the Sub-divisional Magistrate started proceedings under sec. 107, Cr. P. C., against some of the petitioners in respect of an apprehension of a breach of the peace relating to the same *hât*. On the 16th February 1916 the Sub-divisional Magistrate made the order of the 13th January absolute and noted in his order the following " put up after two months."

The petitioners moved the High Court and obtained a Rule on the first and third grounds mentioned in their petition, which were as follows :—

(*i*) For that the order is without jurisdiction, it never having been the intention of the legislature to interfere with the exercise of the civil rights of individuals without sufficiently good and strong reasons.

(1) 11 C. W. N. 79 (1906).

BISHESSUR CHUCKERBUTTY *v.* THE EMPEROR.

(*iii*) For that adequate protection being afforded by action under sec. 107, Cr. P. C., against both parties being taken, the order was illegal and uncalled for.

The second ground taken in the petition was—For that it was never the intention of the legislature to permanently interfere with lawful exercise of rights by individuals by repeated injunctions of this nature.

The rule came on for hearing on the 17th March 1916.

Babu Monmotha Nath Mukerjee for the Petitioners.

Babus Dasarathi Sanyal and *Hirendra Nath Ganguly* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

In this case a Rule was issued calling on the District Magistrate to show cause why the order of the Deputy Magistrate passed under sec. 144, Cr. P. C., should not be set aside on grounds Nos. 1 and 3 in the petition mentioned. It would have been more correct had it been based on grounds Nos. 2 and 3. In this case the dispute is with regard to rival *hâts*. The petitioners at the close of last year had started a rival *hât* on grounds belonging to themselves, which the Magistrate thought was likely to lead to a breach of the peace. He accordingly passed an order under sec. 144, Cr. P. C., on 18th December restraining them from holding a *hât* at that spot. This order would have expired on 18th February 1916. The petitioners moved this Court towards the end of January, and we rejected the petition on the ground that the order of the Magistrate was about to expire, and that there was, therefore, no reason for an interference by this Court. This was our chief, if not only, ground for declining to interfere on that occasion. Before that order expired, the Magistrate proceeded to pass orders under the same section with regard to the new *hât*—the site of which the petitioners had shifted to other lands of their own. This order was passed on 13th January 1916 and expired a few days ago. We are asked to interfere with it on the ground that the Magistrate in this case is doing what this Court has held that a Magistrate should not do, namely, by successive orders under sec. 144, Cr. P. C., extending the period of two months which cl. (5) of that section prescribes. That the Magistrate has this object in view is clear from his orders in these cases. In passing the final order making the injunction absolute in this case on 16th February 1916, he noted "put up after two months." It is obvious that the Magistrate thought that his order dated from 16th February 1916, and that two months thereafter he might be in a position to pass a third order under this section. This is clearly improper. We need only refer to the case of *Satish Chandra Ray* v. *Emperor* (1). The Magistrate states that he has already commenced proceedings against both the parties under sec. 107, Cr. P. C. This is obviously the right procedure to adopt : but we are at a loss to understand why the Magistrate thinks that proceedings under that section will take such a long time before final order can be passed. We see no reason why those proceedings should not be expedited, and orders passed immediately, so as to prevent any further difficulties in respect of these rival *hâts*. We think that the present order now under consideration ought not to have been passed, and we accordingly make the Rule absolute and set it aside.

S. C. M. *Rule made absolute.*

(1) 11 C. W. N. 79 (1906).

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREE

No. 547 OF 1913.

AND

ORDER No. 438 OF 1913.

CHAPMAN, J.
ATKINSON, J.
1916,
Heard, 29, 30 & 31, March.
Judgment, 31, March.

BINDESHARI PRASAD, Appellant,
v.
LEKHRAJ SAHU and ors., Respondents.

***Specific Relief Act** (I of 1877), sec. 39—Conveyance executed by accused in consideration of complainant withdrawing prosecution for non-compoundable offence—Suit to set aside such sale deed, if lies—Parties in* pari delicto, *if entitled to declaratory relief—Court's discretion under sec. 39.*

The rule of law in England with regard to illegal contracts is that a Court of Law will not aid persons in enforcing the performance of an illegal contract or assist them to recover back property which they have given away under such an illegal contract when the persons and parties to the contract are themselves pari delicto *in procuring this illegality.*

The Courts of equity in England have always refused to afford equitable relief in enforcing a contract void in law or restoring property which is based on an illegal contract where the illegality is apparent on the face of the document itself.

The principle on which Courts of law and equity have refused to restore property given away under an illegal agreement, is equally applicable when the relief prayed for is by way of a declaration, after the party seeking such relief has secured to himself the benefit of the agreement.

Sec. 39 of the Specific Relief Act in allowing relief to be granted in a proper and fit case, even when a contract out of which the right springs is void, leaves it entirely in the discretion of the Court to exercise the jurisdiction so conferred upon it.

Where L, B's agent, having purchased property, B alleged that it was purchased by L as B's trustee whilst L claimed to have purchased it in his own right, and the dispute culminated in civil actions brought by the parties against each other, and in B instituting criminal proceedings against L under secs. 408, 477 of the Indian Penal Code, but at the instance of arbitrators appointed by mutual consent, the disputes were settled and B withdrew the criminal and other proceedings against L and in consideration thereof L inter alia *executed a sale-deed of the property purchased by him :*

Held, *in a suit by L to have the conveyance declared void and the sale set aside and cancelled, that the whole of the contract was illegal, as it was not possible to sever the legal from the illegal part.*

That there being no evidence that there was any undue influence, fraud or duress or that the Plaintiff took a more innocent part in the illegal compromise than the Defendant, the Court would not grant relief under sec. 39 of the Specific Relief Act.

These were appeals preferred against the decree and order of Rai Rakhal Chunder Bose Bahadur, First Subordinate Judge of Gya, dated the 30th July 1913.

The facts out of which Appeal No. 547 arises are that Plaintiff No. 1 is the father of Plaintiffs Nos. 2 and 3 and the Plaintiffs Nos. 4 and 5 are the minor sons of Plaintiff No. 2 and grandsons of Plaintiff No. 1. The Defendant Bindeshari Prasad had two firms of shellac business, one in Calcutta and the other at Raniganj. The Plaintiff No. 1 was one of the *gomastas* of the Defendant's firm at Calcutta until May

1911 and the Plaintiff No. 2 was one of the Defendant's *gomastas* at Raniganj up to April 1911. Plaintiff No. 3 is a blind boy, son of Plaintiff No. 1 and a member of joint Hindu Mitakshara family. The three properties scheduled to the plaint were claimed as the joint properties of the Plaintiffs who constitute a joint Hindu family governed by the Mitakshara Law. The Defendant had acquired by purchase two annas share in Mauzah Tadwan (property No. 1) in the plaint. The Plaintiffs had also acquired by purchase six annas six pies proprietary interest and a three annas share in *ticca* right under another co-sharer. The Defendant alleged that these interests were acquired by Plaintiffs *benami* for him.

The relation between the Defendant and the Plaintiffs Nos. 1 and 2 having become strained on account of their refusal to part with their share in property No. 1 and property No. 2 (which is a house in Calcutta) to the Defendant who alleged that they really belonged to him. The Plaintiffs served a notice on the Defendant and other co-sharers for a partition of their respective shares in village Tandwan and subsequently brought a suit for partition in the Court of the Subordinate Judge at Hazaribagh.

In consequence of this suit the Defendant, it was alleged, became displeased with the Plaintiffs Nos. 1 and 2 and refused to pay their salaries and the moneys deposited in his firms by the Plaintiffs Nos. 1 to 3. The Plaintiffs Nos. 1 and 2 thereupon brought suits for their salaries and the Plaintiffs Nos. 1 to 3 for the money deposited in Defendant's firms in the Subordinate Judge's Court at Gya and in the Court of the First Munsif, Gya, which was subsequently transferred to the Subordinate Judge's Court.

As against the Defendant it was further alleged that in order to compel the Plaintiffs to forego their claims in the money suits and to force them to convey to him the properties Nos. 1 and 2 without any consideration, the Defendant brought two false criminal cases under sec. 408 (criminal breach of trust by Defendant) and sec. 477 (falsification of accounts), I. P. C., against the Plaintiffs Nos. 1 and 2 in the Court of the Presidency Magistrate, Calcutta, and an account suit in the Original Side of the Calcutta High Court, claiming one lakh of rupees against Defendant No. 1. Subsequently on 18th October 1911 through the intervention of some mutual friends a *chitti* was signed by the Plaintiff No. 1 laying down certain terms of compromise set out in the judgment of Atkinson, J. The Defendant on the 26th of October 1911 filed application under Or. 22, r.3, C. P. C. in the Plaintiff's money suits pending against him in the Subordinate Judge's Court, Gya, alleging that the suit had been compromised but the application was opposed by the Plaintiffs Nos. 1 to 3. The money suits were dismissed for want of prosecution on 22nd November 1911, and the aplication under Or. 22, r. 3, could not be disposed of. Then on 7th January 1912, it was alleged that while the Plaintiff No. 1 was in fear and mental distress in consequence of criminal cases, the Defendant got a *kobala* or conveyance in respect of the three properties in suit executed by the Plaintiff No. 1 in his favour in consideration of withdrawing the criminal prosecution and the account suit. The Defendant then withdrew the criminal cases but not the account suit pending in the High Court. The Plaintiffs alleged that they were yet in possession of the properties in suit, the *kobala* not having been delivered to the Defendant. They contended that the *kobala* was null and void and inoperative

against the Plaintiffs inasmuch as it was caused to be executed by undue influence and fraud and as its consideration was to stifle prosecution for non-compoundable offences. This suit was instituted on 9th March 1912.

The defence *inter alia* was that the properties included in the *kobala* really belonged to the Defendant and they were merely purchased in the *benami* of the Plaintiff. That mutual friends intervened when the parties were litigating both in the Civil and Criminal Courts and in pursuance thereof the *chitti* was signed by the Defendant who was the *karta* of the joint Hindu family on 18th October 1911. That subsequently when the Plaintiffs refused to carry on the terms of the *chitti*, there was another submission to arbitration on 28th December 1911 and the arbitrators gave their award on 29th December 1911. That in pursuance of the said award the Plaintiff No. 1 executed the *kobala* in question on 7th January 1912 and that it was a perfectly valid *kobala* and for good and valid consideration.

The facts out of which Appeal No. 438 arises are that Bindeshari Prasad made an application under rr. 20 and 21 of the Second Schedule of the Civil Procedure Code on 24th April 1912 praying that the award given by the arbitrators on 29th December 1911 might be filed and that a judgment and decree might be passed in accordance with the award. Lekhraj Sahu and others opposed the application on the ground that the award was illegal and could not be legally enforced and that the submission to the arbitration was made under pressure and undue influence and that they had no independent and free hand in the matter.

The Subordinate Judge before whom the two cases came on for hearing held that the award was illegal and void and further held that the consideration for the *kobala* being to stifle non-compoundable criminal cases, was illegal and void *ab initio*.

Thereupon Bindeshari Prasad preferred the above two appeals.

Mr. Hassan Imam (with *Moulvi Mustafa Khan*) appeared for the Appellant. The case of *Majibar Rahman* v. *Muktashed Hossein* (1) is clearly distinguishable as the Plaintiff there wanted to enforce a mortgage-bond, the consideration of which was to compound a non-compoundable offence. Here the offence has already been committed, both sides have reaped the profit, so the Plaintiffs are not entitled to succeed. Refers to *Ram Sarup* v. *Bela* (8). Sec. 25 of the Transfer of Property Act. *Ayerst* v. *Jenkins* (9). Sec. 23, Contract Act, illus. (*b*) is not applicable. Refers to sec. 24, Contract Act. Pomeroy on Equity (3rd Ed.), pp. 663, 664 and 666. Broom's Legal Maxims, p. 561.

[CHAPMAN, J.—Refers to *Kearley* v. *Thomson* (6)].

Dr. Banerjee's Specific Relief Act, pp. 585, 587 and 588. Every agreement of which object is illegal is void.

[ATKINSON, J.—*Herman* v. *Jeuchner* (10)].

Here both agreed to do something which is illegal and that has been completed, so the Plaintiffs cannot get any relief. *Taylor* v. *Chester* (5) and *Ayerst* v. *Jenkins* (9). Further here the consideration was also legal—reads the *kobala*.

Messrs. Kulwant Sahai and *Atul Krishna Roy* for the Respondent.—Referred to

(1) I. L. R. 40 Cal. 113 : s c. 16 C. W N. 854 (1912).
(5) L. R 4 Q. B. 309 (1869).
(6 24 Q. R. D. 742 (1890).
(8) I L. R 6 All. 318 (883.
(9) L. R. 16 Eq. 275 (1873).
(10) L. R. 15 Q. B. D. 561 (1885).

Broom's Legal Maxims, p. 564, and Dr. Banerjee's Law of Specific Relief, p. 585, and to the case of *Thasi Muthukanun* v. *Shunmuga Velu Pillai* (4) in which *Ayerst* v. *Jenkins* (9) was distinguished. *Srirangachariar* v. *Ramasami* (2) and *Majibar Rahaman v. Muktashed* (1). Read secs. 23 and 32, Contract Act and sec. 6, Transfer of Property Act.

Mr. Imam in reply: referred to sec. 42, Specific Relief Act. Sec. 29 of the Specific Relief Act does not apply. Sec. 34 of the Transfer of Property Act is applicable.

The JUDGMENT OF THE COURT was as follows:—

ATKINSON, J.:—This case has been very ably argued on both sides and we have made up our minds and arrived at a very clear conclusion on the facts and the law.

The Plaintiff in this suit is Lekhraj, and he and his two sons are joint Plaintiffs with him, and Bindeshari Prasad is the Defendant in the action No. 547 of 1913, and this action is brought claiming the specific relief that the deed of the 7th January 1912 may be cancelled and declared null and void. The date of the institution of this suit is the 9th March 1912. I may here incidentally mention that after this suit was instituted, Bindeshari Prasad instituted an action against Lekhraj entitled No. 438 of 1913 to have the award of the 29th December 1911 filed and judgment passed thereon. I do not think it is necessary to go into the details of the history of the family more than to say that Bindeshari Prasad and his family had a partition of their joint property; and their joint interests in the firms in which they carried on business at Calcutta and Ranigunj became severed. From the year 1901 up to 1906 when the partition took place, he and his father, his uncle and his two cousins owned and carried on a joint business at Ranigunj and Calcutta. Apart from the joint property Bindeshari Prasad also had an independent business of his own and the way in which he came in contact with the Plaintiff Lekhraj and his son Mahabir was that they both entered into the employment of the joint firms, in or about the year 1901 so far as Lekhraj was concerned, and in 1903 so far as Mahabir was concerned. Lekhraj was the agent and manager of the firm in Calcutta; and Mahabir was the agent and manager at Ranigunj. Things went on quietly until after the partition. After the partition in 1906 or January 1907, Lekhraj and his son remained in the employment of Bindeshari Prasad, one acting as foreman or manager at Calcutta and the other at Ranigunj. For a few years after 1906 the Plaintiff and his son seem to have got on amicably with their employer Bindeshari Prasad, and it was not until the year 1911 that any form of dispute, so far as we know, arose between them. The cause and origin of the dispute that did arise and develop in June 1911 appears to have arisen out of the acquisition of 6½ annas share in the village Tandwa. In or about November 1909 Bindeshari Prasad purchased a two annas interest in that village and on the same day Lekhraj purchased a three annas share; and subsequently in February 1910 Lekhraj purchased a further share of 1½ annas share or interest and in December 1910 another two annas, making an entire acquisition of interest by Lekhraj in that village of 6½ annas which represented in capital money Rs. 12,000 in value. It is said, and great

(1) I. L. R. 40 Cal. 113: s. c. 16 C. W. N. 854 (1912).
(2) I. L. R. 18 Mad. 189 (1894).
(4) I. L. R. 28 Mad. 413 (1905).
(9) L. R. 16 Eq. 275 (1873).

emphasis is laid upon this fact, that this property purchased by Lekhraj was for himself as the true and lawful owner thereof; but if he was merely a trustee for Bindeshari Prasad why should Bindeshari Prasad on the same day have purchased a two annas share and Lekhraj a three annas share. However, after the completion of this purchase, culminating in December 1910, friction arose, and undoubtedly the friction which arose is manifest from the Plaintiff's own plaint by reason of the claim which Bideshari Prasad was making to the 6½ annas interest in this village; and from that dispute has followed this subsequent litigation. Lekhraj contended that this 6½ annas share was his and formed part of his joint family property. Bindeshari was equally strenuous in contending that Lekhraj was but his agent or trustee. In June 1911 we have Lekhraj joining issue as to this dispute by serving notice on Bindeshari Prasad that he required a partition of this village. But whether immediately before or immediately after the service of that notice the relationship of master and servant, existing between Bindeshari and Lekhraj and Mahabir, was terminated, whether by dismissal or by escape, does not appear clear. Immediately following this rupture between the Plaintiff and the Defendant, Lekhraj instituted a suit for the partition of this village. I may mention that the son Mahabir acquired in the village an interest under a lease or *ticca* some three annas share, but this share is in no way concerned in the dispute in this case. Not content with the partition suit, Lekhraj then files or institutes two other actions against Bindeshari Prasad in July 1911, one for arrears of salary alleged to be due by Bindeshari Prasad to him; and another action by his son, claiming the same relief. Lekhraj's action came on for hearing and was dismissed on the 12th September 1911. The fate of Mahabir's action for wages due seems never to have been finally determined, and, in the same month, July 1911, Lekhraj institutes an action jointly with Mahabir and his other son (a blind boy who does not appear in this case otherwise than as a joint proprietor) against Bindeshari Prasad to recover money alleged to have been deposited with him. Bindeshari institutes by way of reply to these acts of hostility, and I suppose malice, proceedings against Lekhraj under secs. 408 and 477, Indian Penal Code in the month of September 1911; and about a couple of days later he institutes a further suit in the High Court of Calcutta claiming an account on the ground that Lekhraj and his son were defaulting agents and liable to account.

This was the condition of things in the month of October 1911 and it was quite certain then that there was a vista of litigation opening up between these persons, Lekhraj and his sons on the one hand, and Bindeshari Prasad on the other. The friends of both jointly met and endeavoured to induce the parties amicably to come to terms and settle their differences. This the Plaintiffs and Defendant agreed to do; and as a result of their agreement, a document, agreement or *chitti* as it is generally called, was drawn up bearing the date 18th October 1911. That document summarised shortly, is to this effect. In consideration of Bindeshari Prasad withdrawing the civil action for account in the High Court and the two criminal charges against Lekhraj, that he, Lekhraj, in return, would give up his 6½ annas interest in the village of Tandwa; he would also transfer to Bindeshari an orchard of some small extent, and a house which he owned in

Calcutta, and that he would pay in money, the sum of Rs. 5,200 and would discontinue all actions and proceedings which he had instituted against Bindeshari. The consideration for this agreement is shown clearly, and the main consideration, as it appears from the document, was the abandonment of the proceedings under secs. 408 and 477, Indian Penal Code. The offences charged under these sections were the falsification of accounts and criminal breach of trust, neither of these offences being of a compoundable character as defined in the Indian Penal Code itself. Lekhraj, so far as I can trace from the document, never objected to any of the provisions contained in the agreement of the 18th October 1911. It does appear that in one action which he brought against Bindeshari, Bindeshari on the 26th October 1911, relying upon this agreement or contract, applied to have the proceedings against him at the suit of Lekhraj stayed on the ground that the matter of the dispute between them was at an end, and that Lekhraj appeared and applied under r. 3, Or. XXIII to resist this application for the determination of that suit. This is the only act that has been suggested as a repudiation of the terms of the agreement of the 18th October 1911, by Lekhraj, and in my opinion no such act in itself involved any repudiation of that agreement. Matters remained at rest, the parties were at peace, practically no step was taken, nothing actively was done between the 18th October 1911 and December 1911, but undoubtedly during that period of time there was a discussion going on as to whether if Lekhraj paid the money which he had agreed to pay to Bindeshari Prasad, that would exonerate him and his sons from all liability to the cousins of Bindeshari who had an interest in being reimbursed in respect of their share of any money that had been taken during the joint ownership of the two businesses prior to the partition which would cover the period between 1901 and 1906. That claim had been recognised and it was in order to provide a remedy for Lekhraj that the matter was referred to arbitration. Each party selected his arbitrators, it was clear as to what they were to do and the award was clear as to what they did. They were asked to do no more than to ascertain what would be a fair share or proportion of the money paid to Bindeshari by Lekhraj under the agreement of the 18th October 1911, that he should pay to his cousins as representing the loss which he had sustained, while the joint business was being carried on. The arbitrators found that that sum ought to be measured at Rs, 2,000, and they accordingly so awarded; and in the award of the 29th December 1911 they incorporated the antecedent agreement of the 18th October 1911 and they varied none of its terms otherwise than I have stated. Then in considering the award which was made between the parties one has to read the three documents together, *viz.*, the document dated the 18th October 1911, the reference dated the 28th December 1911, and the final award of the 29th December 1911. Lekhraj acquiesced in that submission and award, he apparently having been advised throughout the negotiations leading thereto by his solicitors and by a pleader. Lekhraj took every benefit that was conferred upon him by the award. I can find no document throughout the case which would directly or indirectly suggest that he was induced to enter into that compromise by duress, undue influence or by fraud. Finally on the 7th January 1912, in the performance of the compromise, he executes a conveyance

to Bindeshari Prasad assigning to him *eo-nominee* three denominations of land which I have already mentioned, but the important one being the 6½ annas interest in the village of Tandwa. That document is a very full and elaborate one. It was drawn up by a pleader at the express invitation, as I gather, of Lekhraj himself, and it contains step by step each incident of the litigation culminating in the arbitration and the award of the 29th December 1911 and negatives by its terms the suggestion of undue influence or duress. By this conveyance of the 7th January 1912 Lekhraj fully and freely assigns possession of this property to Bindeshari and towards the end of the document a condition is inserted in the deed that the deed is not to come into force until all the proceedings have been withdrawn and that if the proceedings were not withdrawn the property was then to revert to him, Lekhraj, in as full a manner as he had prior enjoyment thereof; and that pending the withdrawal of all proceedings, civil and criminal, he was to retain possession of the title deeds, and he deposits the receipt of this indenture which was duly registered with his arbitrator Kokil and requests him not to deliver it to Bindeshari until all the conditions provided by the agreement had been satisfied. Kokil, to whom the deed of conveyance was given to be handed over to Bindeshari Prasad on the fulfilment of the two conditions necessary to be performed by him, is since dead, but he told the witness Lalji Ram that he had heard from Lekhraj that the High Court suit had been withdrawn and that the deed might therefore be handed over to Bindeshari Prasad. This was probably early in February. This evidence is not contradicted and thus it appears that Kokil, Lekhraj's arbitrator, handed over the deed of conveyance of the 7th January 1912 to Bindeshari Prasad at the request of Lekhraj and this is how the deed comes now to be in the possession of the Defendant.

Now this action seeks to have that deed set aside and asks us, in the exercise of our equitable jurisdiction, to cancel it. The grounds put forward for asking us to exercise our jurisdiction are—

(1) that Lekhraj was induced by facts amounting to fraud, undue influence and duress, practised and exercised upon him by Bindeshari, to execute that conveyance;

(2) further inasmuch as the contract between the parties was for an illegal consideration it was not binding on him and that therefore to avoid any doubt being cast upon his title the deed of the 7th January 1912 should be cancelled and declared a nullity.

On the 30th January 1912, criminal proceedings were entirely discontinued (the record speaks for itself) and shows that the cases against Lekhraj were withdrawn and he was acquitted of the charge, and the order made by the Magistrate was made with the consent of the parties themselves who apparently were present. Steps were also taken to withdraw the High Court action for an account, the only remaining thing which Bindeshari had to do. Correspondence was entered into between the solicitors of both parties, four or five letters were written. On the 30th January 1912 and 2nd February1912 the draft form of petition for withdrawal of the High Court proceedings were approved of by the solicitors on behalf of Lekhraj and Bindeshari and there was no earthly reason why that petition should not have been filed and the proceedings dismissed and that litigation terminated. But apparently nothing was done and suddenly the parties take into their head

in the month of May to revive the question of this petition and then Lekhraj acting through his solicitors, writes on the 20th June 1912 that, having regard to the events that happened, he declined to give his consent to the withdrawal of the High Court action, the withdrawal of that action having been a condition named by him for the delivery of the deed and it being an essential term of the compromise arrived at between the parties. What happened in the meantime: On the 9th March 1912, Lekhraj embarks upon this action with his sons and I have indicated the relief he seeks. Bindeshari starts the alternative action for the enforcement of the award; but as Mr. Hassan Imam fairly admitted there was very little substance in that claim. The main issue in this case lies in the action instituted by Lekhraj against Bindeshari in Appeal No. 547 of 1913. Three issues appear to us to arise for determination.

(1) Was the purchase of this 6½ annas interest in this village by Lekhraj made by him as a *benamidar* of Bindeshari?

(2) Who provided the purchase money for the payment of Rs.12000 as the purchase price of this interest, and

(3) The most important of all, are Lekhraj and his co-Plaintiffs now entitled to have this deed delivered up and under our order cancelled. In other words has he come into Court and shown us clearly that having secured the benefit provided for him under the illegal contract we ought to cancel this deed in his favour. We have considered very carefully the first two issues which arise for consideration, namely, as to who is the owner and purchaser of the 6½ annas interest and whose money paid for it? The facts as regards both these issues are very conflicting and give us much cause for hesitation and doubt; but acting on the well-recognised principle that Judges on appeal, even though they may have control on questions of fact, should be slow to reverse the finding of a Judge of first instance who has seen and heard the witnesses examined before him and who, by reason of this fact, is probably better able to come to a right conclusion, therefore though we ourselves, had we been judges in the first instance as to the facts, might have come to a different conclusion, we do not feel justified in disturbing the finding of the learned Subordinate Judge on the first two issues I have mentioned.

Now as to the third issue in this case, we have no doubt what our decision should be. The three documents comprising the award in this case clearly show that the consideration on which the agreement was based was illegal, inasmuch as the consideration was that criminal offences, being of a non-compoundable character, should be compounded. The case of *Mojibar Rahaman* v. *Muktashad Hussein* (1), with which we entirely concur, establishes that any contract founded on such illegal consideration is wholly void. If any part of the consideration supporting a contract is void, it taints the whole contract with illegality; and even though a part of the consideration may be legal yet you cannot sever the legal from the illegal; the taint of illegality vitiates the entire contract. In our opinion the contract in this case was founded upon an illegal consideration being the withdrawal of criminal charges which could not be compounded; and we reject as untenable the argument of Mr. Hassan Imam founded on sec. 70 of the Code of Criminal Procedure for the purpose of showing that the consideration supporting this contract was legal and not illegal. We have been

(1) I. L. R. 40 C. 1, 118: s. c. 16 C. W. N. 854 (1912).

referred by Mr. Sahai to *Shriranga-chariar* v. *Ramasamiayyangar* (2), resembling in many respects the facts of this case, but we do not think the principle, enunciated in that case, is sound, or that it should be followed. The rule of law with regard to illegal contracts is that a Court of law will not aid persons in enforcing the performance of an illegal contract or assist them to recover back property which they have given away under such an illegal contract, when the persons and parties to the contract are themselves *pari delicto* in procuring this illegality. The Courts of Equity in England have always refused to afford equitable relief in enforcing a contract void in law or restoring property which is based on an illegal contract where the illegality is apparent on the face of the document itself. *Simpson* v. *Lord Howden* (3), illustrates this principle. Mr. Sahai contends, however, that Lekhraj is really not in *pari delicto* with Bindeshari Prasad in procuring the contract in this case, because he says that Lekhraj was induced to enter into the contract with Bindeshari Prasad through duress and undue influence and fear. In answer to that argument we can only say that we cannot find a trace nor a scintilla of evidence to justify the assertion that, in doing what Lekhraj did, he acted under any undue influence, compulsion, duress or fear alleged to have been practised upon him by Bindeshari Prasad. To our mind undue influence is conspicuous by its absence. The onus is upon Lekhraj to establish undue influence as a fact and this he has not done. Therefore Lekhraj in our opinion was in *pari delicto* with Bindeshari Prasad in procuring the illegal contract in this case. Mr. Sahai's second argument is, that if the contract out of which this deed springs be void, the deed itself is void, and therefore he invokes our aid to have it cancelled. We think that there can be no distinction in principle between granting relief by way of a declaration and that by which Courts of law and equity have refused to restore property given away under an illegal contract or to enforce the obligations created under an illegal agreement. Therefore if there were nothing further in the case we think that according to the principles of English equity the Court should refuse to grant the relief by way of declaration sought in this case; leaving it to both parties to suffer the outcome of their joint wrong, and that neither ought to be assisted against the other under the equitable jurisdiction of this Court. However it has been pointed out to us that under sec. 39 of the Specific Relief Act, according to Indian Law, relief can in a proper and fit case, be given effect to, even when a contract out of which the right springs is void. But that section leaves it entirely to the discretion of the Court to exercise the jurisdiction so conferred upon it. We see nothing in this case which should or ought to induce us to grant the relief claimed in this action under sec. 39. The case of *Thasi Muthu Kannu* v. *Shummugavalu* (4), has no application to the present case before us inasmuch as the basis of the decision in that case was the fact that undue influence had been practised upon the donor of the gift in that case, and that consequently he was not a free agent or in *pari delicto* with the other party to the gift. For these reasons we think that the judgment of the learned Subordinate Judge in this case must be reversed and that the decree in the action No. 437 of 1913 should be dismissed with

(2) I. L. R. 18 Mad. 189 (1894).
(3) 3 Myl. & Cr. 97 (1807).
(4) I. L. R. 28 Mad. 413 (1905).

THE

Calcutta Weekly Notes.

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REPORTS (*See* Index).

Proposed Amendment of the Government of India (Consolidation) Act.

The following announcement, dated the 8th May, has recently appeared in the papers —

The House of Lords to-day passed the first reading of the Bill supplementing the India Consolidation Act of 1915 • The most important provisions are the following Cl 2 provides for insertion in sec 84 of last year's Act, after the words "Governor-General in Legislative Council" the words "or a local legislature" and at the end of the section the words "Or (d) in case of any law, because it bars the right to sue the Secretary of State in Council in particular cases or classes of cases" Cl 3 provides that the Viceroy with the approval of the Secretary of State may declare eligible for appointment to any civil or military office to which a native of British India may be appointed the ruler or subjects of any State in India, the subjects of any State in territory adjacent to India or members of any independent race or tribe in territory adjacent to India Cl. 4 provides that the admission to the Indian Civil Service of British subjects who or whose parents were not born in His Majesty's Dominions shall be subject to such restrictions as the Secretary of State with the advice of the Civil Service Commissioners may prescribe—"Reuter."

Sec. 84 of the Act, which is sought to be amended, appears under the heading "Validity of Indian Laws" and is in the following terms :—

"A law made by any authority in British India shall not be deemed invalid solely on account of any one or more of the following reasons :—

(*a*) in the case of a law made by the Governor-General in Legislative Council, because it affects the prerogative of the Crown,

(*b*) in the case of any law, because the requisite proportion of members not holding office under the Crown in India was not complete at the date of its introduction into the Council or its enactment, or

(*c*) in the case of a law made by a local legislature, because it confers on Magistrates, being Justices of the Peace, the same jurisdiction over European British subjects as that Legislature by Acts duly made, could lawfully confer on Magistrates in the exercise of authority over other British subjects in the like cases

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The effect of the amendment *inter alia* will be to authorise the Indian Legislatures to take away from private persons the right to sue the Government of India in respect of any matter concerning which a suit could have been instituted against the East India Company, a right which was secured to them by sec. 65 of the Government of India Act of 1858 and which, it was provided by sec 22 of the India Council Act of 1861, could not be taken away by any legislation by the Governor-General in Council or by any of the subordinate local legislatures. In *The Secretary of State for India in Council* v. *J. Moment*, 17 C W N 169 (1912), the power of the Indian Legislatures to take away this right to sue the Secretary of State was discussed before the Judicial Committee of the Privy Council in connection with a provision of sec. 41, cl. (*b*), Burma Act IV of 1898, which provided that "No Civil Court shall have jurisdiction to determine any claim to any right over land as against the Government" and their Lordships upon an exhaustive examination of the law came to the conclusion that the provision in question was *ultra vires* of the Legislature

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When the above decision of the Judicial Committee was announced, a great deal was heard about the embarrassment to which Government in this country was put by this stringent limitation on its power of legislation and of the ex-

treme necessity in the interest of administrative efficiency of arming the Indian Legislatures with power, whenever it might deem expedient, of putting the Government of India outside the jurisdiction of Courts of Law. But although more than three years have elapsed since the announcement of the decision, and although the liability of the Government of India to be sued has existed ever since the Government of this country passed into the hands of the East India Company, we are not aware of any occasion except the one referred to where the question of the necessity of modifying the liability was ever raised or found necessary to be raised even as an abstract question. As regards this particular instance, also, it is to be observed, that considering the wide terms in which the provision of the Burma Act was couched, it would, even if found valid, have been regarded as a confiscatory measure for the repeal of which by a pronouncement of the Judicial Committee, no reasonable person even amongst officials need have felt at all sorry.

We cannot help remarking, therefore, not only that the amendment is unnecessary, but that it is also retrograde. It is hardly to be expected, however, that anybody in Parliament will, in these times, do anything to secure its rejection. Nor is it more likely that any one will propose any modification of the amendment which would place this power under reasonable restrictions and safeguard the rights of private individuals. In the event of the amendment passing into law, it will be for the members of Legislative Councils here to keep a careful watch upon all legislation having any tendency to restrict the subject's right of action against the State—a most valuable constitutional privilege. We would draw particular attention, of those interested in the matter, to the recent Privy Council judgment in *The Eastern Trust Company* v. *McKenzie Mann Co., Ld.*, 20 C. W. N. 457, which shows that whilst in England and the Colonies, people are striving to obtain a right of action against the Crown in derogation of the Crown's ancient prerogative not to be made a party defendant in its own Courts, this valuable right already secured to India by Parliamentary Statute is about to be taken away without a hearing.

Review.

THE HINDU LAW OF ADOPTION (Tagore Law Lectures for 1888). *By Golap Chandra Sarkar Sastri, M.A., B.L. Edited by Rishendra Nath Sarkar, M.A., B.L., Vakil, High Court, Calcutta. Second Edition, Calcutta. Published by R. Cambray & Co. 9, Hastings Street, 1916.*

Besides supplying the profession with a new edition of a valuable text-book on an important branch of Hindu Law, the editor has performed a filial duty in giving the final touches to and seeing through the press the materials for the present edition, which the author himself had got ready for publication before his death and had indeed sent to the press as early as 1909. The body of the lectures as originally delivered has not been interfered with, but references to cases since decided added in the notes, and fresh discussions necessitated by such decisions or discovery of fresh materials from text-books embodied in addenda appended at the end of the lectures. The addenda bring out a trait of the late author's character which all who knew him, will appreciate, *viz.*, that strongly as he held to opinions advocated by him on controversial topics, no one was more ready to acknowledge proved errors. In the addenda to Lecture X for instance (Effect of adoption on the status and inheritance of the adoptee) the author writes "The view expressed in these lectures that there is no authority for maintaining adoption to be tantamount to civil death is erroneous (Manu Chap. IX, Sloka 142). . . . The mistake crept in because the last four lectures were prepared in haste in order to conform to the directions of the founder of the Tagore Law Professorship to publish the lectures within six months of the delivery of the lectures. The oversight and error were brought to my notice . . . by a junior vakil of the Calcutta High Court who was requested by a pundit to draw my attention to the texts of Manu."

This posthumous edition of the work very appropriately bears a portrait of the late author, who, it appears from the dates noted there, had just completed a month over 69 years when he passed away.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before LORDS JUSTICES SWINFEN EADY, PICKFORD and BANKES. *Cox* v. *Coulson.* 31st March 1916.

A theatre-goer injured by an actor during the

performance—Principles governing the liability of the manager of the theatre discussed.

The Plaintiff took a seat in a theatre. During the performance an actor discharged a pistol which by some unexplained accident contained a cartridge, and the result was that the Plaintiff was injured in the wrist. The Plaintiff sued the Defendant, who was the lessee and manager of the theatre.

The actors, however, were not the servants of the Defendant, and the question raised was whether the Defendant was liable for the accident, and if so, upon what ground. The County Court held that the Defendant was liable. On appeal Mr. Justice Bailhache was of opinion that the County Court Judge was right, but Mr. Justice Shearman took the contrary view. The Court ordered a new trial. In the course of his Judgment Lord Justice Swinfen Eady said :—

The sole question is whether the Defendant is legally liable for the accident, and, if so, upon what ground. The actor who discharged the pistol was not a servant or employee of the Defendant, so the latter cannot be liable upon that ground. Nor can the Defendant be fixed with liability on the ground of being a joint adventurer with Mill. Although the gross takings were divided between them, there was not any partnership; each had to discharge his own separate liabilities in respect of the venture. One of them might have made a profit out of the venture, and the other might have made a loss. Neither had authority to bind the other in any way; there was no agency between them. The sharing of gross returns does not of itself create a partnership. (See the Partnership Act, 1890, sec. 2, sub-sec. 2.)

If the Defendant is under any liability it must arise out of the contract which was made when, having held out by means of the playbill an invitation to his theatre, he issued a ticket to the Plaintiff and received her 9d. The contract, whatever its implied terms may be, was made between the Defendant and the Plaintiff, as the Defendant received the takings from the persons paying and issued the tickets to them. The Defendant must be taken to have agreed that the play described in the playbill would be produced, and that a person paying for a ticket would be permitted to enter the theatre and witness the performance, and remain there until the performance concluded, behaving properly and complying with the rules of the management—*Hurst* v. *Picture Theatres (Limited)* [(1915) 1 K. B., p. 1]. The Defendant must also be taken to have contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner and with reasonable care—*Francis* v. *Cockrell* (L. R., 5 Q. B., 185) and *Norman* v. *Great Western Railway* [(1915), 1 K. B., 584].

The Defendant does not absolutely warrant the security of his premises—*Redhead* v. *Midland Railway* (L. R., 5 Q. B., 385). He does, however, warrant, not only that there shall be due care on the part of himself and his servants, but also that there shall be due care on the part of any independent contractor who may have been employed by him in the construction or repair of the premises. The principle is that where a legal duty is incumbent on a person, that duty is not discharged by employing a contractor who imperfectly performs it. This, however, only deals with the premises, and the accident did not happen through any defect in the premises.

Is there, then, to be implied, in the contract between the Plaintiff and the Defendant, any term with regard to the play, apart from the premises in which the play is to be performed? The play involved the use of firearms, and according to the evidence included a scene in which a wireless station was defended against an enemy; the performers were dressed as soldiers, and were shooting with revolvers. Such a scene properly performed, and without negligence, would be free from danger, but injury would be likely to result from it unless care was taken in loading and using the firearms.

The County Court Judge held that it was an implied term of the contract between the Defendant and the playgoer that all persons connected with the performance of the play should exercise reasonable care, so that the members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care. In my opinion this is too wide, and there is no authority and no principle upon which so extended a liability can be said to rest upon a person who, for reward, agrees that others shall enter his premises and witness the performance of a play there. Upon this footing the Defendant would be liable for any negligence of the performers, as if they were his servants. It was, however, upon this view of the law that the judgment of the County Court Judge proceeded. . . .

If there are incidents in a play which are

intrinsically dangerous, unless carefully performed, especially if they involve the use of firearms, and which the manager knew or ought to have known of, then, in my opinion, it is an implied term of the contract between the playgoer and the other contracting party that such contracting party will use reasonable care and diligence to see that such incidents are performed without risk to the playgoer. He is not, however, under liability for any accident which he could not have prevented by the exercise of reasonable care or supervision, but which happens through some carelessness or want of skill on the part of a member of the company. He does not warrant that there shall be no such negligence or want of skill. His liability is that of an invitor towards an invitee as expressed in *Indermaur* v. *Dames* (L. R. 1, C. P., 274, at page 288) and in *Norman* v. *The Great Western Railway* (*sup.*).

" The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger, which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it," per Lord Justice Buckley, p. 592.

If there is this implied term of the contract with the playgoer it is no answer to an action by him when injured to say that the lessee of the theatre who owes the duty agreed with an independent contractor to present the play and discharge the duty; and it was owing to the want of care and supervision of this contractor that the accident happened. " A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor."

Per Lord Blackburn in *Dalton* v. *Angus* (6 App. Cas., at p. 829); *Pickard* v. *Smith* (10 C. B., N. S., 470); *Tarry* v. *Ashton* (1 Q. B. D., 314); *Bower* v. *Peate* (1 Q. B. D., 321); and *Hughes* v. *Percival* (8 App. Cas., 443).

The attention of the learned County Court Judge has not been directed to the case from this point of view. No evidence was given as to what supervision was exercised over the firearms, or the ammunition for them, or the loading of the pistols, nor does he find in what any negligence of the Defendant consisted; what the Defendant could and should have done, but failed to do. He does find that there was negligence of somebody, as there was an unexploded cartridge loose in the barrel of the pistol fired. It is true that it was not necessary for the County Court Judge to determine this, if the Defendant was under the wider liability which the Judge considered he was under.

Mr. Lowenthal for the Appellant.

Mr. Simey for the Respondent.

B. D.

KING'S BENCH DIVISION.—Before Mr. Justice Shearman. *Sharman* v. *Merritt and Hatcher Lt.* 8th March 1916.

Plea of privilege in a libel action against newspapers—The defence must shew that it was a fair comment of a public matter and for public benefit.

The Plaintiff sued to recover damages for alleged libel. The defence was privilege under sec. 4 of the Law of Libel Amendment Act, 1888. The Court held that the defence was made out and dismissed the action. Mr. Justice Shearman in the course of his Judgment said :—

It was not disputed that what the Defendants had printed was a fair summary of what was contained in the document, and in his opinion it would be frittering away the privilege of newspapers if he were to hold that this was anything else than a fair and accurate report of what took place at the meeting.

That, however, was not enough to establish the privilege because of the proviso to the statute. He had no doubt that a matter relating to the manager of a public cemetery was a matter of public concern, but the question of the meaning of publication for the public benefit had given him some difficulty. The only case that he could find which threw any light on the matter was *Pankhurst* v. *Sowler* (3 T. L. R. 193), which laid down that the question whether a particular statement was for the public benefit was for the jury. Sitting as a jury, he came to the conclusion that in the present case the publication was for the public benefit. It seemed to him that the statute was intended to protect newspapers which honestly and without malice reported what happened at a public meeting.

If he were to hold that such a publication as the present was not for the public benefit, it seemed to him that it would be placing an intolerable burden upon reporters at public meetings and would be laying pitfalls for them, and would help to fritter away the privilege which he was sure the statute intended to give.

Mr. W. A. Metcalfe for the Plaintiff.

Mr. Macgillivray for the Defendants.

B. D.

costs in all Courts. And for like reasons we think that the claim made in the suit No. 438 of 1913 should likewise be dismissed with costs.

CHAPMAN, J.—I agree that the suits should both be dismissed with costs. Where the illegal portion of an agreement has been carried into effect, the whole matter is outlawed and the Court will not aid either party to retrieve his position if he is not able to show that he has been less to blame than the other. "The Courts will not assist an illegal transaction" [*Taylor* v. *Chester* (5)]. It is a scandal to assist a Plaintiff to recover upon the ground that he has joined in breaking the law, but this will not prevent the Court from intervening to frustrate the illegal purpose before it has been effected, or, in any event, from giving relief to the innocent. In particular, the Court will not in any case allow a Defendant to retain the proceeds of fraud or oppression: and the Court will not refuse protection to those classes of persons whom the law seeks to protect. But in a case in which no such considerations arise, if the illegal purpose has already been executed in whole or in material part, the law leaves both parties to their fate [*Kearley* v. *Thomson* (6)].

In the present case the illegal portion of the agreement was the undertaking to withdraw from the prosecution of certain charges which the law says "shall not be compounded." This illegal promise had been carried into effect beyond possibility of recall. One side now seeks relief from the act done in consideration for the illegal promise. All that they can say in excuse of their breach of the law is that they were persons accused in those criminal cases. But *executio juris non habet injuriam* and in the absence of any evidence to suggest that the criminal proceedings were improper it cannot be held that there was any fraud or oppression or that the accused took a more innocent part in the illegal compromise than the complainant. The authorities make it clear, that a suit for the recovery of property transferred in consideration for such an illegal promise would not have lain. There is no direct authority that the principle would also defeat a suit which is not for the recovery of property, but merely for a declaration that a sale deed executed in consideration for the illegal promise is void, and in America it has apparently been held that a declaratory suit would not be defeated (Keener on *Quasi* Contracts p. 441). But if it is the scandal involved that defeats suits of this class, then the principle is clearly applicable to a suit for a declaratory decree. For so far as the scandal is concerned there is no difference between a suit for the recovery of property and a suit for a declaration.

It is contended that the refusal of a declaration that the deed was void will operate as a direct encouragement to the improper compounding of offence inasmuch as the complainant Defendant will be permitted to retain the proceeds of the illegal compromise. Some authority for the general application of this consideration can be found in the judgment of DeGrey, C. J. in *Jaques* v. *Golightly* (7), a case of the 18th Century. But ever since then the counter consideration has prevailed except in certain classes of cases which I have endeavoured above to define.

A. K. R. *Suits dismissed.*

(5) L. R. 4 Q. B 309 (1869).
(6) 24 Q. B. D. 742 (1890).
(7) 2 W. Bl. 1073 (1775).

PRIVY COUNCIL.

[Appeal from the Judicial Commissioner of Oudh.]

Lord Shaw. Sir John Edge. Sir Lawrence Jenkins.	1916, 14, March.	Raja Debi Bakhsh Singh, Appellant, *v.* Shadi Lal and others, Respondents.

Disqualified proprietor, contract by—Decree made on such contract if may be executed against, property after release from superintendence by the Court of Wards—Oudh Land Revenue Act (XVII of 1876), secs. 173, 174—North-Western Provinces Land Revenue Act (XIX of 1873), sec. 205 (B).

Under sec. 174 of the Oudh Land Revenue Act, a decree made in respect of a contract entered into by a disqualified proprietor during the time his property was under the superintendence of the Court of Wards cannot be put in execution against such property, even after the property has been released from superintendence.

The dictum to the contrary in Rameshar Bakhsh Singh *v.* Dhanpal Das *is unsound in law.*

Raja Muneshwar Bakhsh Singh, Taluqdar, was declared disqualified to manage his estate under the provisions of the Oudh Land Revenue Act, 1876, and the estate was taken under the management of the Court of Wards. During such management the Raja borrowed money from the Respondents. The latter obtained a decree against him, and the estate having by this time been released, they applied to attach a village belonging to the estate in execution of such decree. The Subordinate Judge made an order for attachment. On appeal, the Judicial Commissioners (Stuart and Kanhaiya Lal, J. C.) affirmed his decision, holding themselves bound by a former judgment of their own Court. They said :—

(1) 14 Oudh Cases 6 (1910).

"With regard to the first point, Mr. Sen, who has argued the appeal on behalf of the Appellant, has referred us to the ruling in *Ram Parshad* v. *Musammat Muna Kuar* (2) and to the rulings in *Himanchal Singh* v. *Jhamman Lal* (3) and *Jhamman Lal* v. *Himmanchal Singh* (4). The last of these rulings was passed on the 17th August 1901. He argues that in a case in which a person's property has been taken under the management of the Court of Wards, a decree obtained in respect of a debt contracted by such a person while his property is under the management of the Court of Wards, cannot be executed against the property of such person after that property has been released in so far as the provisions of Local Act XVII of 1876 and Local Act XIX of 1873 affect the case. Had these rulings stood alone Mr. Sen's arguments might have prevailed. We find, however, that a Bench of this Court decided on the 24th November 1910 in *Rameshar Bakhsh Singh* v. *Dhanpal Das* (1) that property so released is liable to attachment in execution of a decree obtained on a debt contracted while the property was under the management of the Court of Wards. On page 8 occur the words :—"It is quite clear that under the old Act a creditor could obtain a decree upon a bond given by a ward while his property was under superintendence, and execute that decree against the property of the ward after the property was released from superintendence." This is a ruling of a Bench of this Court. It overrules the ruling in *Ram Parshad* v. *Musammat Muna Kuar* (2), which was a ruling of a single Judge of this Court, and we consider it to be binding upon us. As this is a case falling

(1) 14 Oudh Cases 6 (1910).
(2) 4 Oudh Cases 28 (1901).
(3) I. L. R. 22 All. 364 (1900).
(4) I. L. R. 24 All. 186 (1901).

under the old Act, we decide this point against the Appellant."

Hence this appeal which was heard *ex parte*.

Mr. L. DeGruyther, K.C. (with him *Mr. S. A. Kyffin*) for the Appellant.

The Judicial Commissioners have held themselves bound by their own judgment in *Rameshar Bakhsh Singh* v. *Dhanpal Das* (1). The protection given against the disqualified proprietor's debts by sec. 174 of Act XVII of 1876 would be absolutely nullified if the estate were held liable. Before United Provinces Act III of 1899 there was nothing to prevent a disqualified proprietor from contracting debts for which his property other than that under superintendence would be liable. The incompetency created by sec. 173 continues even after the property is released.

In the North-Western Provinces Land Revenue Act, 1873 (Act XIX of 1873), there is a corresponding sec. 205 (B), which was inserted by sec. 23 of Act XIII of 1879. The only difference is that sec. 205 (B) comprises both sec.173 and sec. 174 of the Oudh Act, and hence the word "and" is inserted. The section in the North-Western Provinces Act has been construed in *Himanchal Singh* v. *Jhamman Lal* (3), where it was held that "the contention that the restriction only remains in force so long as the property is under superintendence and is immediately removed the moment the superintendence ceases is not warranted by law."

To the same effect is the decision in *Ram Parshad* v. *Musammat Muna Kuar* (2). The decision in *Rameshar Bakhsh Singh* v. *Dhanpal Das* (1) is not really an authority against the Appellant: the remarks of Lindsay and Chamier, JJ., were *obiter dicta* so far as the construction of sec. 174 of the Act was concerned: that point did not arise for decision: the question which arose there related to the construction not of the statute, but of a certain decree.

The opposite construction involves the insertion of more words in the section and would completely defeat the object of the Act which was to protect the property of the ward. It was opposed to the express provision of sec. 174 of this Act.

(1) 14 Oudh Cases 6 (1910).
(2) 4 Oudh Cases 28 (1901).
(3) I. L. R. 22 All. 364 (1900).

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—By sec. 162 of the Oudh Land Revenue Act, No. 17, of 1876, certain persons are declared to be disqualified from managing their estates. Among the enumeration of those persons are the following: Under sub-sec. (*g*), "Persons declared by the Chief Commissioner on their own application to be disqualified from managing their estates." The Talukdar of Mallanpur was one of those persons. On his application, his estates were assumed by the Court of Wards, and they remained under the management of that Court from the year 1886 until the year 1898.

During that period the Raja borrowed certain sums of money; and on the 12th August 1904, his creditors sued and obtained a personal decree against him in the Court of first instance. There were certain judicial proceedings which occurred subsequent to the decree; and it may be of interest to note that, the debt incurred having been originally a sum of Rs. 4,000, execution is now sought to be obtained against the property put under the management of the Court of Wards for a sum which, at a date somewhat anterior

to the present deliverance, amounted to Rs. 21,526, the interest having been running for a certain course of years at the rate of 18 per cent.

The question in this case, and the sole question, is whether a decree obtained for such sums can be put in execution against the property, which was, at the date of the contraction of the debt, under the management of the Court of Wards.

The sections of the Oudh Land Revenue Act, to which reference has been made, are secs. 173 and 174. Sec. 173 is in these terms: "Persons whose property is under the superintendence of the Court of Wards shall not be competent to create, without the sanction of the Court, any charge upon or interest in such property, or any part thereof." Sec. 174 says: "No such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by any *such person* while his *property* is under *such superintendence*." Their Lordships think that it falls to be observed that the object of these sections was the protection of the property against either transactions entered into by the person under tutelage by way of direct transactions of sale or of mortgage, and also the protection of the property against the consequences of any execution in respect of contracts entered into by a person under such tutelage. Sec. 174 deals with the latter situation.

The Courts below have permitted execution against the property to be granted in respect of this debt—a debt incurred by a person under tutelage. The question is whether that decision is sound in law. There have been various decisions in the Courts in India, notably in Allahabad, which appear fully to support the appeal. But there is one dictum which is founded upon by the Court below which seems to have ruled the minds of the learned Judges in constraining them to give effect to the execution against the property in respect of this debt. The dictum is contained in the case of *Rameshar Bakhsh Singh* v. *Dhanpal Das* (1). It was quite unnecessary, in the view that their Lordships take, for the decision of the case, which depended, as it was viewed by the Court who decided it, merely upon the construction of a certain decree. That dictum was to the following effect: "It is quite clear that, under the old Act" —and the reference is either to this Act or an Act in similar terms—"a creditor could obtain a decree upon a bond given by a ward while his property was under superintendence, and execute that decree against the property of the ward after the property was released from superintendence.

Their Lordships are clearly of opinion that this dictum was an unsound proposition in law. They think that, the object of the Act being the protection of the property, a person subject to the Court of Wards would in no sense be protected if this dictum were to be affirmed. What has been done in the present case seems to their Lordships to be a total violation, not only of the spirit of the Statute, but of the express provision of sec. 174. The phrase in that section "while his property is under such superintendence," is, in their Lordships' opinion, a phrase annexed to and elucidative of the verbal expression "contract entered into by any such person." Sec. 174 is meant to protect property against the execution of a decree made in respect of "any contract entered into" during a certain period of time, namely, while the property is under such superintendence. If such a contract, incurring of debt, or transaction occurred during that time, the law of Oudh is plain

(1) 14 Oudh Cases 6 (1910).

under sec. 174, to the effect that the property is protected against execution in respect of any decree following upon that transaction, that debt, or that contract.

There is nothing further in the case, and their Lordships will humbly advise His Majesty that this appeal should be allowed with costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Mr. Edward Dalgado* for the Respondents.

Appeal allowed.

B. D.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 91 OF 1914.

SANDERSON, C. J.
WOODROFFE, J.
MOOKERJEE, J.
1916,
Heard, 7, 10, 11, & 12, January.
Judgment, 13, March.

RAM CHANDRA SIL and others, Defendants, Appellants,
v.
RAMANMANI DASI and others, Plaintiffs, Respondents.

Trespass, action for—Who may sue, tenant or owner—Title by adverse possession not pleaded, if may be allowed in the Court of Appeal—Civil Procedure Code (Act V of 1908), Or. 41, r. 24—Adverse possession against Municipality or the Crown—Public drain, filled up, if becomes public way.

Per SANDERSON, C. J. *and* MOOKERJEE, J.—*The tenant is the proper Plaintiff to sue for trespass committed in respect of the land, and the reversioner can only sue for trespass if the alleged trespass is injurious to the reversion.*

Per SANDERSON, C. J.—*Even though the trespass is accompanied by a claim of right, it is not necessarily injurious to the reversionary estate.*

BAXTER *v.* TAYLOR (1) *referred to.*

Per WOODROFFE, J.—*It is not sufficient for the Plaintiff in an action in ejectment to prove possession. He must show title.*

Per MOOKERJEE, J.—*Mere previous possession will not entitle a Plaintiff to a decree for recovery of possession, except in a suit under sec. 9 of the Specific Relief Act.*

PURMESHWAR *v.* BROJOLAL (2), NISHACHAND *v.* KANCHIRAM (3), SHAMA CHARAN *v.* ABDOOL (4) *and* MANIK BORAI *v.* BANICHARAN (5) *referred to.*

The Plaintiff may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of Appeal, provided such a case arises on the facts stated in the plaint, and the Defendant is not taken by surprise.

SUNDARI DOSSEE *v.* MADHU CHUNDER (6), VASUDEVA *v.* MAGUNI (7), MAJKAL *v.* THUNBUSWAMY (8), SOMASUNDARUM *v.* VADIVELU (9), SHIROKUMARI *v.* GOVIND SHAW (10), JOYTARA *v.* MAHOMED MOBARUCK (11) *and* BIJOYA *v.* BYDONATH (12) *referred to.*

To establish a title by adverse possession, the Plaintiff must prove enjoyment possessing the same characteristics as are necessary for presumption of a lost grant and consequently that the possession was adequate in continuity, in publicity and in extent, to extinguish the title of the true owner.

SUBRAMANIA *v.* SECRETARY OF STATE

(1) 4 Barn. & Ad 72 (1832).
(2) I. L. R. 17 Cal. 256 (1889).
(3) I. L. R. 26 Cal. 579: s. c 3 C. W. N. 568 (1899).
(4) 3 C. W. N. 158 (1898).
(5) 13 C. L. J. 649 (1910).
(6) I. L. R. 14 Cal. 592 (1887).
(7) L. R. 28 I. A. 81, 88: s. c 5 C. W N 545 (1901).
(8) [1914] Mad. W. N. 784.
(9) I. L. R. 31 Mad. 591 (1898).
(10) I. L. R. 2 Cal. 418 (1877).
(11) I. L. R. 8 Cal. 975 (1882).
(12) 24 W. R. 444 (1875).

RAM CHANDRA SIL *v.* RAMANMANI DASI.

(13) *and* RADHAMANI *v.* COLLECTOR OF KHULNA (14) *referred to.*

Per WOODROFFE, J.—*Where in a suit for declaration of title and possession, the Plaintiff did not in the alternative plead title by adverse possession, the Plaintiff cannot ask the Court to frame such an issue on appeal except by amendment, and Or. 41, r. 24, which authorises the Court to remodel the issues does not apply to such a case.*

Per CURIAM.—*A public drain does not become a public way merely because it is filled up.*

This was an appeal preferred against a decree of Chaudhuri, J., passed on 29th June 1914.

The facts of the case so far as they are material to this report will appear from the judgment of his Lordship the Chief Justice.

Mr. Jackson (with him *Messrs. U. P. Roy* and *B. C. Sen*) for the Appellants. This is a suit for ejectment and the Plaintiff can only succeed on clear proof of title. Plaintiff's case is that the disputed strip of land formed part of No. 29, and his case must fail if he fails to establish that. We claimed this strip of land as a public passage all along. The issue of prescriptive right was raised without any foundation and I do not insist on it. The survey plan of 1910 is conclusive. Act I of 1887 (Bengal Act) sec. 22. (Refers also to the notification in the Calcutta Gazette, 1st September 1910, p. 1457).

Mr. S. R. Das (with *Messrs. Rasul* and *M. N. Kanjilal*) for the Respondents. Two issues arise in this case—(1) Does this strip of land form part of No. 29. (2) Whether the Defendants have any right of way.

[MOOKERJEE, J.—The second only arises if the first is decided in your favour.]

Yes.

[SANDERSON, C. J.—Do you claim as owner or as being in possession.]

If I have been in possession that is good title against a trespasser.

[MOOKERJEE, J.—Why was not that case made in the plaint.]

That was gone into in the Court of first instance and the issues were framed in that way. Originally the Defendants' case was that there was a prescriptive right. At a late stage of the case counsel for the Defendant, Narayan Prosad Sil, stated that as to the second issue he had no evidence to support his contention. Then the Defendants No. 1 to 3 also gave up the second issue and for the first time claimed the strip of land as a public passage which as members of public they were entitled to use. Defendant Ram Chandra Sil says in his evidence that after the receipt of summons in this case he came to know after going through his title deeds that this was public land.

I have got to prove my title—I can do that by proving long possession. I have got to prove possession for 12 years. I also claim the strip of land as being included within No. 29. Even if the strip of land was public land it vested in the Calcutta Corporation. Sec. 286, Calcutta Municipal Act (Bengal Act III of 1899). But I prove possession for more than 30 years.

Though in the case as framed I claimed possession, I am entitled to a declaration and an injunction even though I am not in possession for the statutory period. *Nisachand Gaitya* v. *Kanchiram Bagani* (3), *Shyama Charan Ray* v. *Surya Kanta*

(13) 21 Mad. L. J. 132 (1910).
(14) I. L. R. 27 Cal 943 : s. c 4 C. W. N. 593, 690 (1900).

(3) I. L R. 26 Cal. 579, 581 : s c. 3 C. W. N 568 (1899).

RAM CHANDRA SIL *v.* RAMANMANI DASI.

Acharya (25) and *Ismail Ariff* v. *Mohamed Ghous* (18).

Mr. Jackson (in reply). Very slight user has been held sufficient to keep alive an easement. *Judoo Lall Mullick* v. *Gopaul Chunder Mookerjee* (24).

The JUDGMENTS OF THE COURT were as follows :—

SANDERSON, C. J.—This is an appeal by the first three Defendants Ram Chandra Sil, Poorna Chunder Sil and Protap Chunder Sil against a decree of Chaudhuri, J., made on the 29th June 1914. The dispute arose with reference to a strip of land about 4 feet wide and 79 feet 9 inches long running East and West along the North side of premises called 29, College Street. The Plaintiff is the owner of 29, College Street. The first three Defendants are owners of 3/1/1, Arpooly Lane which lies to the East of 29, College Street, and the fourth Defendant, Narayan Prosad Sil, is the owner of 30, College Street which lies to the North of No. 29.

At the date of the plaint the Sen Defendants were lessees under the Plaintiffs, of 29, College Street, under a lease, dated the 23rd September 1910.

The issues raised at the trial by the fourth Defendant Narayan Prosad Sil were two, (1) was the strip in question part of the premises of 29, College Street, (2) had the Defendant No. 4 a prescriptive right of passage over it. Referring to the learned Judge's judgment it appears that Counsel for this Defendant admitted at the trial that as regards the second issue, his evidence was insufficient to sustain it.

The first three Defendants accepted the above-mentioned issues, but, upon the abandonment of the second issue by the fourth Defendant, they took up the position that they did not claim any private right over the land in question but claimed that it was a public passage and that they as members of the public were entitled to use it. And as far as I can ascertain from the report of the proceedings, the case proceeded on that footing, *viz.*, that the first three Defendants were asserting that they as members of the public had a right of way over the said strip.

The learned Judge has found that the first three Defendants behaved in a high-handed manner, and I agree with such finding on the evidence : These Defendants, apparently on or about the 15th November 1910, committed acts upon the premises No. 29, which could not be justified even if they as members of the public had a right of way across the land, for they entered upon the land and levelled up the alleged passage, filled up a well which was some distance from the alleged public passage, and cut down trees which, as I understand the evidence, were not on the disputed piece of land, and I agree with the learned Judge's finding that their acts were clearly illegal and high-handed.

The learned Judge has held that there was no public right of way across the said piece of land :

It appears that many years ago there was an open drain, running east and west from College Street, and in a memorandum of partition, dated 29th June 1825, of the properties of Ram Sunder Mal deceased, certain "land formerly held by Shib Chandra Pal," was dealt with : this land included the properties now known as 28, 29 and 30, College Street, and in describing one of the boundaries thereof the drain was referred to as "the company's drain in the said land :" At sometime or other, this drain became filled up; it is not clear what was the exact date, but at any rate it is clear from

(18) I. L. R. 20 Cal. 884 (1893).
(24) L. R. 13 I. A. 77 (1886).
(25) 15 C. W. N. 16 (1910).

the documents that it had been filled up in the year 1880, and, judging from the maps which have been put in, it must have been some considerable time before that: moreover it was said by the uncle of the Defendant Narayan Prosad Sil that 45 or 46 years ago the owner of 31, College Street laid down an underground drain along the site of the old drain connecting their premises with the public sewer in College Street, since which time apparently there was no open drain.

Assuming the fact that at one time there was an open drain in the strip of land, even if it were a 'public drain' as described in the pleadings, it would not of course follow that when it was filled up and ceased to be a public drain, that there was any public right of way over it, though it may be that it would afford an opportunity for an attempt at asserting such a right of way.

In my opinion the learned Judge was right in concluding that the evidence was not sufficient to establish a public right of way: indeed the evidence of public user to my mind was of a very flimsy character, and it consisted mainly of evidence of user by *methars* for the purpose of performing their service in connection with privies on the Defendants' premises, and if it were sufficient to establish any right at all, it would point rather to an easement in respect of such premises (the case which was abandoned) rather than to a public right of way; it was moreover admitted by Ram Chandar Sil, one of the Defendants, that until this suit was instituted he did not know the alleged passage was public thoroughfare, but that he used to see *methars* pass through it. On the other hand there was evidence given on behalf of the Plaintiff that the alleged passage had been closed at the west end for many years; consequently if the *methars* did make their way across the premises No. 29, they must have entered it at some other place, probably in the same way that Amrito Lal Saha said he did when he inspected the premises 10 or 12 years ago, *viz.*, south of the tiled hut, which was not of course the place where the filled up drain had been.

It is, however, said that the 1910 map shows a passage along the disputed strip of land; looking at the map itself this certainly appears to be the case; but even if this map raises a presumption in favour of the right relied upon, I think such presumption is rebutted by the evidence in the case. The map itself is open to the comments made by the learned Judge upon it, and it should be noted that it is inconsistent with every other map which has been put in evidence.

Hesham's map of 1855 and the Official map published under the authority of the Surveyor General of India in 1894 both show the premises now called 29 and 30 College Street as absolutely contiguous with no right of way across No. 29.

And the map attached to the partition proceedings of the Defendants' premises in 1899 shows that the filled up sewer ditch went as far as the north-east corner of No. 28 and no farther: and this map was certified as being correct at the time it was made by H. C. Pal, the surveyor who made it, one of the Defendants' witnesses.

For these reasons I am of opinion that the learned Judge was right in holding that the Defendants had failed to establish the public right of way across No. 29 College Street.

The remaining question is whether the Plaintiffs have established their right to the whole of the declarations and relief granted in the decree, or to any part thereof.

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In her statement of claim the Plaintiff having set out the facts on which she relied, which included a statement that she had been in possession of the Premises No. 29 since 1894, asked for a declaration that the disputed piece of land formed a part of her premises No. 29 College Street and that the first four Defendants had no right, title or interest in the same, and had no right of way over it. She further asked that the Defendants might be ordered to make over peaceful possession of the land and that the first four Defendants might be restrained by injunction from intermeddling with the possession of the Plaintiff, her servants, agents or assigns of the said land.

It was also argued for the Plaintiff that she was in possession of the said piece of land and that the Defendants were mere trespassers, and that she was, therefore, entitled to an injunction.

With regard to the last point, it appears that at the time of the alleged trespass, *viz.*, on or about 15th November 1910, the Plaintiff was not in actual possession of the land; for by the lease of 23rd September 1910, the land had been let to Sideswar Sen and others who had entered into possession thereof, and although the lease was subsequently surrendered, it was not until after the suit; and therefore at the time the plaint was filed the Plaintiff was not in actual possession. Now when land is in the possession of a tenant, the tenant is the proper Plaintiff to sue for trespass committed in respect of the land, and the reversioner can only sue for trespass if the alleged trespass is injurious to the reversion. See Halsbury's Laws of England, Vol. 27, p. 855. Further, even though the trespass is accompanied by a claim of right, it is not necessarily injurious to the reversionary estate, see *Baxter* v. *Taylor* (1), and the reasons for the decision given in the judgment of Taunton, J.

The tenants were not joined as Plaintiffs in this case, and in fact it is stated in the claim that they refused to join as Plaintiffs: for that reason I am of opinion that the Plaintiff is not entitled to an injunction merely on the ground that she was in possession and that the Defendants are trespassers.

It is necessary, therefore, next to consider whether the Plaintiff is entitled to the declaration that the piece of land, the subject-matter of the suit, forms part of the Plaintiff's premises No. 29, College Street.

This land is part of certain property which belonged to one Ram Sunder Mal and which included the premises numbered 28, 29, 30 and 31, and was dealt with in the memorandum of partition dated 29th June 1825.

The boundary of No. 30 was then described as being to "the north of the Company's drain in the said land," and the boundary of 29 as being "to the south of the Company's drain in the said land."

As regards No. 30, the following deeds were referred to:—

A bill of sale dated 10th May 1833, where it is described in the same way, *viz.*, "north of the Company's drain."

A relinquishment of claim of 1837 where the description is the same.

A bill of sale and release of 1880 where the description is north of the "filled up public drain." The word "Company" disappears and "public" is used.

A lease to the Tramway Company of 19th February 1889 where the words "public filled up drain" are used.

A conveyance by the executors of Golapmoney to the Defendant Narayan Prosad Sil, in which the property is described

(1) 4 Bing. & Ad. 72 (1833).

as being bounded on the south " by a filled up drain." It is to be noted that by this time the word " public " had disappeared.

29th February 1904.—A lease by the same Defendant to Siddeswar Sen, the description is the same, " filled up drain." So that at one time the drain is described as " the Company's drain in the said land," then the " filled up public drain," and later " a filled up drain."

It is said that this shows that the property in this strip of land was public property and was vested in the Crown or the Corporation. I do not think any such conclusion should be drawn. I agree with Chaudhuri, J.'s opinion on this point, and I do not think that the description in the partition shows that the property in the strip was vested in some other than the owner whose land was being partitioned. On the contrary, I think the description shows that the land across which the drain ran formed part of the lands which the co-sharers were dividing, though it is more than likely that the drain at the time of the partition and for some time afterwards was used to drain the water from the contiguous premises.

This is borne out by the documentary evidence in the case.

The earliest map is Hesham's map, which is called the map of Calcutta of 1853 : and which, according to the evidence, demarcates the boundaries of holdings : This shows the northern boundary of 29 to be right up to No. 30. If at that time there was land belonging to the Crown or the Corporation intervening between 29 and 30, it should have been shown in the map.

The *challan* of 1884 shows the area of 539 as 6 Bighas 15 Chittacks and 26 Square Feet—539 is admittedly the same property as 28 and 29. The area of Nos. 28 and 29 is 6-15-17, *i.e.*, including the strip in question : a difference of 9 Square Feet only.

The 1887-1893 Survey map shows the boundary of 29 as being the wall which had been built on No. 30. Again there is no mention of any owner, either the Crown or the Corporation or anyone else intervening between Nos. 29 and 30, and it is admitted that the wall of No. 30 was built on the extreme boundary of No. 30 north of the filled up drain.

But it is said that the 1910 map is conclusive against the Plaintiff. This map apparently shows that No. 29 is bounded on the north not by a drain, or a filled up drain, but by a public passage ; this in my judgment on the evidence before us was wrong. There was no public passage or right of way there, and the strip at any rate is not delineated as belonging to an intermediate owner. Further, as has been pointed out by the learned Judge, this map is wrong in other respects with regard to the two properties Nos. 29 and 30.

The actual frontage of No. 30 is 69 feet : on the map in question it is 66 feet.

But the curious thing about it is that as regards No. 29 the actual frontage including the strip in question is 31-6, and in the map it is shown as 32," and in this respect agreeing with the 1887 to 1893 map which gives No. 29 as 32 feet, and the variation of 6 feet is explained by a projection in No. 28.

So that if reliance is to be placed on the map of 1910, it is as much in favour of the Plaintiff as against her.

How it comes about that in this map the strip is shown as a public passage, is not clear : for at the interview, in June 1910, upon which so much stress is laid by the Defendants, neither of the two Defendants, who were present, seem to have

claimed that the strip was anything more than a "Sircari filled up drain."

The matter, therefore, stands thus: The origin of the Plaintiff's title is the memorandum of partition by which the northern boundary of the Plaintiff's land was "to the south of the Company's drain in the said land," it did not therefore include the strip of land in which the drain was.

Has she then obtained a title to the strip of land as against these Defendants by possession?

The maps down to 1910 are in her favour, but No. 29 was unenclosed land, and the fact that the strip is delineated as part of No. 29 may be explained by the fact that the physical boundary of the wall on No. 30 may have been taken by those who made the maps as the actual boundary of No. 29 after the drain was filled in. As regards the evidence of actual possession by the Plaintiffs, it is not strong. The erection of huts was relied upon as evidence of possession and user: but it appears that it was only upon the west end of the strip of land that a hut projected upon it: the ditch apparently, after it was filled up, remained at a lower level than the rest of the land, and was used to carry surface water from the adjoining properties even after the underground pipe was laid: the fact of the underground drain being laid, though it is consistent with an easement in favour of those who laid it across the Plaintiff's land, is perhaps more consistent with the strip of land not belonging to the Plaintiff or her predecessors, as it was apparently so laid as a matter of right in the first instance.

Further, there is the interview of June 1910 when it is said in effect by two of the Defendants that the Plaintiff's representative in pointing out her boundary excluded the strip of land in question, and on the whole I have come to the conclusion that the evidence of possession is not enough to justify a decree that the strip forms part of No. 29, and, as I have already stated, the Plaintiff not being in possession at the time of the alleged trespass, she was not in a position to sue for trespass.

I, therefore, think this appeal must be allowed with costs.

As regards the costs of the Court of first instance, the first three Defendants have succeeded in the first issue, *viz.*, as to the strip forming part of the premises No. 29, and they have failed in their contention that the strip was a public passage and that they as members of the public were entitled to use it.

The right of way which the first three Defendants claimed was evidently a very important matter between the parties: if the Defendants had confined their claim to a right to drain their premises by means of a drain along this strip, it is quite possible this action would not have been necessary: but they claimed the public right of way, attempted to assert it in a high-handed and illegal manner and persisted in such claim at the trial though it was not necessary for the purpose of meeting the Plaintiff's claim. For these reasons in my judgment the proper order as between the Plaintiff and these Defendants is, that these Defendants should have the general costs of the action, and the Plaintiff should have the costs of the issue upon which she has succeeded, *viz.*, the issue as to the public right of way.

WOODROFFE, J.—This suit must be determined according to the nature of the case made in the pleadings and issues. The case in the plaint is that the small strip of land in suit is part of the premises No. 29, College Street of which the Plaintiff

is the owner : that the Defendants trespassed on it and deprived the Plaintiff of possession. The plaint then asked for a declaration of title, an order for possession and an injunction. It is quite clear that the form of these proceedings is an action in ejectment to sustain which it is not here sufficient to prove possession, but the Plaintiff must show title. The first set of Defendants deny the Plaintiff's title to this strip of land and say that the northern boundary of the Plaintiff's premises is not 30, College Street as alleged, but this strip which was "a public passage formed by a filled up public drain over an underground drain belonging absolutely to them." This public drain is alleged to have been in existence from time immemorial and to have been used by the Defendants and predecessors-in-title. The nature of this defence does not seem to have been always clearly understood. Reference has been made to prescriptive private right and public right of way. If, as the Defendants allege, the title in this strip is not in the Plaintiff, there can be no question of prescriptive right as against her. Again a public drain does not become a public right of way merely because, as here, it is filled up. What the pleadings mentioned say is that there was a public drain, the title of which was in Government and that when it was filled up, it was used as a public passage. There may have been such user without constituting it a public way. The substantial point is (whatever be the user or effect of the user alleged) the land belonged to the Corporation or the Government, and title to it had not been shown by the Plaintiff. If this be so, it is immaterial what the Defendants have or have not established. The fourth Defendant Narayan Prosad Sil, an attorney of this Court, says that the premises Nos. 29 and 30 are separated by a filled up public drain to which the owner of 29 had no title or proprietary interest by possession or otherwise. 29, College Street is also separated from premises No. 3/1/1, Arpooly Lane on the east by a filled up public drain being a continuation of the first mentioned drain in which also the Plaintiff had no title or possession. These filled up public drains are said to have been used from time immemorial by the general public and particularly by the adjoining owners as a passage for sweepers, and an under-ground drainage pipe connecting the premises No. 3/1/1, Arpooly Lane with the main Municipal sewer under College Street was under that passage separating premises Nos. 29 and 30. The Defendant denies that this strip formed part of 29, College Street and claimed a right of way over the filled up public drain which has always been a public passage. On this two issues were raised (1) was this strip in suit part of premises No. 29, College Street, (2) had the Defendant No. 4 a prescriptive right of passage over it. This latter issue was abandoned and was, I think, a misreading of the pleading which in effect asserted that the Plaintiff not being owner of the land in suit was not entitled to take possession of it and so prevent the Defendants and others from passing over a public drain which, when filled up, afforded a passage to the public. The judgment states that it was then stated by the Defendants that whilst they did not claim any private right of passage over the disputed strip, they contended that it was a public passage, and as members of the public they were entitled to use it. If this means that the general public were entitled to use the strip as a public right of way dedicated for such use and if the onus of establishing this is on the Defendants, they have not in fact established it. Nor is the issue one which properly arises on the facts. It is

asserted that there was at one time a public drain. This was subsequently filled up. By such filling up only it did not cease to be a public drain or become a public way. It was, as it had always been, public land which when dug out, was used as a drain, and which when filled up, was used as a passage and the passage being over public land was called a public passage. I need not consider this point further, for the sole and simple question is this (whatever this strip of land may be) has the Plaintiff established his title thereto. It is to be here noted that the plaint is framed on the assumption that the disputed land was at all times the Plaintiff's property. There is no suggestion of the fact which is well established that this land was at one time at any rate a public drain and used as such. There is, therefore, of course, no allegation on a point on which we have been addressed at length, *viz.*, that assuming the disputed land was at one time public property, it ceased to be such by adverse possession exercised by the Plaintiff against the true owner whereby, what was originally not his property became incorporated in it.

[His Lordship here proceeds to deal with the evidence bearing on the question of title, and on this point concludes as follows :—]

It is quite clear, in my opinion, on this evidence that at one time at least the disputed land was public and was not included in premises 29 as is suggested by the plaint and issues.

In, however, appeal, learned Counsel for the Appellant sought to raise a case which is not made in the pleadings of issues, nor is dealt with in the judgment. The plaint does not mention the fact that the land was once at least public land, treats it as part of 29, and alleges possession in conformity with this title and dispossession. The relief sought was a declaration of this title and an order for possession and injunction. Here this case was adhered to, but in the alternative it was argued that if the Plaintiff had not established his title to the land he had established adverse possession for a period of 30 years. Learned Counsel said that he was in possession and did not want an order for possession. It was open to the Plaintiff to have pleaded this alternative case, but she did not. No amendment of the pleadings however was asked for as it was stated to be unnecessary. It was suggested that we might remodel the issues under Or. 41, r. 24. This rule has, in my opinion, no application to the case. It is not open to the Plaintiff to raise this case except by amendment. Had she applied for amendment, the question whether at this stage it could be granted would have had to be considered, and I myself should probably not have been disposed to grant it at this late stage in appeal. The former case was that the land was always part of 29. Now it is alleged that it may have been public land, but ceased to be so and became part of 29 by adverse possession. Formerly a possession was alleged which was relative to the title asserted : now it is an adverse possession. Formerly an order for possession was asked for—now the case is argued on the assumption that the Plaintiff being in possession, the decree which she has got on this point is unnecessary. Nextly, such an issue cannot be raised in this case in the absence of the party affected, on the general principle that all persons must be parties who are interested in the issues raised. Adverse possession is alleged against the Corporation or Secretary of State. In such a case a definite issue was necessary as to adverse possession and the question could have been argued when,

against whom and how this possession was acquired. At present we have no judgment on any of these points. The fact that the Corporation or Government might not have troubled to defend this suit does not affect the question as it arises between the parties to the record. It was nextly suggested that the plaintiff might defend the decree granted in the suit as one of ejectment on establishment of title by converting it into a possessory suit for injunction and damages in respect of trespass. This is a still further departure from the pleadings and issues which cannot be allowed. But I do not rest my judgment merely on these technical points of law even though they, in my opinion, affect the merits. I am not satisfied that if it were open to the Plaintiff to change his case in the ways argued, she has established her claim. I accept the evidence of the attorney, Narayan Prosad Sil, corroborated by Ram Chandra Sil and the survey map, that the disputed strip was in 1910 excluded by admission of all parties from premises No. 29. With this the whole of his case falls both as to title, adverse possession and trespass. Further, the evidence is wholly insufficient to establish these alternative allegations. If the disputed land was, as I find, *originally public*, then it must be held to remain such until either the Plaintiff establishes a settlement of it with herself (which is not alleged) or adverse possession. It appears to be doubtful whether in this case a 30 years' possession would be sufficient. It would rather seem that it is necessary, so far as title to the land is concerned, to establish adverse possession against the State for 60 years which the Plaintiff does not profess to do. But assuming the shorter period, the Plaintiff has still failed to establish to my satisfaction adverse possession for that time. The only solid evidence are the two maps prior to the last. These, of course, could not convey the land but are evidence of possession, and, to that extent, of title. But they are in conflict with the last map which I find was drawn up on reference to the parties. The oral evidence is vague and insufficient. The evidence of user of the passage by others than the owner of 29 may not be, and I think it is not, sufficient to establish that the passage was dedicated to the public as a highway. Because it was once a public ditch does not make it a public passage without anything else. It still, however, remained public land which was used rightly or wrongly as a passage. I accept the Defendants' evidence that it was so used by *methars* and others and in the various ways which I have fully described from the evidence. The existence of the Defendants' private drain in this land, in the absence of any evidence of permission, is strong evidence against the Plaintiff's title and possession to this land. How did this pipe come to be laid in the land, if it was being adversely held as alleged? It cannot be said that the Plaintiff had that exclusive uninterrupted possession which is necessary for adverse possession. Further, some of the acts which are sought to establish this, *e.g.*, the obstructions and barricades, are denied.

The only fact which seems established is that possibly the eaves of the huts may have projected to some extent in parts of the land over the disputed passage. But this, in the circumstances and in particular in the absence of evidence as to when adverse possession commenced and the details of such alleged possession and the fact that persons passed under the eaves along the passage, is insufficient. I do not believe at all this story of adverse possession. I believe that there was no dispute over this matter before 1910. This is common case.

The Plaintiff suggests that she was in peaceable exclusive possession of this strip until 1910 when, without any ground or right whatever, the Defendants denied her claim. This does not seem likely and is, in my opinion, contradicted by the evidence. Rather what appears to me to have happened is this : The land was public land and existed and was used in the manner alleged by the Defendants. Then in 1910 Siddeswar Sen came on the scene. As the lessee of the land to the north he wished to join up the two properties and to get rid of the intervening strip and took a conveyance in which for the first time in the history of the case 29 was described in opposition to all the previous documents as bounded on the north not by the filled up drain, but by the premises No. 30 of which the intending lessee had already possession. Not unnaturally the Defendants then objected and the dispute arose in which it was first alleged that the disputed land was part of 29 and then that it had been made such by adverse possession. On both these points the Respondent in my opinion fails both in law and fact.

The plaint further alleges that the Defendants trespassed " into the Plaintiff's said piece of land (by which apparently the whole premises No. 29 are meant) cut down trees, demolished masonry walls and committed other tortious and unlawful acts ". These are denied. The relief, however, which is sought is in respect of the land marked P on the map attached to the plaint, that is the disputed strip, and the issue raised was as to the strip. The decree also is concerned with this only. This question is, therefore, irrelevant to this appeal, even if the evidence was clear and sufficient enough, which it is not, to enable us to deal with it. Thus it is by no means clear where the trees are, whether they be on the disputed strip, in which case, even assuming that they were cut, which is denied, the decision would follow the findings on the other issues, or whether they were beyond it so as to constitute an act of trespass on land admittedly in the Plaintiff's possession. The Plaintiff is, in my opinion, not entitled to a declaration that the Defendants have no right of way over the land; for a person who does not establish his right by title or possession to land cannot get any declaration as regards it. The land in suit is public property, and in respect of such property the Plaintiff cannot claim to exclude any person from user of it. Such claim is dependent on the principal relief —a declaration of title which fails. If there be any claim or user in regard to the land in suit which is not justified, the right to a remedy lies with the owner, who, on this judgment, is not the Plaintiff. As regards costs of the Appellant, the Respondent must, in my opinion, wholly pay them. For though it is true that the Appellant has not established that there is a public right of way over the disputed land, the suit was one based on title which fails, and the evidence which is said to have been tendered on the question of right of way was not only admissible but necessary on the question of the Plaintiff's alleged title. Thus the Plaintiff asserting such title, it was obviously open to and necessary for the Defendants to prove such facts, that what was alleged to be private property was used by others as a way or in other fashion unconnected with such alleged ownership. None of the facts so proved went beyond this, and thus added to the costs of the trial. They were admissible on both the issues, being, according to this judgment, ineffective on one issue and effective on the other. The fact, therefore, that the subordinate issue is held not

proved does not, therefore, in my opinion, affect the question of costs which should be borne both in this and the first Court by the Respondent-Plaintiff who has failed to establish his right to the relief claimed in this suit and appeal. In my opinion, and for the reasons stated, the appeal should be decreed with costs and the suit dismissed with costs.

MOOKERJEE, J.—The subject-matter of the litigation which has culminated in this appeal, is a narrow strip of land, measuring approximately 79 feet 9 inches in length and 4 feet in width. The Plaintiff, who is the owner of premises No. 29, College Street, claims this strip as included in her property. She alleges that in November 1910, the first three Defendants, who are owners of premises No. 3/1/1, Arpooly Lane, (which lie towards the east of her premises) trespassed on this strip of land and acted in an illegal and high-handed manner, namely, entered upon the land, levelled it up, filled up a well and cut down trees. The acts imputed to the Defendants led to proceedings in the Criminal Court which eventually terminated on the 15th December 1911. On the 12th January 1914, the Plaintiff instituted the present suit for declaration of her title to the strip of land, for ejectment, for injunction and damages and for other incidental reliefs. She joined as Defendants eight persons, namely, Defendants Nos. 1 to 3 (the owners of premises 3/1/1 Arpooly Lane), Defendant No. 4 (the owner of premises 30, College Street, which lies towards the north of 29, College Street) and Defendants Nos. 5 to 8 (who were lessees of 29, College Street, under a lease granted by the Plaintiff to them on the 23rd September 1910). The first four Defendants resisted the claim of the Plaintiff. They denied that the northern boundary of 29, College Street coincided with the southern boundary of 30, College Street, and asserted that the two properties were separated by a public passage formed by a filled up public drain. On these pleadings, two issues were raised, *viz.*, *first*, was the disputed strip of land part of premises No. 29, College Street: *secondly*, had the fourth Defendant a prescriptive right over it. At the trial, Counsel for the fourth Defendant admitted that his evidence was insufficient to sustain the second issue. The first three Defendants thereupon stated that they did not claim a private right of passage over the disputed strip of land, but that it was a public passage, and as members of the public they were entitled to use it. Mr. Justice Chaudhuri has found the first issue in favour of the Plaintiff and the second against the contesting Defendants. The decree made by him consequently declares that the disputed piece of land forms part of 29, College Street, and calls upon the Defendants to deliver up to the Plaintiff quiet and peaceful possession thereof. It further declares that the Defendants have no right, title or interest in the land nor have they any right of way thereupon. It also enjoins the Defendants and restrains them from interference with the possession of the Plaintiff. The decree finally makes a reservation that it does not affect the rights, if any, of the Defendants in respect of an underground pipe through the land in suit from premises No. 3/1/1, Arpooly Lane to the College Street main sewer. The first three Defendants have appealed against this decree, and have contended that the Plaintiff can succeed, only on proof of the specific title alleged by her in the plaint, which, it has been asserted, has not been established by the evidence in the cause. The fundamental question for consideration, accordingly is, whether the disputed strip of land forms part

of 29, College Street as claimed by the Plaintiff.

There is no room for controversy that the suit as framed is in essence an action in ejectment upon establishment of title. The Plaintiff can, consequently, succeed, only upon proof of title and not merely by proof of possession. It is well-settled in this Court, by decisions which are binding upon us, that mere previous possession will not entitle a Plaintiff to a decree for recovery of possession, except in a suit under sec. 9 of the Specific Relief Act. [*Purmeshwar* v. *Brojolal* (2), *Nishachand* v. *Kanchiram* (3), *Shama Charan* v. *Abdool* (4) and *Manik Borai* v. *Banicharan* (5)]. We must, accordingly, investigate the title of the Plaintiff.

[After discussing the evidence on this point, his Lordship concludes as follows :—]

I must accordingly hold on the documentary evidence that the title alleged by the Plaintiff has not been established. This view is supported by the oral evidence as to the nature of the possession exercised over this strip of land for many years down to 1910 when the dispute first broke out. That evidence has been analysed in detail by Mr. Justice Woodroffe, and I agree with him that the account given by Narayan Chandra Sil is fully reliable. The oral evidence, to my mind, does not show that the disputed strip was held and enjoyed exclusively by the owners of 29, College Street as an integral part of their property; no such claim in fact was put forward till the lessee of 30, College Street also became the lessee of 29, College Street, and found it convenient to make the two properties contiguous. On the other hand, the presence of the underground pipes (the existence whereof was strenuously denied by the Plaintiff, but was verified by actual excavation) and the user of the strip by sweepers and scavengers militate against the theory that it formed part of 29, College Street. I further accept the evidence that at the time of the last survey it was conceded on behalf of the Plaintiff that the strip occupied the site of what was at one time a public drain.

The question next arises, whether the Plaintiff has established a title to the disputed land by proof of adverse possession for the statutory period. Here we cannot overlook the fact that title by adverse possession was not explicitly pleaded in the plaint. As ruled by this Court in *Sundari Dassee* v. *Madho Chunder* (6), the Plaintiff may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of Appeal, provided such a case arises on the facts stated in the plaint, and the Defendant is not taken by surprise. This view is supported by a dictum of Lord Davey in *Vasudeva* v. *Maguni* (7), though the contrary view has sometimes been maintained. [*Majkal* v. *Thunbuswamy* (8), *Somasundarum* v. *Vadivelu* (9), *Sirokumari*, v. *Gobind Shaw* (10), *Joytara* v. *Mohamed Mobaruck* (11) and *Bijoya* v. *Bydonath*, (12)]. But even if the Plaintiff is permitted to set up now a case of title by adverse possession, it is perfectly plain that the enjoyment she relies upon must possess the same characteristics as are necessary for presumption

(2) I. L. R. 17 Cal. 256 (1889).
(3) I. L. R. 26 Cal. 579 : s. c. 3 C. W. N. 568 (1899).
(4) 3 C. W. N. 158 (1898).
(5) 13 C. L. J. 649 (1910).
(6) I. L. R. 14 Cal. 592 (1887).
(7) L. R. 28 I. A. 81, 88 : s. c. 5 C. W. N. 545 (1901).
(8) [1914] Mad W. N. 784.
(9) I. L. R. 31 Mad. 531 (1898).
(10) I. L. R. 2 Cal. 4 : s. 1877).
(11) I. L. R. 8 Cal. 975 (1882).
(12) 24 W. R. 444 (1875).

of a lost grant. *Subramania* v. *Secretary of State* (13). The Plaintiff must consequently prove, to use the language of Lord Robertson in *Radhamani* v. *Collector of Khulna* (14), that her possession was adequate in continuity, in publicity, and in extent, to extinguish the title of the true owner. This the Plaintiff has failed to do. The erection of huts on a portion of the disputed land or the projection of the eaves over a certain length are clearly insufficient for the purposes of the Plaintiff. There is this additional difficulty that neither as against the Crown nor as against the Municipal Corporation (who would have to be joined as parties if the Plaintiff were to be allowed relief on the basis of a title by adverse possession acquired against either of them) has the Plaintiff proved possession of the requisite character and extent. The title to the drains is vested in the Corporation for Municipal purposes [*Sundaram* v. *Municipal Council of Madura* (15), *Mayor of Tunbridge Wells* v. *Baird* (16) *and Municipal Council of Sydney* v. *Young* (17)]. As against the Corporation, the Plaintiff would have to prove adverse possession for thirty years (Art. 146A, Act IX of 1908). On the other hand, as against the Crown, the Plaintiff would have to prove possession for sixty years (Art. 149, Act IX of 1908): and here the difficulty in the way of the Plaintiff would be insurmountable. The Plaintiff holds 29, College Street, as a lessee from the Crown and she must establish, if she has to succeed against her grantor upon a claim by adverse possession, that she has encroached on the disputed land to the knowledge of the grantor for the statutory period. Consequently, even if the Plaintiff were now permitted to set up a case of title by adverse possession, which in the circumstances of this case, I think she should not be allowed to fall back upon at this stage, she could not possibly succeed on the basis thereof.

Finally, we have to consider whether the Plaintiff is entitled to an injunction to protect her possession from trespass by the Defendants; the Plaintiff seeks to invoke the aid of the principle that as lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever and is a mere trespasser, the possessor can obtain a declaratory decree and an injunction restraining the wrong-doer. [*Ismail Ariff Mohamed Ghous* (18)]. This doctrine is of no assistance to the Plaintiff. It is an elementary rule that as trespass is an injury to a possessory right, the proper Plaintiff in an action of trespass to land is the person in actual or constructive possession at the time of the trespass; the owner has no right to sue in trespass, if any other person is in possession of land, since a mere right of property with a right of possession is not sufficient to support the action. Consequently, if, as here, the land is in the possession of a tenant, the tenant is the proper Plaintiff to sue for trespass, committed in respect of the land; but if the trespass is injurious to the reversion, the reversioner, although he cannot sue in trespass, may sue for the injury done to his interest. [Bacon. Abr. tit, trespass, c. 3: *Cooper* v. *Crabtree* (19), *Turner* v. *Cameron's Coal Brook Steam Coal Co.* (20), *Litchfield* v. *Ready* (21),

(13) 21 Mad L. J. 182 (1910).
(14) I. L. R. 27 Cal. 943: s c 4 C. W. N. 597 (1900).
(15) I. L. R. 25 Mad. 635 (1901).
(15) I. L. R. 25 Mad 635 (1901).
(16) L R. [1896] A. C. 434 (1915).
(17) L. R. [1895] A. C. 457.
(18) I. L. R. 20 Cal. 884 (1893).
(19) 20 Ch. D. 589 (1882).
(20) 5 Exch. 932 (1850).
(21) 5 Exch. 939 (1850).

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Attersoll v. *Stevens* (22), *Gordon* v. *Harper* (23) and *Baxter* v. *Taylor* (1)]. Chitty in his work on Pleading (seventh edition) puts the matter in the same way: "A person having the immediate reversion or remainder in fee or in tail or for a less estate may support an action on the case for waste or any nuisance of a permanent nature or which affects, litigates and injures the right and which is injurious to his reversionary interest, but he cannot sue in trespass when the possession is lawfully in his tenant or other person." (Vol. I, p. 72). "The gist of the action is the injury to the possession and the general rule is that unless at the time the injury were committed, the Plaintiff was in actual possession, trespass cannot be supported, and though the title may come in question, yet it is not essential to the action that it should; therefore, the landlord cannot, during a subsisting lease or demise, support trespass for an injury to the land, and an action of trespass must be in the name of the tenant." (Vol. I, p. 196). This possibly is the reason why the suit was not framed as an action in trespass. It is consequently impossible to sustain the reliefs granted by the decree to the Plaintiff, for if the Plaintiff has no title, as I find she has not, she is not, under sec. 42 of the Specific Relief Act, entitled to relief even by way of declaration that the Defendants have no right of way. In this view, it is immaterial to discuss the second issue or to determine whether the Defendants have a public right of way over the disputed strip. But I may add that I see no reason to differ from the view that the Defendants have failed to establish the alleged right. If what is now level land was originally a public drain, it did not become a public way merely because it was filled up in course of time. [*Judoo Lall* v. *Gopaul Chunder* (24)]. I also agree with Mr. Justice Woodroffe that the discussion on this part of the case really proceeded on a misapprehension of the expressions loosely used in the written statements about a public drain and a public passage on the site of the disputed strip.

The result is that, in my opinion, the appeal must be allowed and the suit dismissed with costs throughout. I think the Defendants should have their entire costs, even though they have failed in their allegation of a right of way; indeed, even if the Plaintiff were allowed to have costs of the trial of this issue, it would be extremely difficult, if not practically impossible, to apportion the costs with any approach to accuracy, as the very same witnesses who deposed to the question covered by the first issue also deposed upon the other matter.

M. N. K. *Appeal allowed.*

(22) 1 Taunt. 183, 190 (1808).
(23) 7 T. R. 9 (1796).
(1) 2 Barn. and Ad. 72 (1832).

[CIVIL APPELLATE JURISDICTION]
APPEAL FROM ORIGINAL DECREE
No. 100 OF 1915
WITH
RULE No. 312 OF 1915.

TEUNON, J. CHAUDHURI, J. 1916, 31, March.	BHABATARINI DEBI, Objector, *Appellant*, *v.* HARI CHARAN BANERJEE, Petitioner, Respondent.

Court Fees Act (VII of 1870), Sch. II, Art. 12—Caveat, what is a—Probate proceeding—Persons upon whom citations issued, preferring objections—Objections if must be stamped as caveat.

A petition by which a party upon whom citation has been issued opposes the grant of probate is not a caveat and need not be stamped as such.

(24) L. R. 13 I. A. 77 (1886).

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A caveat, which is in the nature of a precautionary measure intended to assure that there shall be no proceeding in the matter of the estate of the deceased without notice to the person who files a caveat, is not necessary where persons interested in the estate of the deceased appear upon citation.

This was an appeal preferred on the 26th March 1915 against an order of A. H. Cumming, Esq., District Judge of Zillah 24-Parganas, dated 22nd December 1914.

The facts of the case appear from the judgment.

Babu Satindra Nath Mukherjee for the Appellant.

Babu Ramani Mohan Chatterji for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

In this case it appears that a widow of the name of Charubala Debi died sometime in October 1914. Thereafter her father presented to the Court of the District Judge of Alipur a document which he alleged to be the last Will and testament of the deceased Charubala Debi and applied for probate thereof. In his application he stated, as the law requires, the names of the relatives of the deceased, these relatives being in this case two daughters. One of the daughters thereupon appeared and intimated her intention of opposing the application for probate. She did so in a petition on which she affixed an eight-anna stamp. The learned District Judge was of opinion that this petition was in the nature of a caveat and so required a stamp of five rupees under Art. 12, Sch. II, of the Court Fees Act. He therefore refused to accept the petition of objection and having refused that petition proceeded to deal with the application for probate *ex parte*. His order granting probate after these *ex parte* proceedings is dated the 16th January 1915.

It is clear that in treating the petition of objection filed by the daughter as a caveat the learned Judge has fallen into error. A caveat is in the nature of a precautionary measure intended to ensure that there shall be no proceedings in the matter of the estate of the deceased without notice to the person who files the caveat. In this case no caveat was necessary. Citations had issued upon the daughters at the instance of the Petitioner and in answer to the citation she appeared and claimed her right to be heard. Eight annas on such a petition is sufficient and the daughter having appeared upon citation and being a person interested in the estate of the deceased should obviously have been allowed to be present throughout the proceeding and to adduce such evidence as she might have in opposition to the claim.

For these reasons we set aside the Judge's order of the 14th December 1914, and also his order of the 22nd December 1914, and direct that the proceedings be reopened and that the Will be proved in the presence of the objector who shall be allowed full opportunity to adduce such evidence in the matter as she may be advised to offer. The probate already issued shall be recalled. The appeal is accordingly decreed and the Rule No. 312 of 1915, made absolute.

Costs will abide the result. We assess the hearing-fee in the appeal and in the Rule at one gold mohur in each.

Appeal allowed,

N. G. *Rule made absolute.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDER
NOS. 314 AND 315 OF 1914
WITH
RULES NOS. 702 AND 703 OF 1914.

	EASTERN MORTGAGE AND AGENCY CO., LTD., Plaintiffs, Appellants,
WOODROFFE, J. COXE, J.	*v.*
1914, 6, August.	PREMANANDA SAHA and ors., Defendants, Respondents.

Receiver, order refusing to remove, if appealable—Resignation of one of two joint Receivers if terminates order appointing Receiver.

No appeal lies against an order refusing to remove a Receiver who has already been appointed.

Where two persons were appointed joint Receivers to an estate, the order appointing them did not come to an end on the resignation of one of them so as to leave the estate without a Receiver and without the protection for which a Receiver is, in fact, appointed.

These were appeals preferred on the 24th June 1914 against an order of Babu Behary Lal Chatterjee, Subordinate Judge of Zillah Dacca, dated 6th June 1914.

The facts of the case will appear from the judgment.

Mr. C. R. Dass, Babus Pravash Ch. Mitter and *Ambica Pada Chowdhury* for the Appellants, Petitioners.

Mr. Langford James, Babu Gopal Ch. Dass, Dr. Sarat Chandra Basack and *Babu Satis Ch. Chowdhuri* for the Respondents, Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

WOODROFFE, J.—I am of opinion that the preliminary objection that no appeal lies in this matter succeeds. This is not a case of an application for appointment of a Receiver or of a refusal to appoint a Receiver. In substance it is one for the removal of a Receiver who has already been appointed.

Therefore, I think that no appeal lies. But as the case has been argued at some length I shall deal with some other points which have been raised.

The Court was of opinion that in the interest of the estate two Receivers should be appointed so that the interests of both the morgagor and the mortgagee might be represented. Each of the parties was allowed to nominate. The Plaintiffs nominated Mr. Tweedie and the Defendants nominated Premananda Saha who is a Court Officer, a Sheristadar. Our attention has been drawn to the decision in *Mohini Mohan Patra* v. *Ram Narayan Patra* (1) in which an opinion was expressed that it was not expedient to appoint a Court Officer as a Receiver. But we are not concerned here with that question, for we have not to consider an application for the appointment of any Court Officer as a Receiver but we have to determine whether any appeal lies upon an application to remove a person who is a Court Officer from being a Receiver.

It appears clearly that the order for appointment of the Receiver was not by consent. It also appears that for some time the joint Receivers worked together without any (at any rate overt) quarrels. Later, disputes arose between them which appear to have been due to several causes, some of which have been drawn to our attention by Mr. James. One cause of ill-feeling appears to have arisen out of the question as to whether or not, Mr. Tweedie should retain for himself what is described as a personal *nazar* or whether it should be credited to the estate. Babu Premananda Saha very properly thought

(1) 14 C. L. J. 445 (1911).

that this *nazar* should be credited to the estate.

Another point to be noted in this connection is that Mr. Tweedie while leaving India had purported to appoint a substitute to act for him and the Judge did not, and I think rightly, accept Mr. Tweedie's substitute. On Mr. Tweedie's return he found that his substitute had not been appointed and that his co-Receiver had received the commissions for the work done as was right seeing that the work had been done by Babu Premananda Saha alone. Following on these disputes in which the right appears to have been with Babu Premananda Saha, an application was made by Mr. Tweedie with a view to get his co-Receiver removed on the ground amongst others that he was ignorant of zemindary business. Mr. Tweedie also states that if his wishes were not given effect to he would himself retire. This he subsequently did.

It has been contended before us by learned Counsel on behalf of the Appellant that on the retirement of Mr. Tweedie, the order appointing the Receivers came to an end. For such a proposition no authority of any kind has been cited. It would be indeed dangerous to hold that if—two persons are appointed as Receivers and one were (to give an example) suddenly to die that then the estate would be without a Receiver and without the protection for which a Receiver is, in fact, appointed.

Moreover, our attention has been drawn to an order passed by the Subordinate Judge on the 4th July 1914, which states that Mr. Tweedie was a Receiver until the date when his resignation was accepted. It further directs that the sole Receiver, Premananda, should submit accounts for the period subsequent to that and until the appointment of another joint Receiver. The Appellants appear to have refused to nominate any person to represent them as a Receiver in the place of Mr. Tweedie who had retired.

It has also been objected that even if these contentions with which we have dealt are not made out the objection which has been raised against the continuance of the Sheristadar as Receiver has not been investigated. These objections appear to me rather to have come from Mr. Tweedie for the personal reasons stated than from the Company in whose name he purports to act. But it is quite clear and this is made out in the 19th paragraph of the affidavit of Premananda that the objections which was put forward in the name of the Company were fully considered by the Court as also was the written answer of Premananda which was put up before the Judge.

On these grounds I hold that there is no appeal or a case before us for revision. The appeals therefore fail and are dismissed with costs. We assess the hearing fee at five gold mohurs in each case.

The Rules are discharged.

Coxe, J.—I agree.

Appeals dismissed,

S. C. M. *Rule discharged.*

[CIVIL REVISIONAL JURISDICTION]

Rule No. 1210 of 1915.

D. Chatterjee, J.
Beachcroft, J.
1916,
Heard, 28 and 29, March.
Judgment, 11, April.

Radha Sham Basak and ors., Plaintiffs, Petitioners,
v.
The Secretary of State for India in Council, Defendant, Opposite Party.

Indian Railways Act (IX of 1890), secs. 3 (6), 77, 140—Railway administered by Government—Suit by consignee for price of goods consigned and mislaid by railway—Notice to Traffic Manager and

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to Collector for Secretary o State, if sufficient—Limitat on—Limitation Act (IX of 1908), Sch. I, Arts. 30, 31, 115.

In the case of a railway administered by Government, notice under sec. 77 of the Railways Act is [in view of the definition of the words "Railway Administration" in sec. 3 (6) of the Act] effective, if served on Government, and sec. 140 does not mean that the "Manager" is the only person on whom notice can be served, but that if notice is served on the Manager, it must be served on him in the manner provided in sec. 140.

THE SECRETARY OF STATE *v.* DIPCHAND PODDAR (1), GREAT INDIAN PENINSULA RAILWAY *v.* CHANDRA BAI (2), JANAKI DASS *v.* THE BENGAL NAGPUR RAILWAY COMPANY (3), PERIANNAN CHETTI *v.* SOUTH INDIAN RAILWAY COMPANY (4) *and* NADIAR CHAND SAHA *v.* WOOD (5) *considered.*

Per D. CHATTERJEE, J.—Semble.—*In the absence of evidence showing that the "Agent" of a railway administered by Government is the Manager, or that the "Traffic Manager" is not the Manager and regard being had to the rule printed and published in the Fare and Time Table of the Railway that "references regarding delay in transit to or loss of goods, parcels, luggage or other articles or claims for compensation and refunds should be addressed to the Traffic Manager," notice to the Traffic Manager may be considered sufficient under sec. 140 of the Act.*

In a suit by consignors of goods which were not alleged to have been lost, but were found to have gone astray after they were delivered to the Railway, for recovery of their price with compensation, the Defendant did not plead or prove any loss and on the other hand alleged that the goods had not been delivered at all, nor was there evidence when the goods were to be delivered.

Held, *per* CURIAM, *that neither Art. 30 nor Art. 31 applied, and (Per* D. CHATTERJEE, J.), *that the suit was governed by Art. 115 of the 1st Schedule to the Limitation Act.*

MOHAN SINGH CHAWAN *v.* CONDER (6) *and* DANMULL *v.* BRITISH INDIA STEAM NAVIGATION COMPANY (7) *referred to.*

This was a Rule granted on the 20th December 1915, against the judgment of Babu R. C. Sen, Small Cause Court Judge of Dacca, dated the 5th October 1915.

The facts of the case as found by the Court below were as follows :—

On the 23rd March 1914, two bundles of cotton thread weighing 3 mds. 38 seers were booked at the Dacca Railway Station and under Invoice No. 6 were despatched for carriage to Narsinghdih for delivery to Gobinda Chandra Das, the consignee. At Naraingunge the wagon carrying the aforesaid goods was opened for transhipment to the Steamer Company but the goods were not found in the wagon and the Railway Company failed to deliver the goods to the consignee. The Plaintiffs, consignors, brought this action on 22nd April 1915 for recovery of the price of goods with damages thereon. The Defendant Company urged (1) that the claim was barred under secs. 30 and 31 of the Limitation Act, but from the evidence of witnesses examined by the Defendant and the Bill of lading it was, in the Court's opinion, clear that the Defendant Company received the cotton threads for despatch to the consignee at Narsinghdih, that one Sultan Baksh Chaudhuri, Tally Clerk, was said to have loaded the goods as per

(1) I. L. R. 24 Cal. 306 (1897).
(2) I. L. R. 28 All. 552 (1906).
(3) 16 C. W. N. 356 (1912).
(4) I. L. R. 22 Mad. 137 (1899).
(5) I. L. R. 35 Cal. 194 (1907).
(6) I. L. R. 7 Bom. 478 (1883).
(7) I. L. R. 12 Cal. 477 (1886).

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Invoice No. 6 in the van No. 3456, but when it was opened at Naraingunge by Jnan Ranjan Das Gupta it appeared that the goods in question were not there. Under the circumstances it seemed to the Court probable that the goods had gone astray at Dacca instead of being put in the right wagon. In this view the Court held, on the authority of the decisions in *Danmull* v. *British India Steam Navigation Company* (7) and *Mohan Singh* v. *Conder* (6) that the case was governed by Art. 49 rather than by Arts. 30 and 31, Sch. I of the Indian Limitation Act, so that the suit was instituted in time.

The Defendant had also pleaded (2) that no proper notice under sec. 77 of the Railways Act had been served within the period of six months required by the Act.

On this question the Court held that the notice that was given to the Government was not served within six months from the date of delivery of the goods inasmuch as a registered letter addressed to Government on 28th January 1915, was not acknowledged till the 30th January 1915, and that the notice which was served upon the Traffic Manager was not a notice to the Manager of the Railway Administration and that there was nothing in the record to prove that the notice served upon the Traffic Superintendent reached the Manager within six months from the date of delivery of the goods. In this view the Court dismissed the suit, but in concluding its judgment it added that if the claim was maintainable he would have decreed the suit for Rs. 392-15 only.

The Plaintiff moved the High Court and obtained this Rule.

Dr. Sarat Chandra Basak and *Babu Hemendra Kumar Das* for the Petitioner.

(6) I. L. R. 7 Bom. 478 (1883).
(7) I. L. R. 13 Cal. 477 (1886).

Babu Ram Charan Mitter for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

D. CHATTERJEE, J.—The petitioners, on the 23rd of March 1914, consigned two bundles of cotton thread at the Dacca Station of the Eastern Bengal State Railway for conveyance to one Gobinda at Narsinghdih. The goods did not reach the consignee and information was given to the District Traffic Superintendent on the 25th of May 1914. On the 5th of June 1914, they gave notice to the Traffic Manager of the Railway at Sealdah that if they did not get delivery within a week they would bring a suit. The Petitioners say they gave this notice in accordance with the following Rule printed and published in the Fare and Time Table of the Eastern Bengal State Railway. "References regarding delay in transit to or loss of goods, parcels, luggage or other articles and claims for compensation and refunds should be addressed to the Traffic Manager, Calcutta." They also say that the said Railway has no officer who is called the Manager but there is one called the Agent. On the 1st August 1914, they served a notice on the Secretary of State through the Collector of Dacca demanding payment of compensation and informing him that in default of payment a suit would be brought after two months. This notice was, it seems, sent over by the Collector to the Traffic Manager who wrote to the Petitioners asking for details of their loss and such details were duly supplied on the 4th of October 1914. On the 23rd December 1914, and 8th January 1915, the Traffic Manager wrote to them that the matter was under enquiry. The Petitioners brought a suit for the recovery of the price with compensation. The De-

fendant, the Secretary of State, pleaded (1) that the suit was not maintainable as no notice had been given to the Agent of the Railway under sec. 77 of the Railways Act : (2) that the suit was barred by Arts. 30 and 31 of the 1st Schedule to the Limitation Act : (3) that no goods were in reality consigned by the Plaintiffs who brought the suit in collusion with the servants of the Railway.

The learned Judge in the Court below held that the goods had been really consigned but must have gone astray at Dacca instead of being loaded in the proper wagon, but as no notice had been served on the Agent within six months he dismissed the suit with costs.

The Petitioners obtained this Rule from this Court and it is urged at the hearing that the learned Judge was wrong in his decision on the question of notice.

Sec. 77 of the Railways Act provides that notice must be given to the Railway Administration within six months of the delivery of the goods for carriage by the railway. Sec. 3 (6) says that " Railway Administration " in the case of a Railway administered by Government, means the Manager of the Railway and includes the Government and in the case of a Railway administered by a Railway Company means the Railway Company. Sec. 140 provides that any notice required to be served on a Railway Administration may be served in the case of a Railway administered by the Government, on the Manager, and in the case of a Railway administered by a Railway Company, on the Agent of the Company in India.

It is contended by the learned Vakil for the Petitioners that the service of the notice, dated the 1st August 1914, on the Secretary of State through the Collector of Dacca was sufficient to meet the requirements of sec. 77 : the learned Vakil for the Secretary of State contends that sec. 140 is imperative and no notice but on the Manager is acceptable. I think sec. 140 has not the effect of cutting down the connotation of the words Railway Administration as contained in sec. 3 (6). It only provides for the convenience of the party aggrieved that if he wants to serve the notice on the Manager of the State Railway or the Agent of the Railway Company he must do so in one of the ways mentioned there. If the party chooses to give notice to the Government or the Native State or the Railway Company there is nothing in the Act to prevent his doing so; the latter alternative may enhance his trouble, but it cannot take away his rights. I think the clause " includes the Government " has the effect of extending the meaning of the words Railway Administration whereas the said words might not mean the Government when there was a Manager. A number of cases have been relied on in this connection by either side but I do not think that any of those cases contra-indicates the above view. The case of *The Secretary of State* v. *Dipchand Poddar* (1) is however the only case which had reference to a State Railway. The notice to the Collector there was beyond six months from date of delivery and therefore of no avail : the other notice was to the Traffic Superintendent within six months and the case was sent back for a finding whether it reached the Manager within the required time. This case, if it helps any side, seems to help the Petitioners for it was held in effect that it was not necessary to serve notice both on the Collector and the Manager : for if it were the opinion of the Court that the Railway Administration meant both the Manager and the Government and notices were re-

(1) I. L. R. 24 Cal. 306 (1897).

quired to be given to both, the case would have been disposed of at once as the notice on the Collector was out of time.

All the other cases referred to in the argument are Railway Company cases and have hardly any bearing on the point at issue before us. Some of them, however, do indicate the opinions of the learned Judges who decided them on the point and may be referred to in this connection. The case of the *Great Indian Peninsular Railway* v. *Chandra Bai* (2), held that a notice to the General Traffic Manager was not a notice to the Agent and was therefore insufficient. The learned Judges, however, say in one part of their judgment " the notification of a claim prescribed by sec. 77 may therefore be given either to the Railway Administration as defined in sec. 3 (6) or in any other way." In the case of *Janaki Das* v. *The Bengal-Nagpur Railway Company* (3), it was held that a notice to the Goods Superintendent is not a valid notice under secs. 77 and 140. Sir Lawrence Jenkins, C. J., says in his judgment, however, " the method of service permitted by this section (140) has not been followed nor has it been shown that the claim has been otherwise preferred to the Railway Administration so as to satisfy the requirements of sec. 77." The Madras High Court also expressed a similar opinion in the case of *Periannan Chetti* v. *South Indian Railway Company* (4). The learned Judges say " We do not think that sec. 140 precludes a claimant from showing that the notice required by sec. 77 did in fact reach the agent within the time limited though not in one of the modes prescribed by sec. 140." This view is in accordance with what was held in this Court in the case of the *Secretary of State* v. *Dipchand Poddar* (1). I am aware of a note of dissent from the Madras case expressed in the case of *Nadiar Chand Saha* v. *Wood* (5) but that case must be read by the light of its own facts and besides the authorities quoted do not seem to support the opinion which was expressed in terms rather too general. Furthermore that was a company case and the point now before us was foreign to the enquiry. I think therefore that these cases do not support the contention of the Opposite Party and the notice that was served in this case upon the Government through the Collector within six months was sufficient to satisfy the requirements of sec. 77. In this view of the case it is not necessary to consider whether the notice to the Traffic Manager was a valid notice. I think it right to state however that the position taken by the learned Government Pleader in this respect also is very debatable. He says the notice ought to have been to the Manager of the Railway but there is no officer having that designation on this Railway : then he says the notice ought to have been served on the Agent but the law does not require notice to be given to the Agent in a State Railway and if a notice had actually been given to the Agent it could have been argued that it should have been given to the Manager. Then again there is no evidence that the Agent is the Manager or that the Traffic Manager is not the Manager.

On the other hand the Time and Fare Table of the Railway which is presumably issued by the authority of the Railway Administration directs the public to give notices to the Traffic Manager. I think that it is the duty of the Government to throw more light on this point and inform

(2) I. L. R. 28 All. 552 (1906).
(3) 16 C. W. N 356 (1912).
(4) I. L. R 22 Mad 187 (1899).

(1) I L. R. 24 Cal. 806 (1897).
(5) I. L. R. 35 Cal. 194 (1907).

the public that the Manager of the Railway for the purpose of serving notices is either the Traffic Manager or the Agent or somebody else.

The next question is that of limitation under Art. 30 or 31 of the 1st Schedule to the Limitation Act. The goods were delivered to the Railway on the 23rd of March 1914 and the suit was brought on the 22nd of April 1915 about a month over one year after. Art. 30 does not apply as the Plaintiffs' case was not for the loss of the goods and the Defendant did not plead or prove any loss. On the other hand the Defendant pleaded that no goods had been delivered at all. Art. 31 applies to suits against a carrier for compensation for non-delivery of or delay in delivering goods and the time for suit is one year from the time when the goods ought to be delivered. I think this article also has no application. In the first place this article seems to contemplate a suit by the party who is entitled to the delivery, namely, the consignee. In the second place it would be for the company to show when the goods ought to have been delivered—that fact being presumably within its knowledge but there is no evidence on the point: on the contrary the case of the Defendant being that no goods were in reality delivered, he could hardly prove when the goods should have been delivered. Narsinghdih is not a place on the same line but has to be reached after transhipment at Naraingunge, so that one cannot even by guess say that the goods should have reached within a month. Apart from this consideration, however, I think that this is a case of a breach of a written contract and Art. 115 of the Schedule governs the case. It was so held in a similar case *Mohan Singh Chaowan* v. *Conder* (6) which was followed by Garth, C. J., and Wilson J., in the case of *Dammull* v. *British India Steam Navigation Company* (7). This being so the suit was not barred by limitation. The learned Judge says he would have decreed the suit for Rs. 392-15 only if it were maintainable. I would, therefore, decree the suit for Rs. 392-15 with costs. The Petitioners are entitled to their costs in this Court three gold mohurs. The Rule is accordingly made absolute.

(6) I. L. R. 7 Bom. 478 (1883).

BEACHCROFT, J.—I agree that in view of the definition of the words "Railway Administration" in sec. 3 (6) of the Act, the notice under sec. 77 is effective if served on the Government, and that sec. 140 does not mean that the Manager is the only person on whom notice can be served, but that if notice is served on the Manager, the only alternative being service on the Government, it must be served on him in the manner provided.

Whether the Collector is the proper person to receive notice under sec. 77 on behalf of Government when notice is served on Government and not on the Manager, I express no opinion, but as the learned Government Pleader did not suggest that he was not, except in so far as he argued that under sec. 140 notice must be served on the Manager alone, for the purposes of this rule I accept the position that notice to the Collector is notice to the Government. As regards the question of limitation it is sufficient to say that I agree that Art. 30 does not apply, and that if Art. 31 does there is no evidence when the goods ought to have been delivered.

I agree in decreeing the suit.

N. G. *Rule made absolute.*

(7) I. L. R. 12 Cal. 477 (1886).

CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 188 OF 1916.

CHITTY, J.
WALMSLEY, J.
1916,
10, March.

ATUL HAZRAH and ors., 2nd Party, Petitioners,
v.
UMA CHARAN CHONGDAR and others, 1st Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145—Order under section contrary to decree of Civil Court.

The Petitioners, the second party to the proceeding under sec. 145, Cr. P. C., obtained a decree against one of the first party and another person who were entitled to an undivided one-fourth share in the property in dispute. This share was sold in execution of the decree and purchased by the decree-holders, the Petitioners, who obtained delivery of possession through the Court. The Magistrate finding that the Petitioners were never in actual possession of the property and the crop was grown by the first party made an order in favour of the latter.

Held—*That the order was liable to be set aside.*

This was a Rule granted on the 16th February 1916 against an order passed by Babu Joy Kali Mukerjee, 1st class Honorary Magistrate of Amta, on the 4th February 1916 declaring the Opposite Party to be entitled to possession of the disputed lands and directing petitioners to pay Rs. 32 as costs to the Opposite Party.

The order of the Magistrate was as follows :—

On a police report that there was every likelihood of a breach of the peace regarding the cutting of paddy in 12 plots of lands proceedings under sec. 145, Cr. P. C., had been drawn up by the Honorary Magistrate of Amta. The 1st party and the 2nd party appeared and put in their respective claims to the properties in dispute.

The first party alleged that the lands were in their joint possession and they cultivated the lands this year and were in possession of the lands and grew crop on them.

The second party alleged that they purchased the land at an auction sale in execution of their decree against Bhusan and Nanda Chongdar and got delivery of possession through Civil Court and cultivated the land this year and grew crop.

From the evidence on both sides it is quite clear that the land belonged to Uma-Charan, Bhusan, Nanda and others in equal shares.

The second party Atul Chandra and another purchased the share of Bhusan and Nanda which is only one-fourth in an auction sale.

According to sale certificate, 2nd party purchased certain quantities of land of the entire plots which on calculation comes to one-fourth in each plot and he also took symbolical possession of the same.

* * * * *

The only question to be determined in this case is who were in actual possession of the lands at the time when proceedings were commenced. Both have produced large number of witnesses and from the evidence adduced by 1st party it has been satisfactorily proved that the lands were in possession of the 1st party and they actually grew crop . . . . .

I cannot understand why the 1st party would come and resist the 2nd party in taking away the paddy when they peacefully allowed them to take possession only five or six months ago. . . . I believe 1st party did actual cultivation of the land and were in possession, the 2nd party failing to get actual possession resorted to unlawful act in cutting the paddy in an unripe state. It is no doubt 2nd party has

a right to possession by virtue of their purchase but actual possession rests with 1st party . . . Hence ordered that possession be declared in favour of 1st party, etc., etc.

Babu Monmotha Nath Mukerjee for the Petitioners.

Babus Dasarathi Sanyal and *Debendra Narain Bhuttacharjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

In this case, the five Petitioners, who are the second party to the proceedings, obtained a decree against Bhusan Chongdar (one of the first party) and Nanda Chongdar, who were entitled to an undivided one-fourth share in a property. This one-fourth share was brought to sale in execution and was purchased by the decree-holders. They obtained delivery of possession through the Court. The present proceedings were taken between the first party—of whom Bhusan Chongdar, one of the judgment-debtors, was one, and the second party, who were the decree-holders. The learned Magistrate has found that, though the second party are undoubtedly entitled by virtue of their purchase to an undivided one-fourth share, they were never in actual possession of the property and that the crop was grown entirely by the first party. He has accordingly declared in favour of the possession of the first party and directed the second party to go to the Civil Court.

We do not think that the order in this particular case can stand. It seems contrary to all principles of justice that a judgment-debtor should be allowed to retain possession against his decree-holder who has actually been given possession against him by a Civil Court, and, in a Criminal proceeding, to assert that possession and, by force of the order of the Magistrate, drive the decree-holder and auction-purchaser back to the Civil Court for a further declaration of his rights. This element in the case before us distinguishes it from the case of *Basanta Kumari Dasi* v. *Mohesh Chandra Saha* (1). With the principles laid down in that case, we are fully in accord; we think that the present order cannot be allowed to stand and must be set aside and we order accordingly.

If there is still any likelihood of a breach of the peace, the Magistrate will have power to take steps under sec. 107, Cr. P. C., to bind down the aggressive parties.

S. C. M. *Rule made absolute.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREE No. 245 OF 1913.

CHAPMAN, J. ATKINSON, J. 1916, 6, April.	BHAGAT MAL SAHU, Defendant No. 1, Appellant, *v.* SK. ABDUL KARIM and anr., Plaintiffs, Nanku Sahu Defendant No. 2, Respondents.

Mortgage by Mitakshara father—Son, though of age, not a party to the deed—His liability—Moral obligation to pay father's debts, unless incurred for immoral purposes—Legal proof of immoral purposes.

Liability on the part of a son to pay a father's debt arises from moral and religious duty and obligation and this is so even though the debt is not incurred for the benefit of the individual or for the estate. A son can only exempt himself from liability if he can establish that the father was

(1) I. L. R. 40 Cal. 982 ; s. c. 17 C. W. N. 944 (1913).

BHAGABAT MAL SAHU *v.* SK. ABDUL KARIM.

guilty of applying the money for some immoral purpose.

Although there need not be any direct proof that the money was raised to be spent on any particular person, yet one must be reasonably satisfied that the father was a man of vicious, extravagant and lustful habits and that he raised the money for the purpose of applying it for the immoral purpose. In some way by reasonable legal proof it must be shewn that there is a connection with the debt and the immoral purpose.

CHINTAMANRAV MEHENDALE *v.* KASHINATH (3) *and* DATTATRAYA VISHNU *v.* VISHNU NARAYAN (4) *referred to.*

To be liable on a mortgage executed by the father for a purpose not proved to be immoral, it is not necessary for the adult sons to be parties to the bond.

The case of UPOOROOP TEWARY *v.* LALLA BANDHJEE SAHAY (1) *seems to have been overruled if not distinctly qualified by the later case* BASO KOOER *v.* HURRY DAS (2).

This was an appeal against the judgment and decree passed by Babu Shasibhusan Basu, Subordinate Judge of Palamow, dated 6th March 1913.

The facts of the case were shortly as follows :—Kunja Behari Sahu, the deceased father of the Defendants Nos. 1 and 2, executed a mortgage-bond on 29th December 1899 in favour of Muksud Ali, deceased, for Rs. 2,400 with interest at the rate of Re. 1-8 per cent. per mensem. The Plaintiff No. 1 is the son and the Plaintiff No. 2 is the widow of Muksud Ali. The present action is brought by the Plaintiffs for the recovery of Rs. 2,400 by way of principal and Rs. 4,008 by way of interest due on the morgage-bond.

Both the Defendants filed a joint written statement, stating that the Plaintiffs were not the heirs of Muksud Ali, that the father of the Defendants was profligate and was addicted to debauchery, that he incurred the debt, if at all, for immoral purposes, that they were separate in mess and property from their father and that they are not liable for his debt.

The Subordinate Judge found all the points in favour of the Plaintiffs and decreed the suit for Rs. 6,380 after deducting the sum of Rs. 28 only from the claim of the Plaintiffs which was shewn to have been paid to Muksud Ali. The Defendant No. 1, the eldest son of the original mortgagor, preferred this appeal and challenged the conclusions of the first Court so far as his liability for the debt was concerned.

Mr. Roy Guru Saran Prasad for the Appellant.

Mr. Khursid Hussain for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

ATKINSON, J.—This is an action brought by the Plaintiff to recover Rs. 2,400 by way of principal and some Rs. 4,008 by way of interest on a mortgage-bond dated the 29th December 1899. The bond purports to be made by the Defendant's father and apparently the money was raised for the purpose of extinguishing three prior existing mortgage-debts on respective bonds, dated 20th February 1896, 7th December 1896, and 16th September 1899. These bonds were for various amounts and it would appear that irrespective of interest the total amount of monies raised by way of principal by

(1) I. L. R. 6 Cal. 749 (1881).
(2) I. L. R. 9 Cal. 495 (1882).
(3) I. L. R. 14 Bom. 320 (1889).
(4) I. L. R. 36 Bom. 68 (1911).

these bonds would be about Rs. 1,200 to Rs. 1,500. The bond sued on is for Rs. 2,400 with interest. The original mortgagor is dead and the Defendants are his two sons. The original mortgagee is also dead and this suit is brought by the Plaintiff as his representative to recover the money due on this mortgage-bond for the amount of Rs. 6,408. It will be noticed that this appeal is brought against the decision of the learned Subordinate Judge by one Defendant only, that is Defendant No. 1, who is the eldest son of the original mortgagor. Defendant No. 2, although he joined in filing a written statement on behalf of himself and his brother, does not seriously contest the decision of the learned Subordinate Judge and expresses his willingness to pay Rs. 3,000 in discharge of his liability. Thus the appeal before us is simply an appeal by one of the parties liable as a son of the original mortgagor. He seeks to resist liability for this debt on three grounds. First of all, that he and his father were separate in mess and residence and that in fact the joint property which had previously belonged to his father himself and his brother had been severed or partitioned and that by reason of this, he is not liable for the antecedent debts of his father. Secondly, it is contended that if the joint property has not been severed that he is within the class of exception which provides that a son is not liable according to Hindu Law for the debts of his father if the debts be contracted for an immoral purpose. And thirdly, he contends that in point of law, at the time that the mortgage-bond was made and given, he was then of age and that his father executed the bond without his consent, express or implied, and that consequently he is not liable, it not having been shown that the debts were not incurred for any family necessity.

On the first question we are of opinion that there was no evidence given that there had been any partition of the joint property between father and sons.

Taking the third point next we are of opinion that the case cited in *Upooroop Tewary* v. *Lalla Bandbjee Sahay* (1), in support of that argument is of little weight. It seems to have been overruled if not distinctly qualified by the later case reported in *Baso Kooer* v. *Hurry Das* (2),

The only question which then remains to be considered is whether or not the money raised in this case was raised for some immoral purpose? Liability on the part of a son to pay a father's debt arises from moral and religious duy and obligation, and this is so even though the debt is not incurred for the benefit of the individual or for the estate. A son can only exempt himself from liability if he can establish that the father was guilty of applying the money for some immoral purpose. The only evidence adduced in this case for the purpose of shewing that the money was applied for an immoral purpose is the evidence of the Defendant No. 1 himself which merely says in general terms " my father used to drink and keep women and borrowed money for the purpose." That is the only affirmative evidence given by the defence on that issue. It in no way connects the money raised under this mortgage-bond now sued on with the keeping of any particular woman, nor in the evidence of the Defendant is the name of any woman suggested. The evidence seems very elastic, indefinite, and inconclusive. Some little corroboration, how-

(1) I. L. R. 6 Cal. 749 (1881).
(2) I. L. R. 9 Cal. 495 (1882).

ever, is given to the defence pleaded by the evidence of witness No. 6 for the Plaintiff in which he says that the mortgagor kept a woman and that a dispute arose between him and his sons on account of this prostitute. There too no connection is shown between the raising of the money and its expenditure for any specific immoral purpose. We have considered the cases that have been decided, the cases reported in *Chintamanrao Mehendale* v. *Kashinath* (3) and *Dattatraya Vishnu* v. *Vishnu Narayan* (4), are directly in point and we think that while you need not have direct proof that the money was raised to be spent on any particular person one must be reasonably satisfied that the father was a man of vicious, extravagant and lustful habits and that he raised the money for the purpose of applying it for the immoral purpose. In some way by reasonable legal proof it must be shown that there is a connection with the debt and the immoral purpose. We are unable on the evidence here to say that there has been any reasonable proof connecting the debt incurred in this case with immoral purpose alleged and therefore we must confirm the decision of the learned Subordinate Judge with costs.

Chapman, J.—I agree.

A. K. R. *Appeal dismissed.*

[Civil Appellate Jurisdiction.]

Appeal from Original Decree No. 206 of 1913.

Sharfuddin, J.	Mr. Manners,
Roe, J.	Defendant, Appellant,
1916,	*v.*
18, April.	Satroghan Das,
	Plaintiff, Respondent.

Thika *taken by a cultivating raiyat—Conversion into tenure-holder—Merger—Bengal Tenancy Act (VIII of 1885), sec. 22—Liability to eviction after expiry of the period of* thika—*Construction of lease.*

(3) I. L. R. 14 Bom. 320 (1889).
(4) I. L. R. 36 Bom. 68 (1911).

A thikadar *is liable to eviction after the expiry of the period of his lease, even though it is found that he was a cultivating raiyat with respect to the lands of which he took the* thika *prior to it. His interests as a raiyat became merged into the rights he acquired under the lease.*

This was an appeal against the judgment and decree passed by R. L. Ross, Esq., District Judge of Saran, dated 10th March 1913.

The facts out of which this appeal arose are as follows :—Maharajah Pertab Singh of Durbhanga had assigned 15 bighas and odd of land to the Mahanth of the Asthal called Kamalabari. This land was in possession of one Sarwan Mahton before 1304 Fasli by executing a *thika* lease in favour of the Mahanth. Sarwan executed a sub-lease in favour of Mr. Manners of the Ilmasnagar Factory. From the *thika* executed by Sarwan it appears that he was a tenure-holder and not a cultivating raiyat. Then Mr. Manners obtained a lease of these lands from the Mahanth for a period of 14 years from 1304 to 1318 F. S. The present suit was instituted by the Mahanth for recovery of *khas* possession of the lands after the expiry of the *thika* executed by Mr. Manners. The defence was that Mr. Manners was a cultivating raiyat and could not be ejected. The first Court gave a decree for recovery of *khas* possession and Mr. Manners preferred the present appeal.

Messrs. S. C. Mitter and *C. S. Banerjee* for the Appellant.

Mr. Baldeo Narain Sinha for the Respondent.

THE

Calcutta Weekly Notes.

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Patna High Court to follow Calcutta decisions.

We congratulate the learned Chief Justice and the Hon'ble Judges of the Patna High Court on having held on a Full Bench Reference in the case of *Hazi Abdul Gani* v. *Raja Ram and ors.* which we report in this issue that when the balance of a long course of decisions in the Calcutta High Court has on any question of law or its interpretation been one way, the Patna High Court would not depart from that view without very good reasons, although the other High Courts in India may have adopted a contrary view. Sir Edward Chamier, C. J., with the concurrence of his brother Judges, expressed his opinion very clearly on the subject. This is as it should be. Every High Court in India should always observe a consistency in its decisions and it is only fit and proper that the Patna High Court should always endeavour to maintain consistency in its interpretation of the law with the parent Court out of which it has come into existence. This will also promote a mutual sense of strength and co-operation between the two High Courts which is in the highest degree desirable.

Removal of Calcutta High Court Records to Patna.

We understand that in the course of the establishment of the Patna High Court, the records of all cases from the Province of Bihar and Orissa which had been decided by the Calcutta High Court prior to the establishment of the Patna High Court have been removed to the latter Court. We do not know under what authority the Government of India could direct the records of the Calcutta High Court to be removed to the newly established High Court. The Calcutta High Court is by Royal Charter a Court of Record and the parent Courts out of which it arose have been as much Courts of Record as the Royal Courts of Justice in England. Under the circumstances it was only fit and proper that the records of all cases decided by the Calcutta High Court should remain in the custody of that Court. There seems to be, therefore, no sanction in law or reason for the removal of these records under the directions of the Government of India from the Calcutta High Court. It is only the records of pending cases that could properly be removed from the Calcutta High Court by the transfer of jurisdiction under the Letters Patent of the Patna High Court. We therefore beg to draw the attention of the Hon'ble Judges of both High Courts to this matter. We would like the Hon'ble Judges of the two High Courts to give the matter their due consideration and make such arrangements regarding the custody of the records in question as may be convenient and also at the same time legal.

Judicial condemnation of severe sentences and oppressive administration of criminal law.

We have often protested in these columns against the unduly severe sentences that are passed in India by magistrates and judges inexperienced in the administration of the criminal law. It was with a sense of relief that we noticed that Sir Lancelot Sanderson, K.C., the Chief Justice of the Calcutta High Court, who was for many years the Recorder of Wigan and

as such is more familiar with the practical administration of criminal law in England than any other Judge on the Bench of the Indian High Courts, introduced a very healthy change by passing such sentences at the last Calcutta Court of Criminal Sessions as would be awarded by the Judges in England in similar cases. We also notice with pleasure that Mr. Justice Walsh of the Allahabad High Court, who was also a K.C. and has recently come out to India, expressed his great surprise at the harsh administration of the criminal law even in trivial cases. Harsh administration of the criminal law frustrates its object by making the executive authority of magistrates and the Police unpopular amongst the people while justice and considerate treatment by the judiciary of chance transgressions of the letters of the law by honest citizens in *bonâ fide* assertion of their rights have the very opposite effect.

We therefore welcome the severe condemnation passed by Mr. Justice Walsh upon the perversion of criminal procedure and the passing of inhuman sentences by mofussil magistrates in trivial cases where the accused persons may not have offended against the law though they may have given offence to the Police. The remedy against such gross and grave miscarriages of justice lies in making the Criminal Courts in India independent of the local executive authorities. So long as this is not done a systematic condemnation by the Superior Courts of any perverse administration of the criminal law by the Subordinate Courts would surely go a great way to improve their *morale*. The following judgment which was delivered by Walsh, J., is reproduced below from the columns of the *Pioneer* of the 19th May last :

" For this so-called riot and obstruction of the police, which in my view are not proved and which in any case were of a trivial and venial character, all seven men were sentenced to two years' and three months' rigorous imprisonment. They were further condemned under sec. 107 to furnish bonds of Rs. 200 each, and two sureties of Rs. 160 each to keep the peace for one year after their release. The cumulative result of the magistrate's proceedings on the 25th February, as far as Badri, Ram Kumar and Gava Prashad were concerned, the two latter being in the most prejudiced view of the case mere subordinates, and little more than spectators of a trivial assault, was that they were ordered altogether to undergo three years and nine months' rigorous imprisonment in any case, bound over for a further year in their own bonds of Rs. 200 and two sureties of Rs. 100 each, fined Rs. 100 with the possibility, if not the certainty, of another three months' rigorous imprisonment and the additional penalty of remaining still further in confinement until, after having served nearly four years in jail and paid a fine of Rs. 100, they managed to find security to the amount of Rs. 100. These savage sentences are the combined result of erroneous views of the law, unjustifiable and sometimes perverse findings of fact, and misconduct in procedure. The conviction for obstruction under sec. 152 for which the accused received 18 months each was actually thrown overboard by the prosecution, when the appeal was heard before the Sessions Judge. It is due to the Defendants to say that I can find in all the evidence very little trace of moral obliquity in their conduct, and that they have shown in trying circumstances more self-control than their judge. It would be some consolation to feel that the lamentable miscarriage of justice was merely the result of a series of judicial blunders, but it is impossible to take this view. I am satisfied that the defendants not only never had a chance, but were never intended to have a chance, and that they have been the victims, for some reason unknown to me, of deliberate and vindictive injustice of such a kind as to constitute a public danger in any tribunal charged with dealing with the liberties and characters of humble persons."

Proposed Cl. D, sec. 84, Government of India (Consolidation) Act.

We drew attention in our last number to the very important issues involved in the proposed amendment to the Government of India (Consolidation) Act. We deal with them more fully in an article in the present issue, and attention is drawn to certain aspects of the amendment in a letter which also appears in this issue. As we are going to the press we are pleased to notice that the Burma Chamber of Commerce, more alive from past experience than other public bodies to the dangers of the proposed measure, have been circularising all the Chambers of Commerce in India with a view to submitting " strong protests to the Secretary of State, the Government of India, Members of Parliament, and newspapers urging that the Bill be dropped." We

hope, this appeal which we reproduce below, will have the desired effect.

The following telegram dated May 17th has been despatched by the Secretary, Burma Chamber of Commerce, to all Chambers of Commerce in India: Please refer to Reuter's telegram of the 8th instant regarding the Bill in the House of Lords supplementing the India Consolidation Act. The object of the amending sec. 84 (D) is to overrule the decision of the Privy Council in the case—the *Secretary of State* v. *Moment* (*vide* Lower Burma Rulings, volume seven, page ten)—thus giving the Government arbitrary powers against the public and depriving them of their rights to settle private disputes as to their interests in property alleged to be Government land. The action of the local Government here in this connection has often created public anxiety. This Bill has been introduced without any notice to the non-official community of India or Burma who are very seriously affected and despite official promises that legislation of a controversial nature is barred during the war. The actual meaning of the amended Bill is that if any revenue officer happened to be of the opinion any time that Government should claim certain rights against any private individual such as rights over land, no redress could be sought against the Government in civil courts. In the Moment case, Lord Moulton said, to shut out civil courts altogether would be insufferable and it would mean reading into the Act the words "provided the Governor-General in Council may deprive every subject of his suits, remedies and proceedings." But this is exactly what the Bill before the House of Lords proposes to do. As the matter is urgent I am directed to invite you to telegraph a strong protest to the Secretary of State, the Government of India, Members of Parliament, and newspapers urging that the Bill be dropped. Legal opinions setting forth the serious consequence of the proposed legislation are being forwarded to you by post.

SUBJECT'S RIGHT TO SUE GOVERNMENT.

We briefly referred in our last issue to the proposed amendment of the Government of India Act. The matter is, however, of such paramount importance to all Indians, that we feel constrained to revert to it in this issue, if only to draw the attention of the Government of India to the retrograde character of the proposed cl. (*d*) to sec. 84 of the Act.

The limits within which the Crown may be proceeded against in Courts of law in England at the instance of a subject is thus concisely indicated in a text-book on English Constitutional Law:

"Under the maxim that the Crown can do no wrong, it is exempt from criminal prosecutions and even for a civil action arising in tort. Civil actions also against the Crown or its servants for the recovery of real or personal property can only be brought by the particular process of Petition of Right which is available to the subject in cases of debt or for damages for breach of contract, but this remedy is available as of grace and not as of right (23 and 24 Vict., c. 31, sec. 2) and it is not available in actions arising out of tort [*Tobin* v. *Reg.*, 16 C. B. (W. S.) 310]. This prerogative of the Crown, however, forms part of the ordinary common law of the land, and, as such, the extent of the prerogative itself is cognizable by the Courts."

The statement in the above quotation that the remedy by petition of rights is available as of grace and favour embodies only a constitutional fiction. For practical purpose it exists *as a right*. How this right is viewed by English Judges will appear from the following quotation from the judgment of the Judicial Committee delivered by Sir George Farwell in the case of the *Eastern Trust Company* v. *McKenzie Mann & Co.* (20 C. W. N. 457) already referred to, which will also show that English Judges are at the present day not disposed to regard the right of the subject to invoke the arbitrament of the Courts of Law in disputes between the Crown and the subject as limited even in the manner laid down in text-books. His Lordship said (the case came from Canada) "The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the Colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law or authorise the interference by the Crown with private rights at mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General and a declaratory order obtained." And yet what will be the effect of the proposed amendment except to enable the Legislature here to confer on the Government in India by statute this very immunity from all law and authorise it to interfere with private rights at mere will? This was indeed the plea set up by the Burma Government in the case of *Secretary of State* v. *Moment* (17 C. W. N. 169) under the Burma Act which, as already stated, provided that no suit was to be entertained against the Government in respect of land—and which, paraphrased into plain English, gave power to Government by "executive

act to confiscate land belonging to private subjects without the subjects having any right to resort to Courts of Law in order to test whether the appropriation of private property by Government had the warrant of law or not.

It may be mentioned, in conclusion, that the Indian subject of the Crown is not singular (as is hinted in the passage from Sir George Farwell's judgment) in having a statutory right (and not one by grace and favour only) to sue the Crown in Courts of Law. The Government of New South Wales is liable to be sued in tort (39 Vict., No. 38, N. S. W. Act), so also the Government of the Straits Settlements (Crown Suits Ordinance Act, 1876). We have not been told that the Governments of these Colonies are finding this restraint of law intolerable. We cannot also believe that the Government of India is really chafing to free itself from this wholesome restraint. The Government of India, it is only reasonable to assume, is fully imbued with that respect for law which is enjoined on Governments and executives by Sir George Farwell in the judgment from which we have quoted. "It is the duty of the Crown" he said, "and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue and it is the duty of the executive in cases of doubt to ascertain the law, in order to obey it, and not to disregard it." But statutory enactments authorised by the proposed amendment will close the Courts to and against the Crown and prevent the executive from "ascertaining the law in order to obey it."

It is possible to conjecture how the proposal for amendment originated. The amount at stake in *Secretary of State* v. *Moment* was not large and there could be no question, in common fairness, if not in law, that the Plaintiff Moment was entitled to the damages he claimed. But it occurred to some local official to raise the technical defence that the Plaintiff's claim depended upon the adjudication of title to land as against Government and that Civil Courts had no jurisdiction under local statute to adjudicate upon such titles against Government. Moment had the temerity to question the validity of the statute itself! The local officials came to feel that they were in honour bound to maintain the validity of the law, and so although the Secretary of State lost the suit in India and although the amount claimed was less than Rs. 2,500, the Government took the case to the Privy Council. The argument before the Privy Council (which is fully reported at pp. 184 to 202 of 17 C .W. N.) is highly instructive. Whilst the English Judges on the Committee professed to confine themselves to the language of the Parliamentary Statutes governing the matter, Mr. Ameer Ali, the only Indian member, threw out the following interjection :—

Mr. Ameer Ali.—Then the Indian Legislature has the right to take away any right given to the subject. This is your contention?

Again—

Lord Moulton.—I cannot imagine it (sec. 65 of the Government of India Act of 1858) saying whatever claims you have for lands you shall not be heard in a Civil Court at all, if that is not taking away a right?

Mr. Dunne.—Your Lordships does not suppose that I am in the least degree defending or am required to defend a particular provision of the legislation in the sense that it is right. They of course do it for administrative purposes and I really do not know myself the particular reasons that operated in the minds of the Legislature in Burma.

Lord Moulton.—You quite misunderstood me. . . . I say that I cannot imagine a thing more directly contrary to sec. 65 than saying that whatever rights to land you have, you shall not go into a Civil Court to enforce them.

The Lord Chancellor (Lord Haldane) in the course of the argument remarked: "The curious thing is that here the Government of India is put in the same position as the Company and is like any other subject.* I do not know to what extent a petition of right is required in India now?" To this Sir Earle Richards replied: Not at all. An ordinary suit lies but notice is required.

We hope the Government of India will realise that their honour or prestige will in no way be compromised if they should abandon this amendment which we have no doubt has been pressed upon them by officials from Burma, and that in abandoning it they would be acting in consonance with the spirit of the pronouncements of Sir George Farwell in the judgment from which we have quoted. It would be lamentable if a petty squabble between certain Burma officials and an inhabitant of Rangoon should lead to the loss of a valuable constitutional privilege to the entire population of British India. The matter in any case is a highly controversial one and ought not to be rushed through Parliament at a time when it is so wholly preoccupied by the war that it is impossible for it to spend time and thought in debating over its effect on a portion of the

*The Lord Chancellor was obviously thinking of the Government's liability to be sued for tort. His Lordship was apparently unaware that the position was the same in several colonies and was by no means singular to India.

world so far removed from Westminster as India.

Correspondence.

THE GOVERNMENT OF INDIA ACT AMENDMENT BILL.

TO THE EDITOR, "CALCUTTA WEEKLY NOTES."

Sir,—I have read your paragraphs on the proposed amendment of the Government of India Consolidation Act, but judging from the fact that it has as yet elicited no remarks from any other quarter either in India or in England, I doubt very much whether the scope and tendency of the proposed clause *(d)* to sec. 84 of the Act is at all realised even by men interested in public questions, or will be realised until public attention is drawn to the matter in some ways more effective than an academical discussion in a sedate legal journal like the *Calcutta Weekly Notes.*

You have referred to the *retrograde character* of the proposed amendment. To any one, even superficially acquainted with English Constitutional law, this is too obvious to need discussion. But there are two other points which have to be particularly emphasised in regard to the measure.

First, *its utter needlessness*, for practical administrative purposes. What powers have not the Indian legislatures already got for these purposes—Legislatures which still are mainly controlled by Government? They can pass taxing statutes of any description. They can pass Acts authorising the appropriation of private property for public purposes. Witness the Land Acquisition Acts and the City Improvement Acts. In many matters they have conferred large discretionary powers on executive officials although their exercise may affect private rights, without appeal to the Courts, and these have not been questioned as *ultra vires*. The Privy Council itself has laid down that what is a "public purpose" to justify acquisition by Government of land from the subject is a matter which under statutory sanction rests solely with the executive, and their determination on this question is not open to review by Civil Courts (*Ezra* v. *Secretary of State*, I. L. R. 32 Cal. 605 : s. c. 9 C. W. N. 454.) The determination of election disputes by *quasi-executive* tribunals is another instance touching a right not affecting property. It is unnecessary to multiply instances.

The law as laid down in *Secretary of State* v. *Moment* (17 C. W. N. 169) does not even remotely touch or affect this power of Government here to make laws interfering with peoples' rights, personal or proprietory, in the public interest. What it holds the Government cannot do is to place themselves by statute so completely outside the jurisdiction of Civil Courts as to prevent the subject from getting individual acts of its agents examined and tested by Courts of Law with reference to laws framed by legislative organs which, as I have already shown, possess for legislative purposes an amplitude of jurisdiction to which practically there is no limitation. Therefore, I urge that the proposed amendment is unnecessary and uncalled for.

Secondly, have Indians at the present moment got any tangible constitutional right other than the right to sue the Government in Courts of Law in order to test the legality of their executive acts—executive acts which may, if not illegal, be always supported by laws passed by legislatures which too are controlled by Government? Where is the occasion for decreeing against three hundred millions of His Majesty's Indian subjects the loss of this one public right which they possess? I do not wish to advance in this connection the familiar argument of the need for recognition of the invaluable services rendered to the British Government by Indians during the war which is now in progress. But it may be permissible to point out that the conditions introduced by the war make the present occasion in the highest degree inopportune for introducing such disqualifying legislation.

I conclude with a word of warning which I sincerely hope will not fall on deaf ears, for I do not believe that the Government of India in recommending the proposed amendment intended to commit themselves deliberately to a policy of depriving the Indian population of what I have already described as their sole constitutional right. Any legislation securing immunity for Government from action at the instance of a private person who believes himself to have been wronged by an executive act of Government will place in the hands of subordinate executive officials powers of interfering with the subject's rights which may easily lead to grave abuses. This danger is greater in India than in England where there are so many more checks, constitutional and social, to the exercise of arbitrary power by Gov-

ernment officials. The irresponsible acts of local officials in India are subject only to what is known as "departmental control." But it is no disparagement of the Governmental machinery of this country to say that this control does not go very far. The system again has a tendency (not exclusive to the Indian) of thinking, in all its parts, alike, as is evidenced by the case of *Secretary of State* v. *Moment* itself, in which a question of paying compensation for demolition of Plaintiff's buildings—a matter of two thousand odd rupees—was exalted into a question of principle and fought up to the Privy Council by Government at what costs to the taxpayer may well be imagined. The only check which can at all operate on the agents of Government at the present moment is the liability to be *publicly* sued in the Civil Courts and the fear that an illegal or high-handed act may be publicly exposed. The loss to Government in money or property resulting from success in such suits does not count, for it can never in the aggregate come to much. It is the publicity of the proceedings in the Courts of Law, which, in the absence of a watchful representative assembly, affords to the Indian subject his one protection against illegal acts of Government servants.

Yourts etc.,
Lex.

Vakils' Library,
15th May 1916.

Reviews.

Desai's Point-Noted Index of Cases, judicially noticed, 1811-1915. *Prepared and published by Bulwantrai R. Desai (High Court Pleader) Baroda. Fifth Edition. 1916. Price Rs. 12.*

The last edition of this indispensable work of reference appeared in 1914. Two years' interval for the issue of a new edition is a record not only in expedition but highly significant with regard to the recurring public demand for the compilation. And yet the compiler has found it necessary to apologise for the unusual delay in bringing it out which he says is due to the scarcity of paper caused by the war.

The experiment tried with reference only to the cases of the I. L. R. series in the previous edition of citing the cases in which a particular case is judicially noticed with reference to particular points decided therein has been extended in the present edition to cases in the other reports as well, and some attempt has been made to cite other cases bearing on those points though the principal case has not been referred to in them. This last innovation opens up possibilities in the future development of the computation which will be watched with interest. The changes introduced, such as they are, have enhanced the value of the book.

Outlines of Medical Jurisprudence with special treatment of toxicology and insanity. *By Rames Chandra Ray, L.M.S. Third Edition. Calcutta. Published by the Proprietor of the Hare Pharmacy. 38, Amherst Street, 1916. Price Rs. 4.*

As we stated in our notices of previous editions, this book gives in the smallest possible compass a variety of very useful medico-legal information and in a form most convenient for purposes of reference by students preparing for their examinations, medical practitioners, lawyers and police officers. To provide facilities for ready reference has been its chief aim and in that the book has been pre-eminently successful. The two subjects which concern lawyers most, *viz.*, poisoning and insanity, are dealt with fairly fully without sacrificing conciseness.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before Lords Justices Swinfen Eady, Phillimore and Pickford. *Zinc Corporation Limited* v. *Aron Hirsch and ors.* trading as *Aron Hirsch und Sohn.* 21st December 1915.

Effect of war on a contract with alien enemies.

Appeal from a decision of Bray, J. The Plaintiff, a British Corporation, entered into an agreement with the Defendants who are Germans—alien enemies—to sell certain goods to the defendants.

The Plaintiff now sued for a declaration that the contract was dissolved by reason of the war.

The Court allowed the claim, and the Defendants' appeal was also dismissed. Lord Justice Swinfen Eady in the course of his Judgment said as follows:—

The result was that the outbreak of war had dissolved the contract so far as regarded the future performance after August 4, 1914. The remedy of either side for what had previously

been carried out remained in abeyance until the termination of the war. [*Esposito* v. *Bowden*, 7 E. and B., 779, 783; *Jansan* v. *Driefontein Consolidated Mines* (*Limited*) (1902), A. C., per Lord Lindley at p. 509.]

There remained, however, another point of view from which the matter must be considered. The contract of 1910 not only provided that the Defendants should purchase the Plaintiffs' whole production, but that the Plaintiffs should not sell their concentrates to any other person. That negative stipulation remained in force, according to the tenor of the agreement, as well during a war as during a temporary strike or accident, or breakdown of machinery.* Again, by clause 5 the Defendants had the right to leave 2,200 tons of concentrates on the Plaintiffs' floors, and 800 tons in their vats, at the Plaintiffs' risk for an indefinite period. Thus the position was that the Defendants could not take delivery, and yet the Plaintiffs could not sell their production elsewhere, and must keep their premises encumbered with concentrates which they could not dispose of.

The effect of such an agreement as the present one was to prevent the resources of the country from being developed and labour from being employed, and the value of the mineral from being realized and the proceeds utilized in the best interest of the country. Moreover, the result of preserving intact for the Defendants (as the agreement purported to do) all concentrates made ready by the Plaintiffs would be to enable the Defendants on the conclusion of peace to resume their trade as speedily and in as great volume as possible, and so to diminish the effect of the war on the commercial prosperity of the enemy country, which it was the object of this country during the war to destroy. To recognize such a contract and to give effect to it by holding that it remained legally binding on the contracting parties would be to defeat the object of this country in crippling the commerce of the enemy—" it would be to undo by British tribunals the work done for the British nation by its naval or military forces "—per Lord Lindley (1902) A. C., at p. 507). Such an agreement was void, as tending to assist the King's enemies. To carry it out during the war, and to withdraw goods from commerce and preserve them for the enemy after the war, was little removed from actually trading with the enemy.

Moreover, upon what ground could an agreement not to sell goods during the war be binding in favour of a person who had become an alien enemy? He could not during the war enforce it. The answer was that the tie had become not suspended but dissolved by the war. The language of Lord Stowell in *The Hoop* (1 Chr. Rob., 196) was as applicable to the future performance of a contract entered into before the war as it was to entering into a contract during the war. The impossibility of enforcing it by an appeal to the law was the same in each case. The contract became dissolved on the outbreak of war, and the judgment below was right and the appeal failed.

Mr. J. A. Compston, K. C., and *Cohn* for the Defendants.

Mr. F. Gore-Browne, K. C., and *F. Dodd* for the Plaintiffs.

B. D.

COURT OF APPEAL.—Before THE LORD CHIEF JUSTICE, WARRINGTON, L. J., and SCRUTTON, J. *Hewlett* v. *Great Central Railway Co.* 22nd March 1916.

The duty of a railway company to light the gate and posts, etc., in spite of regulations under the Defence of the Realm Act—Duty to take care.

The Plaintiff, a taxi-cab driver, sued the Defendants for damages for injury done to his taxi-cab. The Plaintiff's complaint was that the Defendants had not sufficiently lighted a post at the entrance to their station, and that caused a collision with the post.

Mr. Justice Darling and a jury awarded damages. The Defendants appealed and it was urged on their behalf that the place was insufficiently lighted owing to regulations under the Defence of the Realm Act, and that in any case the Great Central Railway Act, 1902, did not impose any duty upon them to light the street. The Court dismissed the appeal.

The Lord Chief Justice, in the course of his judgment, said :—

Notwithstanding the company's statutory authority to maintain the gates and posts, the Act contained nothing which absolved them from their duty to act with reasonable care, in the circumstances of the case from time to time existing, for the protection of the public.

The common law said that when statutory powers were conferred, in the absence of

special provisions to the contrary, those powers must be exercised with reasonable care. The principles of law were stated by Lord Hatherley and Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430. At p. 455, Lord Blackburn said :—

I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence although it does occasional damage to anyone; but an action does lie for doing that which the Legislature has authorized if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, "negligence" not to make such reasonable exercise of their powers.

Applying those principles, and without saying that an obligation was cast on the company of lighting the street, an obligation was cast on them to use their powers reasonably, and, if by the reasonable use of their powers they could do so, to prevent damage to others. It was true that hitherto the company had relied on the public authority to light the gates and posts, and there had been no breach of duty in their not themselves taking precautions for the safety of the public while that lighting went on. But the duty to take such precautions was there all the time, and it was a fallacy to suppose that there was no such duty should new and unforseen circumstances arise. There was no breach of duty while the public authority's lighting was sufficient.

The standard of care to be taken varied from time to time, and when the lighting of the public authority became insufficient it was open to the jury to say that some further means to protect the public became necessary. It was open to the company, for instance, to paint the offending post white, and that or some other step could have been taken to protect the public. As they had failed to take any such step the company had committed a breach of their duty.

Messrs. Gordon Hewart, K. C., and *Barrington Ward* for the Appellants.

Mr. W. A. Jowitt for the Respondent.

B. D.

PRIVY COUNCIL.

[Appeal from Bengal.]

Lord Shaw.
Lord Sumner.
Lord Parmoor.
Sir John Edge.
Mr. Ameer Ali.
1916,
5, April.

Chowdhry Mahadeo Prasad, Petitioner,
v.
Sheikh Nabi Baksh, Opposite Party.

A Mahomedan's right to sacrifice cows.

This was an application for special leave to appeal to His Majesty in Council, from the judgment of the Calcutta High Court, dated 18th May 1914.

The Respondent instituted the present suit in the Court of the Munsif of Sitamarhi on the allegation that the Appellant and his servants denied the right of the Plaintiff to sacrifice cows, and that they put the Magistrate in motion against the Respondent and other Mahomedans of the village. The Plaintiff claimed that a declaratory decree may be passed against the Defendants to the effect that the Plaintiff had the right to sacrifice cows at all times and under all circumstances, according to law and religion, and that a perpetual injunction may be issued against the Defendants to prevent them from interfering with his right in future.

The Defendants denied the Plaintiff's claim, and pleaded among other things, that the plaint did not disclose any cause of action, and that there existed an ancient custom prohibiting the slaughter of cows in the zemindari of the Defendant.

The Munsif held that the Defendants had established their pleas, and dismissed the suit, but the District Judge of Mozafferpore and the High Court came to opposite conclusions. They held that the custom alleged was not proved, and that the Plaintiff was entitled to the reliefs claimed by him.

Mr. L. DeGruyther, K.C., and *Mr. Bhuqwandin Dubé* for the Petitioners submitted that the plaint did not disclose any cause of action for the suit against the Appellant, and that having regard to the nature and circumstances of the case, no declaration of right and decree for perpetual injunction ought to have been made, under the discretionary powers of the Court.

Their Lordships rejected the petition.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Petitioners.

B. D.

MR. MANNERS *v.* SATROGHAN DAS.

The JUDGMENT OF THE COURT was as follows :—

SHARFUDDIN, J.—This appeal is on behalf of the Defendant, first party, in the suit. The Plaintiff of the suit, namely, Mahanth Satroghan Das, disciple of Mahanth Ram Narain Das, brought the present suit for an adjudication that the Defendants, first and second parties, had not acquired any sort of right in the lands in suit, and that they are bound to deliver possession to the Plaintiff after the expiry of the lease under which the Defendants held the lands. The Subordinate Judge, against whose judgment the present appeal has been preferred, gave a decree to the Plaintiff. The Defendant, first party, has therefore appealed to this Court. The facts of the case are, that Maharaja Pertab Singh of Darbhanga had assigned 15 bighas and odd of land to the Mahanth of the Asthal called Kamalabari. This area now after survey has been proved to be 13 bighas 19 chataks and 7 dhurs. This Fakirana land was in possession of one Sarwan Mahton before 1304 Fasli, and that on a *thika* taken from the Mahanth, Sarman Singh executed a sub-lease known as Khustkana in favour of Mr. Manners of the Ilmasnagar Factory. The *kabala* executed by Sarwan shows that he was a tenure-holder and not a cultivating raiyat. Then it appears that Mr. Manners obtained a lease of these lands from the Mahanth for a period from 1304 to 1318, on Rs. 34-2 as pesgi and with a *jama* of Rs. 50. On behalf of Mr. Manners it has been argued that he was a cultivating raiyat under Dhori and he continued to remain as such even when he took *thika* directly from the Mahanth, and that he therefore cannot be evicted.

If Mr. Manners was a cultivating raiyat under Dhori, and if by taking the *thika* from the Mahanth he became a tenure-holder under sec. 22, the entire interest of the landlord and the raiyat having become united in the same person, namely, Mr. Manners, Mr. Manners cannot have any right to hold the land as a tenant. The question now is, as to whether the lease given to Mr. Manners by the Mahanth was a lease for cultivating purposes or constituted a tenure. There are many indications from the lease itself that go to show that this is not a cultivating lease but a tenure, because this interest has been described in the lease as *thika* of the whole entire 15 bighas, together with all *fakirdari* rights. It is clear therefore that by taking this lease Mr. Manners became a *fakirana* holder. All the rights that vested in the Mahanth began to vest in Mr. Manners after the execution of that lease, he thereby became a proprietor. The *jama* stated in the lease Rs. 60 is in one lump and not by way of rent per *bigha*. These facts necessarily indicate that the lease constituted a tenure; but there can be no doubt that the lumping up of the annual rental along with other facts in certain circumstances goes to show the intention of the executant and the intention of the party in whose favour the deed was executed. On all these circumstances it appears to me, that what was taken by Mr. Manners under that lease was a tenure and, that being so, even supposing that he was a cultivating raiyat under Dhori, whatever right he may have acquired then merged into the right that he acquired under the lease. That being so, under the terms of the contract after the expiry of the period of the lease he is now compelled to go and make over possession to the Mahanth or the Mahanth's representatives. He not having done so the present suit was instituted. I think the Subordinate Judge rightly decreed the

suit, the appeal is therefore dismissed with costs, hearing-fee Rs. 100.

Roe, J.—I agree.

A. K. R. *Appeal dismissed.*

[PRIVY COUNCIL.]

[Appeal from Bengal.]

Viscount Haldane.
Lord Shaw.
Sir John Edge.
Mr. Ameer Ali.

1916,

Heard, 3, 7, 8, 9, 10, 14, 15, 16 and 17, February.

Judgment, 16, March.

Mahant Ram Parkash Das, Appellant,

v.

Mahant Anand Das and others, Respondents.

Hindu Law—Religious endowment—Muth or asthal, position of mahant, that of trustee—Appointment by reigning mahant of a married relation as successor in violation of the vows of the order and ablication in his favour, a breach of trust—Mahant if entitled to continue in office—Succession—No general customary law—Usage of each muth to be proved and applied—Previous judicial proceedings, how far admissible in evidence—Trial Judge's finding on question of fact, value of.

Property of a muth or asthal *is held by the* mahant *as its owner in trust for the institution, and succession to him in such property follows with the succession to the office.*

Although large administrative powers are undoubtedly vested in the reigning mahant *the trust exists and must be respected.*

As the mahant *is not only a spiritual preceptor but also a trustee in respect of the* asthal *over which he presides, a Court will be justified on proper grounds in removing him from office.*

The reigning mahant *A of an* asthal *having by a series of deeds appointed his nephew as his successor in office and abdicated in his favour, Plaintiff claiming to be the senior* chela *of A challenged the Defendant's title, first, on the allegation of a custom of the* asthal *by which the senior* chela *alone succeeded and secondly, on the allegation that the Defendant being a married man with children was disqualified from holding the office of* mahant. *By the custom of the* asthal, *the* mahant *had to be a* bairagi *or celibate* chela. *The Defendant denied that he was married and alleged a custom of succession by appointment from amongst the* chelas *by the reigning* mahant.

Held—*That questions of succession to the* mahant*-ship in India are not settled by an appeal to general customary law. It must depend upon the custom and usage of the particular* muth *or* asthal.

That neither party had proved the custom alleged by him.

A note in the Magistrate's judgment of an admission made by a witness in a criminal case or a copy of recorded evidence of the witness was not by itself admissible as evidence in a later civil suit between the parties, and was rightly rejected by the Trial Judge, though the fact that the witness (who was acting in the civil suit as the legal representative of the party affected by such admission and was present in Court when the note was produced) was not called by him into the box to clear up the matter or deny that he made the statement or explain it, naturally made a deep impression upon the Judge.

Regarding the allegation that the Defendant was a married man, the Trial Judge found upon the evidence adduced that the allegation had been established.

Held—*That upon such a question of fact, the verdict given by the Trial Judge who had the advantage of seeing and hearing the witnesses, could not be lightly set aside, specially as that Judge was also*

MAHANT RAM PARKASH DAS *v.* MAHANT ANAND DAS.

presumably acquainted with the manners and customs of the people among whom the transaction was alleged to have occurred.

The High Court which reversed the Trial Judge not having stated sufficient grounds for disturbing his verdict, and upon an examination of the evidence,

Held, *further, that this rule could not be safely departed from in the present instance.*

As part of his case Plaintiff alleged that in 1904 the mahant *had asked his signature on one of the documents by which he wanted to set up the Defendant as his successor, and that on his refusal he had been assaulted and expelled from the* muth. *Plaintiff sought to prove proceedings in the Criminal Court taken by him about the time showing that a conviction for assault had been obtained by him and that in these proceedings Plaintiff had assigned his failure to execute such a document as the reason therefor. The conviction had been quashed on appeal.*

Held—*That these proceedings were not relevant to the case, the one important fact being that they were taken on a ground which was referable to the execution of the document, and were taken by the Plaintiff as claiming to be a resident as of right in the* asthal *from which he had been expelled.*

Held (*on the evidence*), *that Plaintiff had established that he was a* bairagi chela, *and* (*on admission*) *that if not the only* chela, *he was the senior* chela *of the* mahant.

That, by conferring the mahantship *upon a relation who was a married man, A had consented to a violation of the vows and practices of asceticism and celibacy which it was his duty as a trustee to maintain and protect.*

That his installation of the Defendant as mahant *and retirement from* mahantship *amounted to an abdication of his office, which in the circumstance the Court should accept, and in the absence of just cause disqualifying the Plaintiff for appointment as* mahant, *the Plaintiff as the senior* chela *and* (*even on the Defendant's case*) *the next in succession in default of appointment, was properly declared by the Trial Judge as the person entitled to the office of* mahant.

This was an appeal from a decree of the High Court of Judicature at Fort William in Bengal, dated the 26th August 1910, reversing a decree of the Subordinate Judge (Second Court) of Mozufferpur, dated the 16th June 1909.

The suit in which the said decrees were made was instituted by the Appellant in the Court of the said Subordinate Judge to establish his title to the office and position of *mahant* of *Asthal Patepur*, a religious institution in the Mozufferpur District and to the properties appertaining thereto which were of considerable value.

The Appellant claimed to be the senior *chela* or disciple of the first Respondent who had held the said *mahantship* from the year 1866 until 1897 when he resigned the same, but his claim was denied *in toto* by the Respondent who asserted that he was the *chela* of one Baliram Das and had never lived in or had any connection with *Asthal Patepur*, and the question whether the Appellant was or was not the *chela* of the first Respondent was the principal issue in the said suit. The Appellant also claimed that by the custom of the said institution he was entitled as such senior *chela* to succeed to the said *mahantship* upon the death or resignation of the first Respondent. This also was denied by the Respondents, who asserted that the true custom was that the *mahant* for the time

being had the right to appoint any one of his *bairagi* or ascetic *chelas* to succeed him. The first Respondent had by a Will dated the 24th June 1890 appointed the second Respondent who was his brother's son to succeed him as *mahant* and by a deed dated the 14th May 1897 had resigned the said office and purported to have constituted the second Respondent as his successor therein upon certain conditions and had made over all the said properties to him. An *ekrarnama*, dated the 6th August 1904, had also been made between the Respondents by which it was agreed that the third Respondent who was the brother of the second Respondent should succeed to the latter in the said office. The Appellant denied the validity of any of these arrangements alleging that the second and third Respondents were not *chelas* of the first Respondent and not even *bairagis*, the second Respondent being a married man with children, and the third Respondent afflicted with leprosy, and on these grounds, and also as being blood relations of the first Respondent, were both disqualified from holding the said *mahantship;* these allegations were however in turn denied by the Respondents who all supported the first Respondent's claim.

The said suit was filed by the Appellant on the 10th December 1906. It was framed in the alternative praying for a declaration that the Appellant was the senior *chela* of the first Respondent, and as such entitled to succeed to him in the said office and properties, or if it were found that the first Respondent had in fact resigned the said office and given up possession of the said properties, that the Appellant might be put in possession thereof. The Appellant also prayed that the Will, deed and *ekrarnama* above referred to might be held to be fraudulent and void, and that the two latter might be cancelled.

The Respondents each filed separate written statements of their defences and the said suit came on for trial in due course before the said Subordinate Judge, when the following amongst other issues were framed for decision :—

(1) Whether the Plaintiff is the senior *bairagi chela* of the Defendant No. 1?

(2) Whether, according to the custom and usage prevailing in the *asthal* in dispute, the senior *chela* of a *mahant* succeeds to the *mahantship* on the death of the latter or on his relinquishment of the *mahantship*?

(3) Has the ruling *mahant* any power to nominate any of his *bairagi chelas* as his successor irrespective of his seniority and has the *chela* so nominated a preferential title to the *mahantship*?

(4) Whether the Will dated the 24th June 1890 and the deed of *mahantship*, dated the 14th May 1897, and the *ekrarnama*, dated the 6th August 1904, executed by the Defendant No. 1, are fraudulent, collusive and invalid? Whether the Plaintiff can question their validity during the lifetime of the Defendant No. 1?

(5) Whether the Defendants Nos. 2 and 3 are *bairagi chelas* of the Defendant No. 1? Is Defendant No. 2 married? As the Defendants Nos. 2 and 3 are related by blood with the Defendant No. 1, have they been made valid *chelas* of the latter?

(6) Can they or either of them become *mahant* of the *asthal* when the Defendant No. 1 is alive?

(7) Has the Defendant No. 1 really relinquished the mahantship or is he still in possession of the properties of the *asthal*?

The said Subordinate Judge after taking evidence and hearing arguments delivered on the 16th June 1909 judgment in

favour of the Appellant whom he held to be entitled to the said office and properties subject to certain provisions for the maintenance of the first Respondent and he decreed the said suit with costs upon those terms.

The Judges of the High Court (Brett and Vincent, JJ.) disagreed with the conclusions of the said Subordinate Judge upon almost every question of fact in the case and in the result found that Defendants Nos. 2 and 3 were duly initiated as *chelas* of Anand Das and that they were *bairagi chelas* and not *grihast* (secular) *chelas*.

Hence the present appeal to the Privy Council.

Mr. A. M. Dunne for the Appellant submitted that the Subordinate Judge, who had heard and seen the witnesses had rightly held that the Plaintiff's case was true. The evidence established that Mahant Anand Das had abdicated in favour of the Respondent Ram Partab, who was a married man and had children. Such an appointment was contrary to the usage of the *asthal*. A married man was disqualified for the office of the *mahant*. The usage of each particular *muth* is the only law which governs succession to a *mahantship*. *Greedharee Doss* v. *Nundokissore Doss* (3), *Muttu Ramalinga* v. *Periayanayagam* (4), *Vurmah Valia* v. *Vurmah Mutha* (5), *Janoki Debi* v. *Sri Gopal Acharjia* (6), *Genda Puri* v. *Chhatar Puri* (7), *Ramalingham Pillai* v. *Vythilingam Pillai* (8), *Bhagaban Ramanuj Das* v. *Roghunundun* (9) and *Sitapershad* v. *Thakur Dass* (10).

(3) 11 M. I. A 405 at p. 421 (1867).
(4) L. R. 1 I. A. 209, 228 (1874).
(5) L. R. 4 I A. 76, 82 (1876).
(6) L. R. 10 I. A. 32 (1882).
(7) L. R. 13 I A. 100 (1886).
(8) L. R. 20 I. A. 150 (1893).
(9) L. R. 22 I. A. 94 (1895).
(10) 5 C. L. R. 78 at p. 79 (1897).

The Appellant was the senior *chela*, and in the events that had happened is, now the only *chela* of Mahant Anand Das, and was therefore entitled to succeed to the vacancy.

Sir William Garth and *Mr. Bhugvandin Dubé* for the Respondents submitted that the decision of the High Court was right. The Plaintiff had failed to prove his claim by any reliable evidence. The burden of proving that Ram Partap was a married man was upon the Plaintiff, and strict proof of marriage was required, but the Plaintiff had failed to discharge that burden. Ram Partap was appointed *mahant* in 1897, and from that time he had been in possession as *mahant*, and had been publicly acting as such. His position was not challenged until 11th December 1906. It was incredible that the story told by the Plaintiff should be true. According to the custom of the *asthal*, Mahant Anand Das had power to select any *chela* as his successor, and the senior *chela* in point of time of initiation had no prior right to succeed. The appointment and installation of Ram Partap was proper and valid. But in any case Mahant Anand Das was still alive. He had retired in favour of Ram Partap on certain terms and conditions, and should it be held that Ram Partap was disqualified for the office by reason of marriage the *mahantship* must in law revert to Mahant Anand Das. Reference was made to *Samantha Pandara* v. *Settappa Chetti* (1).

Mr. Dunne replied.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 26th August 1910, reversing a

(1) I. L. R. 2 Mad. 175 at p. 179 (1879).

judgment and decree of the Second Subordinate Judge of Mozufferpur, dated the 16th June 1909.

The question in the appeal has reference to the office and rights of a *mahant* of an *asthal*, known as the *Patepur Asthal*, in the district of Mozufferpur. There are rival claimants to this office in the person of the Plaintiff and of the Defetndant No. 2. The Defendant No. 1, Anand Das, was the *mahant* of the *Patepur Asthal*. By written documents and by his actings he has, as will be afterwards found, abdicated. But in this litigation he supports the claim of Defendant No. 2, in whose favour he has granted those deeds which will be hereafter referred to. The *asthal* is one of some importance, and is stated to have a revenue of Rs. 50,000 a year.

An *asthal*, commonly known in Northern India as a *muth*, is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets, and the observance of its rites. The followers of the cult and disciples in the institution are known as *chelas;* the *chelas* are of two classes—celibate and non-celibate. In the *asthal* now being dealt with, the religious brethren were the *bairagi* or celibate *chelas*: the lay brethren were *girhast* or householder *chelas*. The *mahant* must, by the custom of the *muth*, be a *bairagi* or religious *chela*. The *mahant* is the head of the institution. He sits upon the *gaddi;* he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assests are vested in him as the owner thereof in trust for the institution itself. Upon his death or abdication he is succeeded by one of the *bairagi chelas*. These *bairagi chelas* are, as stated, celibates; or if they have ever been married they must, prior to their initiation as *bairagi chelas*, have renounced their wives and families and have conformed to the practice of the *muth*. This practice is ascetic: it involves a separation from all worldly wealth and ties, and a self-dedication to the services and rites of the *asthal*. (See, *e.g.*, *Wilson's Religious Sects of the Hindus*, pp. 51, etc.)

"Pious persons endow the schools with property, which is vested in the preceptor for the time being, and a home for the schools is erected and a mattam constituted." *Samantha Pandara* v. *Settappa Chetti* (1).

It is, however, the rule that this property is held by the *mahant* as its owner, and the succession to him in such property follows with the succession to the office. The nature of the ownership is, as has been said, an ownership in trust for the *muth* or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning *mahant*, this trust does exist, and that it must be respected.

The question as to who has the right and office of *mahant* is one, in their Lordships' opinion, which, according to the well-known rule in India, must depend upon the custom and usage of the particular *muth* or *asthal*. Such questions in India are not settled by an appeal to general customary law; the usage of the particular *muth* stands as the law therefor.

It appears [*Mahant Rama Nooj Doss* v. *Mahant Debraj Doss* (2)] that the *muths* are—

"of three descriptions, namely, *mouroosi*, *punchaiti*, and *hakimi*, that in the first the office of chief *mahant* was hereditary, and devolved upon the chief disciple of the

(1) I. L. R. 2 Mad. 175 at p. 179 (1879).
(2) 6 S. D. R. 328 (1839).

existing *mahant*, who, moreover, usually nominated him as his successor; that in the second the office was elective, the presiding *mahant* being selected by an assembly of *mahants*; and that in the third the appointment of presiding *mahant* was vested in the ruling power" (presumably the civil power), "or in the party who endowed the temple."

The case cited was interesting, and the report proceeds:

"Mr. Money then directed the *pandit* of the Sudder Dewanny Adawlut to state what was the law of the *shastre* in regard to the appointment of a presiding *mahant* of a *muth* or temple called '*mouroosi*'; whether the principal disciple of the last *mahant* should succeed, or whether the existing *mahant* was competent to appoint whom he pleased from among the body of his disciples?

"The reply of the *pundit* was as follows: 'Under the circumstances stated in the question, the principal *chela* or pupil is entitled to succeed on the death of the presiding *mahant* of a *mouroosi*, or hereditary *muth*. If the principal pupil be personally unfit to succeed, or be disqualified by any of those causes which, according to the *shastre*, are sufficient for such disqualification, then in that case the presiding *mahant* should, during his lifetime, select one properly qualified from among his pupils to succeed him. The person so selected will succeed.'"

Alongside of this report should be placed the view of Sir Charles Turner in *Samantha Pandara* v. *Settappa Chetti* (1), to this effect:—

"The preceptor, the head of the institution, selects among the affiliated disciples him whom he deems the most competent, and in his own lifetime instals the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed on the *gaddi*, and takes by succession the property which has been held by his predecessor."

Their Lordships are of opinion that the language last quoted cannot be taken in any sense as a statement of the general law of India. Any contention to that effect would indeed not be in accordance with Sir Charles Turner's own views, he having made this plain in the succeeding passage of his judgment:—

"We do not, of course, mean to lay down," said he, "that the property may not in some cases be held on different conditions and subject to different incidents."

It in short may rank as one of the varieties of circumstance and tenure whose adoption or rejection will fall to be determined by the usage and custom of the *muth*.

That this forms the controlling rule with regard to the right to the office of *mahant* may now be considered as having been conclusively settled by authority. In *Greedharee Doss* v. *Nundokissore Doss* (3), Lord Romilly so put it, observing "that the only law of these *mahants* and their offices, functions, and duties is to be found in custom and practice, which is proved by testimony." More recent authorities, such as *Muttu Ramalinga* v. *Periayanayagam* (4) and *Vurmah Valia* v. *Vurmah Mutha* (5), confirm this proposition, with the explanation which their Lordships think it right here to repeat, given by Sir Barnes Peacock as Chief Justice of Bengal, and cited with approval in the case last mentioned to the following effect:—

"Numerous cases have been cited to show what was the usage, but the law to be laid down by this Court must be as to what is the usage of each *mahantee*. We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the rule of succession; but when no such rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular *mahantee*."

As between the rival claimants to this

(1) I L. R. 2 Mad. 175 at p. 179 (1879).

(3) 11 M. I. A. 405 at p. 428 (1867).
(4) L. R. 1 I. A. 209, 228 (187).
(5) L. R 4 I. A. 76, 82 (1876).

mahantship the situation is as follows: The Plaintiff maintains the broad proposition that according to the custom of this *muth* the succession falls to the eldest or senior (that is, earliest inducted) *bairagi chela*; that it so falls as of right; and that this right of succession cannot be defeated by any deed or deeds executed by the reigning *mahant*. If this be correct there is an end to the claim, so it is maintained, of Defendant No. 2.

Upon the other hand Defendant No. 2 maintains that there is no such absolute right of succession; that there are deeds in existence under the hand of Ananda Das, the then reigning *mahant*, which transfer to and vest in him, the second Defendant, the mahantship; and that, the question of succession being thus settled, the Defendant No. 2 is now in office under a right —which is not defeasible by any right in the Plaintiff as alleged senior *chela*.

Their Lordships have considered deeds executed by predecessors of the parties in the years 1832, 1854 and 1866 respectively. As between the propositions (1) that the choice of the reigning *mahant* must prevail, and (2) that the right of the senior *bairagi chela* must prevail, their Lordships are not prepared to affirm that either proposition is upon those deeds made out. In the first place, language, apparently of selection, is used; but in the second place, the person selected is in each case the senior *bairagi chela* for the time being. And there is in the evidence an apparent admission of the right of the senior *chela* to the office. Lastly, there is no instance given either in the documentary or oral evidence of a senior *chela* having been superseded by virtue of the selection of another by the *mahant* for the time being. In the view taken by their Lordships it is unnecessary to come in this case to a decision upon this issue.

For, in their Lordships' opinion, such an issue is superseded by issues of fact. Those issues are of undoubted difficulty. They are the subject of extreme conflict of testimony. The number and width of the topics in dispute are rare even in questions of disputed fact coming from India. These topics may, however, be conveniently ranged in two divisions.

The first question is whether Defendant No. 2, the nominee of Anand Das under the deeds now to be mentioned, is competent to be *mahant* of this *asthal*. This competency is challenged: if the challenge be sound he cannot succeed.

The second question is, is the Plaintiff a *bairagi chela* of this *muth*? His entire life history, vouched by himself and others, is challenged as a tissue of falsehood. If this challenge be sound the Plaintiff cannot succeed.

What would happen if both of these challenges were sound or both were unsound their Lordships need not consider, as they have come to a definite conclusion that the one challenge succeeds and the other fails.

Before, however, the investigation is entered upon, it may be convenient and proper that the following general observation should be made. Their Lordships have had the duty, in view of the reversal of the judgment of the Subordinate Judge by the High Court, of considering for themselves the entire body of the evidence in the case. They desire to record that in their opinion the Subordinate Judge has dealt with this complex and onerous case with much care, and that, although they differ from him in one or two particulars, his conclusions appear to the Board to be stated with clearness and with cogency; and they think it right also to say that there does not appear to be any ground for the reflection made

in the judgment of the High Court that the Subordinate Judge has displayed in any portion of his judgment, or has been in any particular moved by, either partiality or bias.

Upon the first question, the objection taken to Ram Partab Singh, the second Defendant, is that he is a married man, the father of a son and daughter, one at least of these children having been born since he became, or is alleged to have become, *mahant*.

This enquiry into the domestic relations of the second Defendant is of course on an issue which is fundamental. For the proposition cannot be denied that, even upon the assumption that a right of selection did exist on the part of the *mahant* as among the *bairagi chelas*, the nomination must fall upon one who is competent to hold his important sacred office. For instance, the person chosen may be disqualified by reason of bodily deformity, of bodily disease such as leprosy, of disease of the mind, or of the leading of a life which is immoral or is inconsistent with the religious vows of the brotherhood. In all such cases the nomination would be void.

Among these disqualifications stands the contracting of marriage and the begetting of children. As already mentioned, initiation of a married man must be preceded by the entire and permanent separation from his wife and by the giving up of all worldly ties. On the question of marriage, which will afterwards be considered in this case, it is no part of the Respondents' case that Defendant No. 2 was once married, but had relinquished those ties. The dispute of fact to be afterwards investigated is upon the broad question of whether he ever was, or, indeed, is now, a married man or the father of children.

If this question be answered in the affirmative, disqualification attaches to that Defendant; he can never be *mahant*. And the deeds appointing him to that office or giving him any administrative rights, present or prospective, with regard to the mahantship are void.

Was Ram Partab Singh a married man and the father of children?

No registers of marriages can be appealed to. The evidence given in the case is that of the Plaintiff, who attended the marriage ceremony, which he describes; of Kishen Das, who also gave evidence to this effect; and of Sitabullah Das, the *mahant* of a neighbouring *asthal* of Chainpara, who lent elephants and horses for the marriage procession. There is also the evidence of other witnesses, one of whom, Ajodhya, speaks to the Defendant No. 2 having a wife, a son, and a daughter, and swears to having seen his son some four or five years ago. There is some other evidence of a similar description. In short, if the case stood at that point, the fact of the marriage and of the existence of the wife and son and daughter would be beyond question.

Their Lordships think it necessary to advert to this further point, which is of wide significance in regard to more than the present issue. The case for the Plaintiff on this topic, as on nearly all others, is stated in the evidence with complete particularity, a particularity achieved in many instances in the course of an extended and meticulous cross-examination. The date of the marriage, for instance, is given; the name of the family into which Defendant No. 2 married, and of his father-in-law, together with his residence and the present residence of wife and children, all are frankly given. It is further mentioned that the ceremonial of marriage was the cause

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of expense to Anand Das, Defendant No. 1, the then reigning *mahant*. Defendant No. 2, Ram Pratab, was his nephew. All expenses were entered in the books of the *asthal*, and this expense would there appear. Furthermore, in a criminal case, to which reference will afterwards be made, it is alleged that Haman Lal, who knew the circumstance, made a statement on oath that Dedendant No. 2 was married. The magistrate who tried that case stated in his judgment that an admission of the marriage was made in the course of it. An offer was made in the present case to produce a copy of the statement of Haman Lal, and that was resisted. Their Lordships are of opinion that the note of the admission made to the magistrate in the criminal case was rightly rejected as by itself evidence of the fact recorded therein, and also that the objection of Defendant No. 2 to the production of a copy of the evidence of Haman Lal was justified in law. But the peculiarity of the case is this: Haman Lal was in Court while all this was going on; he was acting as a legal representative of the Defendants; and he was not called by them to clear up the matter, or to deny that he made the statement alleged or to explain it. Their Lordships are not surprised that that circumstance should have made a deep impression upon the mind of the Subordinate Judge as to where the truth upon this issue of fact really lay.

The counter-case is that the whole of this story of the Defendant No. 2's being a married man and the father of two children is a pure invention. The extraordinary circumstance is that, although places, events, and people have been named so openly and in such detail, and although the cross-examination on behalf of the Defendants has in many instances elicited overwhelming materials for exposing the falsehoods, if they were falsehoods, none of these materials were taken advantage of, and no such exposure is attempted. No witnesses were brought from the village named to say that Defendant No. 2's wife and chilrden do not live there. Her father, who had been openly named in the Plaintiff's evidence, is not cited. In short, the details elicited at great length in cross-examination of the Plaintiff for the purpose of testing his evidence are left just as he has placed them, without the people whose names are put to him being brought forward to contradict in any particular the statements that he has made. To this case the answer made by Defendant No. 2 is: "My father-in-law! my wife! my children! no such persons exist." And the case is left there.

As to the books, they have not been produced for any period which is critical in this case. It is admitted that the manager of the *asthal*, Raghunath, was responsible for their custody and accuracy. Had they been produced the absence of entries in them would, if the Defendants' case be true, have completely confounded the Plaintiff's allegations. The story which Raghunath gives as to the books is, in their Lordships' opinion, very unsatisfactory. He says that they were destroyed or taken away by one Kamal Sahai Dewan. He assigns no possible motive for such an act: Kamal is available as a witness, and is not called.

Their Lordships do not go further into the evidence upon this subject, except to say that in face of the fact that conclusive evidence upon material particulars with regard to this issue having been available to the Defendants and not led, their Lordships are not prepared to accept in lieu thereof general statements of belief on the part of other witnesses to the effect that, so far as they know, the Defendant No. 2 is

not a married man, and that his conduct in representing himself and acting as *mahant* proves that he is not disqualified.

Finally, upon this head their Lordships think it right to observe that upon a question of fact such as is now being investigated, the verdict given by the Subordinate Judge, who had the advantage of seeing and hearing the witnesses, cannot be lightly set aside, especially as that Judge was also presumably acquainted with the manners and customs of the people among whom such a transaction was alleged to have occurred. They must further remark that they see no sufficient grounds stated by the High Court for disturbing the verdict come to; having themselves investigated the facts, they are of opinion that the rule which applies—of attaching weight to the opinion of the Judge of first instance—cannot with safety be departed from in the present instance.

The result of this portion of the case is fatal to the claim of Defendant No. 2. He cannot be *mahant*.

He was the nephew of Anand Das, the reigning *mahant*, who was apparently determined to favour him. By a Will dated the 24th June 1890, he appointed this nephew to succeed him. By a deed dated the 14th May 1897, he resigned the office, and constituted the second Respondent as his successor. And by an *ekrarnama* dated the 6th August 1904, it was agreed between the uncle and nephew that the third Respondent, another nephew and brother of the second Respondent, should succeed the latter in the office of *mahant*. All these deeds, for the reason stated, are unavailing, and must be set aside.

The deeds were in themselves, it may be added, of a peculiar character. The Will stated that Ram Partab Das was senior *chela* and *inter alia* was competent to "perform the sheva of Takurji." The *mahant* seven years afterwards, namely, in 1897, transferred the absolute ownership of the *asthal* and all the properties and goods thereof to Ram Partab, the nephew, as *mahant*, but with the reservation to Anand Das, the grantor, of an annuity of Rs. 12,000 per annum, and with a declaration that Ram Partab should have—

"" no right or power to do anything without my advice and consultation with me, and shall keep himself under my governance and power in respect to the management of every form relating to the *asthal*;"

while the closing paragraph declared—

"that without my consent and sanction he shall not be competent to appoint any of his *chelas* as *mahant*."

The *ekrarnama* seven years later, namely, in 1904, went a step further. The effect of this deed was that Ram Partab was to pay Anand Das—

"any amount of money which at any time I, the first party, may require for personal expenses."

Then occurs a clause to this effect—

"As I, the second party, generally keep unwell, therefore I, the first party, with consent of the second party, have permitted the third party (another nephew) to perform *sradh* of me, the first party."

The meaning of this is that, whereas according to law and custom the successor in the mahantship performs the religious rites attending the obsequies of his predecessor, an arrangement was come to by which this was avoided, and that vital rite was, so to speak, handed on past the second Defendant and confided to his brother, the third Defendant. Whether such a transaction with regard to a mahantship in India be competent and possible need not be determined, as in their Lordships' opinion the whole deeds are void, in consequence of the disability by marriage of the second Defendant, Ram Partab. It is not unworthy of remark, however, that the fact of the

marriage of Ram Partab, and of this being known to Anand Das, might afford the only reasonable explanation yet offered for passing over Ram Partab, seeing that the marriage of the latter would undoubtedly have incapacitated him from performing the obsequies of his uncle. There is no evidence that Ram Partab's state of health was such as to create any incapacity. The inference, in short, is that the second Defendant was married and the father of children, and that his uncle Anand Das knew it. It may be mentioned that the third Defendant, it was admitted at the Bar, is dead.

The second question in the case is, accordingly, whether the Plaintiff answers this description and is a *bairagi chela*. The deeds founded on by the Defendants having been declared invalid, and the second Defendant being incompetent to hold office, there is no dispute that the eldest or senior *chela* must succeed to the mahantship.

The Plaintiff narrates the material circumstances of his life-history in his own evidence. As the Subordinate Judge observes—

"he has been cross-examined very severely for several days, and he was asked questions relating to the minutest details of the *asthal* and its people and he has acquitted himself very creditably. He knows all the *bairagis* and servants of the *asthal*; he knows every creek and corner of the *asthal* building; he describes the room of the *asthal* in which he used to live. He names the *mahants* of other *asthals*, as well as their *chelas*. He mentions the *bandaras* he attended with the Defendant No. 1."

Their Lordships agree with the Subordinate Judge that no explanation has been given of the intimacy and unquestionable accuracy of the Plaintiff with people, events, and affairs of the *asthal*, except upon the footing that he was initiated as one of the *chelas* thereof.

The details are briefly these. When he was about 10 years of age, the Plaintiff went to bathe in the Ganges with his aunt and some women of his caste. The Ganges was only a distance of 6 or 8 miles from his native village. The story is that Anand Das had pitched his tent close to the river, and that the boy, after hearing the ringing of the bell, went and saw the idol which Anand Das had taken with him, and was asked by Lachmi Das whether he would become a *bairagi*, and that he agreed and stayed on. He was in poor circumstances, and it was a rich *asthal* into which he was to be initiated. His father a year afterwards came to the *asthal* and made enquiries, and consented to his continuing there. His initiation took place on the 4th April 1884. He remained at the *muth* till 1889. Being then 15 years of age, he was sent to Ajodhya. In Ajodhya he received an education fitted to qualify him for his position as *bairagi chela*, including instruction in the Sanskrit language. He returned to the *muth* in 1897. In the meantime he had paid occasional visits to the *mahant* Anand Das, who had made payments of the sums required for his upbringing, all of which payments would, in the ordinary course, appear in the books of the *asthal*. From 1897 he remained in the *asthal* until the year 1904. In that year he was asked to sign as a witness the *ekrarnama*, which was the last of the series of documents above referred to, and under which Defendant No. 2 had the mahantship confirmed to him by Anand Das, his uncle, but under the peculiar reservations and conditions already referred to, and with, so to speak, a destination over in favour of his brother, the late Defendant No. 3. This was the first deed, apparently, to which the Plaintiff's signature had been required.

It is beyond question that after the ini-

tiation of the Plaintiff, and under what influences is not known, the Defendant No. 1, Anand Das, made the resolve to attempt to bring his nephew or nephews into the succession to the mahantship, and that he was not deterred from this scheme even after he was aware that the Defendant No. 2, Ram Partab, was married. The Plaintiff, however, stood in the way of this scheme, and if his signature could be obtained as witness to the *ekrarnama*, this might have gone some way to the defeat of the Plaintiff's rights.

Whether this story be on all points correct will never be ascertained; but this at least is true, that in 1904, just about the time when the *ekrarnama* founded on the present case was, in fact, executed, the Plaintiff brought a criminal suit in respect of the assaults committed upon him on the occasion of his expulsion from the Patepur *asthal*, and the reason assigned by him for having been assaulted was the failure to sign an *ekrarnama* as a witness. The Plaintiff succeeded before the magistrate, and a conviction followed which was quashed on appeal. Their Lordships do not think these proceedings to be relevant in this case. The one important fact is that they were taken on a ground which is referable to the execution of an *ekrarnama*, and they were taken by the Plaintiff as a claimant to be a resident as of right in the *asthal*, from which he had been expelled. It should be added that the Plaintiff's account of his expulsion includes this—that he was deprived of the possession of his books and papers, including all the letters received by him from Anand Das, the *mahant*, while he, the Plaintiff, was absent receiving education at Ajodhya.

By accident there have, however, been found two postcards, which are produced in this case. It is not seriously contended that these postcards are forgeries. In their Lordships' opinion they are of importance. The first is dated the 6th August 1902 and is from Sukh Deo Das to the Plaintiff, addressed thus: "To Ram Parkash Das self," and the address is given, "Asthan Patepur, Thana Patepur, District Mozufferpur." The official post office stamps are: (1) "Rajnagar, 6th August 1902"; (2) "Mahuwa, 8th August 1902": and (3) "Patepur B., 9th August 1902." In this Sukh Das writes to the Plainti:—

"I had told you that I would write to you in case the Chandrika (a treatise on Sanskrit grammar) was being taught."

The second postcard is from Ambar Janardan Dasji to the Plaintiff, Ram Parkash Das, and to Shyam Sundhar Dasji. It is dated the 14th October 1901. The address of Ram Parkash Das is given as "The Asthan P. O. and Thana of Patepur." There are several postmarks, one of which is "Patepur." The document asks:—

"Are you prosecuting your studies or are you not? Is Shyam Sundhar Das prosecuting his studies or not?"

This accordingly is evidence tending to show that the Plaintiff had studied in Ajodhya; that he was known to have proceeded thence to the Patepur *asthal*, and that it was in that *asthal* that he had his postal address. The whole of this is inconsistent with the case of the Defendants, which is a complete denial of the entire story told by the Plaintiff or of the fact that he at any time was a resident, either by right or otherwise, in the Patepur *asthal*.

On this part of the case one thing is extremely suggestive,—namely, that the later postcard was addressed jointly to the Plaintiff and Shayam Sundhar Dasji. This *chela* was in point of fact living at the *asthal* at the time the evidence in the present suit was being taken and "for the

last ten or twelve years." He was, therefore, completely at the call of the Defendants, and although weeks elapsed between the time when the Plaintiff gave his evidence and they were called upon to give theirs, Shyam Sundhar Dasji was not produced as a witness. It must, in their Lordships' opinion, be taken that, slender as this documentary evidence is, it and the circumstance of the not calling of Shyam Sundhar strongly support the case of the Plaintiff and strongly rebut that of the Defendants.

But the failure in the matter of evidence on the part of the Defendants does not rest there; as in the case of the marriage of the Defendant No. 2, so in the case of the life history of the Plaintiff, the fullest details are given, many of the points being elicited by the cross-examination on behalf of the Defendants. In particular the Plaintiff describes his own relations, stating that his father was alive and where he resides, and with regard to the various places visited season after season by the Plaintiff, materials are piled up by which his story, if inaccurate, could have been confounded. It is, however, left without an attempt to do so having been made.

On this branch of the case also the evidence of the Plaintiff is believed by the Subordinate Judge. It is supported by the evidence of Sitabullah, a neighbouring *mahant*, who swears that Anand Das initiated the Plaintiff in his presence; and by that of Balkrishna Das. Both of these witnesses are also believed by the Subordinate Judge. With regard to the former no motive whatever can be suggested for his having perjured himself; and the allegation as to his having asked a thousand rupees as a bribe from Raghunath Ja, the Defendants' manager, is rightly treated by the Subordinate Judge as false. It was said by Raghunath that the request was made in the presence of Gobind Das, and Gobind Das is not examined.

As to Balkrishna, he is a hemp smoker, which is not uncommon, and he is a mendicant going from place to place according to the habits of *chelas* in that part of the world. The Subordinate Judge remarks on this topic that

"the *bairagis*, it appears, are beggars no doubt, but those who are true to their cult have a regard for truth, and they cannot be easily bribed to give false evidence."

Whether this be correct or not, their Lordships do not see any grounds in the evidence given for declining to accept, as the Subordinate Judge did, the credibility of the witness.

In reviewing the evidence, the learned Judges of the High Court were greatly moved by the view which they took that the story of the circumstances under which the Plaintiff was induced to attach himself to Anand Das in 1884 amounted to an allegation of kidnapping, and that the date stated for the initiation of the Plaintiff would have clashed with a period of mourning for a relative of Anand Das. The date—it is many years ago—may have been erroneous by two days, and there is no reason why, if the case were false, a questionable date should have been named. The Board agrees with the conclusion of the Subordinate Judge on the point.

The Subordinate Judge dealt lightly with the allegation of kidnapping, and in the course of his judgment made the observation that

"people of other religious denominations are now and then heard of enticing away minor children from custody of their lawful guardians for making them converts of their own faith."

This observation was unnecessary. But

their Lordships are surprised to find that the High Court deals with it as if it were an attack upon Christian missionaries, and they go so far as to say that

"supposing them to be directed against Christian missionaries, they are not supported by a tittle of evidence, and, so far as our experience goes, they are absolutely false. In introducing them into his judgment, the Subordinate Judge does not appear to have exhibited an impartial frame of mind in treating the facts of this case."

Upon this their Lordships deem it right to observe that they think the supposition upon which this reflection proceeds to be strained, and the reflection to be uncalled for.

They incline to the view that the error on these subjects may have moved the High Court to discount improperly the true weight of the evidence, and to overlook important elements in the case.

As an instance of what their Lordships means, it may be mentioned that the post-cards are not alluded to in the judgment of the High Court, nor is the non-production of Gobind Das as a witness, nor even of Haman Lal as a witness; while, with regard to the non-production of the books, there are speculations made as to whether they would or would not have assisted in the solution of the problems arising in the case, but no due weight is attached to the serious fact that evidence, which might have concluded the case in one direction or another, and for the custody of which the Defendants are responsible, has not been brought before the Court by them.

But the case of the Defendants, which otherwise would have rested on a denial by themselves and been supported by nothing more substantial than negative evidence of *mahants*, many of whom lived a considerable distance, from the Patepur *asthal*, to the effect that they did not know that the Plaintiff was a *bairagi chela*, or in residence—that case is still more seriously weakened by the positive case which the Defendants put forward. That positive case is as follows, namely, that the Plaintiff was a *bairagi chela*, but that he did not belong to Patepur *asthal*. He belonged, so it is said, to a sub-*asthal* or sub-*muth*, consisting of a small house on a small plot of ground in the neighbourhood of Patepur, which was a separate *asthal* and had for its *mahant* one Baliram. This was an issue of fact, which fell to be proved by the Defendants, and they had the materials for doing so, and at first hand. Baliram had, so the argument went, two *bairagi chelas*—one was the Plaintiff and another was Manmohan Das. Their Lordships must decline to accept any hearsay evidence upon this subject, and it is sufficient to say that Baliram and Manmohan, both alive and available, are not produced as witnesses in support of the case alleged for the Defendants. It is a somewhat striking fact that in the judgment of the High Court there is no reference made to this important incident.

Their Lordships think it unnecessary to investigate further the details of the evidence, being satisfied that upon it the conclusion come to by the Subordinate Judge cannot be successfully challenged, and that accordingly the Plaintiff has established his position to be a *bairagi chela* of Patepur *asthal*.

He is also by admission, if this be so, the senior *chela*, if not the only *chela*, who is competent to fill the office of *mahant*.

Only one other question remains. It is this: Anand Das is still alive. The deeds which he granted, which purported to be a transfer during his life of the mahantship to his nephews, Defendants Nos. 2 and 3, are unavailing, Defendant

No. 2 being disqualified for the office, and Defendant No. 3 being dead. In these circumstances, does the mahantship not revert to Anand Das? Anand Das is a man now nearing 80 years of age. He has for years relinquished the mahantship. Since at least 1897 he has retired from office, and has made over to Defendant No. 2 all his duties together with the properties of the *asthal*. He has had a mutation of names effected in the Collector's Register in respect of the villages belonging to the *muth*. He has thus abdicated all his functions, and, as he admits, his position is no more than that of any other worshipper. The *mahant*, in their Lordships' opinion, is not only a spiritual preceptor, but also a trustee in respect of the *asthal* over which he presides. His installation of Defendant No. 2 on the *gaddi*, and his own retirement from the mahantship, would thus appear to have created a vacancy in the office.

But a more serious difficulty also arises from the fact that their Lordships cannot acquit Defendant No. 1 of having been a party to deeds, and especially to the *ekrarnama* of 1904, which were of a nature inconsistent with his duty and position as guardian of this religious institution. To confer the mahantship upon a relation who was a married man and the father of children was to consent to a violation in the person of the highest and most responsible officer, namely, the *mahant*, of those vows and practices of asceticism and celibacy which it was his duty as a trustee to maintain and protect. In these circumstances their Lordships must accept the abdication which occurred as a governing fact in the case. Further, it is not alleged that the senior *chela*, on whom even according to the Defendants' case the succession would devolve in the absence of an appointment, is disqualified by any just cause from holding the office vacated by the old *mahant*. In these circumstances their Lordships think that the Plaintiff is entitled to the declaration made in his favour by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the decree of the High Court set aside with costs, and the decree of the Subordinate Judge restored.

The Respondents will pay the costs of the appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Barrow Rogers* and *Nevils* for the Respondents.

B. D. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 360 OF 1913.

GHAUDHURI, J. NEWBOULD, J. 1916, Heard, 29, February. Judgment, 13, March.	SATISH CHANDRA SINGHA, 1st Party, Appellant, *v.* ANANDA GOPAL DAS and others, 2nd Party, Respondents.

Land Acquisition Act (I of 1894), sec. 30—Reference to Civil Court if lies after payment of compensation to one party by Collector—Order by Civil Court directing Government to pay compensation to party found entitled to it and to realise the amount wrongly paid from the other party, propriety of—Facts to be proved by claimant in order to be entitled to compensation—Road-cess return, value of, to show status as lakherajdar.

The Appellant who was the first party claimed that he had a lakheraj *title to a land acquired under the Land Acquisition Act. The second party claimed as* putnidars *and* dar-putnidars. *The Collector made an award in favour of the first party and the amount of compensation was actually paid to him. On a reference to the Civil Court under sec. 30 of the Act the Subordinate Judge found in favour of the*

SATISH CHANDRA SINGHA *v.* ANANDA GOPAL DAS.

second party and directed the Government to pay the compensation to them and to realise the amount previously paid to the first party from him.

Held—*That though the Land Acquisition Act clearly contemplates that when there is a dispute as to apportionment the reference to the Civil Court under sec. 30 should be made before any payment has been made, still there is nothing in the Act that prohibits the Land Acquisition Collector from making the reference after payment of compensation to one of the parties. When such a reference has been made, it is undesirable that the party who succeeds in showing that the Collector's order was wrong should have to resort to a regular suit to compel the Opposite Party to refund the compensation to which he has been held not to be entitled, nor can the rights of the Opposite Party be in any way prejudiced by the reduction of litigation.*

That the omission of the Appellant to file any road-cess return with regard to the land went strongly against his claim to have asserted a lakheraj *title to it.*

The High Court varied the decree of the Subordinate Judge and ordered the first party to pay the amount of compensation received by him to the second party with interest at 6 per cent. per annum from the date of withdrawal.

Held, *further, that a claimant in a Land Acquisition proceeding can get no share of the compensation without establishing either title to or possession of the land acquired.*

This was an appeal preferred on the 13th August 1913 against a decree of Babu B. G. Basu, Subordinate Judge of Burdwan, dated the 17th July 1913.

The material facts will appear from the judgment.

Babus Upendra Nath Chatterjee and *Gurudas Sinha* for the Appellant.

Babus Jogesh Ch. Ray and *Asita Ranjan Ghosh* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a dispute about the apportionment of a sum of Rs. 1,242-15-2 awarded as compensation for land taken under the provisions of the Land Acquisition Act, I of 1894. The first party, who is the Appellant before us, claims that he had a *lakheraj* title to the land acquired. The second party claims as *putnidars* and *dar-putnidars*. The Land Acquisition Collector made an award in favour of the *lakherajdar* and paid him the compensation. Then as the *putnidars* did not admit the title of the *lakherajdar*, he referred the case to the Civil Court under sec. 30 of the Act. The learned Subordinate Judge who heard the reference held that the first party had no *lakheraj* right to the land and that the *maliks*, *viz.*, the *putnidars* and *dar-putnidars* were entitled to get the compensation that had been awarded. He directed that the *maliks* should get the above compensation from the Government and that the Government would be at liberty to realise from the first party the sum which had been wrongly paid to him. Against this decree the first party has preferred this appeal and the second party, after an unsuccessful application for review, have taken a cross-objection that the Court ought to have directed the first party to pay them the compensation with interest from the date of his withdrawal.

It is first contended on behalf of the Appellant that the Collector after he had paid the amounts, had no jurisdiction to make an order of reference to the Civil Court under sec. 30 of the Land Acquisition Act,

In support of this contention reliance is placed on the case of *Gobinda Ranee* v. *Brinda Rance* (1). In this case the learned Judges observed that it was open to doubt whether sec. 18 or sec. 30 of the Act can have any application after the money has actually been paid away. They, however, came to no decision that would be binding on us on this point and as pointed out in *Mrinalini* v. *Abinash Chandra* (2), a different view was taken in the case of *Nobinkali* v. *Banolata* (3). In our opinion though the Act clearly contemplates that when there is a dispute as to apportionment the reference to the Civil Court under sec. 30 should be made before any payment had been made, still there is nothing in the Act that prohibits the Land Acquisition Collector from acting as he has done in this case, namely, making the reference after payment of compensation to one of the parties. When such a reference has been made it is undesirable that the party who succeeds in showing that the Collector's order was wrong should be compelled to resort to a regular suit to compel the Opposite Party to refund the compensation to which he has been held not to be entitled nor can the rights of the Opposite Party be in any way prejudiced by the reduction of litigation. Before the lower Court the Appellant raised no objections to the proceedings and unless those proceedings were without jurisdiction, it is too late for him to plead prejudice. As we hold that the lower Court had jurisdiction we therefore decide against the first objection taken on behalf of the Appellant.

On the merits we think the learned Subordinate Judge is right in holding that the Appellant has no title to the land acquired. The unregistered deed of sale, which is his title-deed, is of a very suspicious appearance, and in the absence of direct evidence of its execution and having regard to the unsatisfactory nature of the evidence called to prove the signatures of the attesting witnesses we can attach no weight to it. The evidence as to possession is contradictory but apparently the land which consists of a tank and its bank was regarded as of no great value before the Land Acquisition proceedings were contemplated. The owner probably did little to assert his right or to prevent casual grazing and fishing by the villagers generally. However that may be, we are certainly not disposed on a perusal of the recorded evidence to reverse the finding of the lower Court on this point. The omission of the Appellant to file any road-cess return with regard to this tank goes strongly against his claim to have asserted a *lakheraj* title to it. It is contended that the onus has been wrongly thrown on the Appellant. This, however, is not a case in which the onus lies on the zemindar to prove the land is *mal* against a person claiming it as *lakheraj*. The parties to these proceedings claim the property as being in separate *mehals*. Also obviously a claimant in a land acquisition proceeding can get no share of the compensation without establishing either title to or possession of the land acquired and the Appellant has failed to prove either in this case.

We think the cross-objection taken by the Respondent must be allowed. Government was not a party to these proceedings and the lower Court therefore could not direct in its decree that the amount payable to the second and third parties should be realised from Government. The order also is unnecessary. The money has to be repaid by the first party and to be received by the second and third parties, and it is simpler that the payment should be

(1) I. L. R. 35 Cal 1104 : s. c 12 C. W. N. 1039 1908).
(2 14 C. W. N. 1024 (1910).
(3) I. L. R. Cal. 921 (1905).

made directly by the former to the latter. The Respondents are entitled to interest from the date of withdrawal, which we allow at the rate of 6 per cent.

We dismiss this appeal with costs.

We allow the cross-objection taken by the Respondents and vary the decree so far as it directs that the sum of Rs. 1,242-15-2 be realised from Government by the second and third parties and that Government will recover the said sum from first party. This sum will be paid by the first party to the second and third parties with interest at 6 per cent. per annum from the date of withdrawal. The Appellants will also pay the Respondent's costs, if any, on this cross-objection.

Appeal dismissed,
S. C. M. *Decree modified.*

[CIVIL APPELLATE JURISDICTION]
APPEAL FROM APPELLATE DECREE
No. 485 OF 1912.

MOOKERJEE, J.
BEACHCROFT, J.
1914,
Heard, 10, 11 & 13, February.
Judgment, 16, February.

NAGENDRA NATH BOSE, Defendant, Appellant,
v.
PARBATI CHARAN and anr., Plaintiffs, Respondents.

Ex parte *decree and sale thereunder—Suit to set aside decree and sale on the ground that processes in suit and execution suppressed in collusion with officers of Court—Suit if maintainable—Case of fraud, pleading and proof in—Purchaser at certificate sale, suit for rent by, after registration under Land Registration Act—Decree obtained therein, sale in execution of—Purchase by decree-holder—Certificate sale subsequently cancelled—Rent-decree and sale, if thereby reversed.*

Where the Plaintiff in a suit to set aside an ex parte *rent decree and sale held thereunder alleged that the Defendants had in collusion with the officers of the Court, caused a suppression of the processes in the suit as also in the execution proceedings;*

Held—*That if this allegation had been established, the Plaintiff would have been entitled to succeed.*

The mere circumstance that a Defendant has failed to have an ex parte *decree set aside under sec. 108, C. P. C. (of 1882) or to have a sale set aside on the ground of material irregularity does not debar him from seeking relief in a suit properly framed for the purpose on the ground that the suit itself was a fraudulent suit and that the proceedings therein were vitiated by fraud. But to enable the Plaintiff to succeed in a suit so framed, he must specifically allege the circumstances of fraud and he must prove the fraud as laid in the plaint.*

Fraud how to be pleaded and in what manner established discussed.

A, having purchased property at a sale under the Public Demands Recovery Act, on 7th September 1908, sold it to B who duly obtained a sale-certificate from the Revenue authorities, was placed in possession and had his name registered under the Land Registration Act. B then sued the tenant on the property for rent and obtained an ex parte *decree, in execution whereof the tenure was sold and purchased by the decree-holder himself on 20th November 1909. The sale under the Public Demands Recovery Act was cancelled on 29th March 1910 on the ground that no notice had been served under sec. 109 of the Act and that the proceedings were invalid and inoperative in consequence.*

Held—*That the rent-decree and sale thereunder which were duly and regularly had at the instance of a stranger who had no concern with the irregularities in connection with the certificate sale were not affected by the reversal of the certificate sale.*

NAGENDRA NATH BOSE *v.* PARBATI CHARAN.

This was an appal from a decision of Babu J. N. Chakerbarty, Subordinate Judge, 24-Parganas, dated 14th November 1911, reversing that of Babu Sukumar Bhattacharjee, Munsif, Diamond Harbour, dated 2nd February 1911.

The facts of the case will appear from the judgment.

Babus Mohini Mohan Chakervarty and *Prokash Chandra Mozumdar* for the Appellant.

Babu Gour Chandra Pal for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the second Defendant in a suit to set aside an *ex parte* decree. The Plaintiffs held the disputed land within a tenure which was sold under the Public Demands Recovery Act on the 7th September 1908, and was purchased by the first Defendant. The second Defendant purchased the tenure from the first Defendant, and on the 18th June 1909 instituted a suit for rent against the Plaintiffs. The suit was decreed *ex parte* on the 16th July 1909; in execution of this decree, the property was purchased by the decree-holder on the 20th November 1909. Meanwhile proceedings had been instituted for cancellation of the sale under the Public Demands Recovery Act on the ground, amongst others, that no notice had been served under sec. 10 and that consequently the proceedings were invalid and inoperative. The sale under the Public Demands Recovery Act was set aside for the reasons stated on the 29th March 1910. On the 7th May 1910, the Plaintiffs commenced this action to set aside the *ex parte* decree as also the sale consequent thereon on a two-fold ground, namely, first, that the decree was vitiated by fraud; and secondly, that as the certificate sale was subsequently set aside, the rent decree also was in essence cancelled. The Court of first instance held that the *ex parte* decree in the rent suit was not liable to be set aside on either ground. Upon appeal, the Subordinate Judge has, in concurrence with the Court of first instance, held that the decree is not liable to be set aside on the ground that the certificate sale has been subsequently set aside; but he has also held, herein differing from the Court of first instance, that the rent decree must be set aside on the ground that it had been obtained by fraud. In this view, the Subordinate Judge has set aside the decree and sale and has declared that the title of the Plaintiffs has not been affected by the proceedings in the rent suit.

On the present appeal by the second Defendant, the decision of the Subordinate Judge has been challenged on the ground that the facts found by him do not justify the inference that the rent decree was vitiated by fraud. This position has been contested on behalf of the Plaintiffs-Respondents, who have further endeavoured to support the decree of the Subordinate Judge on the ground that his decision upon the second question raised was erroneous.

In so far as the question raised in the appeal is concerned it is in our opinion plain that the view taken by the Subordinate Judge cannot be supported. It is now well-settled, as was laid down by the House of Lords in *Wallingford* v. *Mutual Society* (1) and by the Judicial Committee in *Ganga Narain Gupta* v. *Tiluckram Choudhury* (2), that general allegations of fraud, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice, *Jyoti Prokash* v. *Jhowmull* (3) and *Balaji* v.

(1) 5 App. Cas. 685, 697 (1880).
(2) I. L. R. 15 Cal. 533 (1888).
(3) I. L. R. 36 Cal. 134 (1908).

Gangadhar (4). Where a Plaintiff seeks relief on the ground of fraud, he is bound under Or. 6, r. 4, of the Code of Civil Procedure to specify in his plaint the facts which constitute fraud. It is also well-settled that a charge of fraud must be substantially proved, as laid, and when one kind of fraud is charged, another kind of fraud cannot upon failure of proof, be substituted for it. [*Abdul Hussein* v. *Turner* (5)]. In the case before us, the specific allegation of fraud made in the plaint was to the effect that the second Defendant had, in collusion with the officers of the Court, caused a suppression of the processes in the suit as also in the execution proceedings. No doubt, if this allegation had been established, the Plaintiff would have been entitled to succeed; because, it is firmly settled that a judgment will be vacated if it is proved that the successful party has taken means to prevent service of notices upon the other or has procured a false return of service [*Abdul Majumdar* v. *Mohamed Gazi* (6), *Mohammed Golab* v. *Mohammed Sulliman* (7) and *Narsingdas* v. *Rafikan* (8)]. Unfortunately for the Plaintiffs, however, the facts found by the Subordinate Judge do not support the conclusion that the processes, either in the suit or in the execution proceedings, were suppressed at the instance of the then Plaintiff. The Subordinate Judge had found, so far as the processes in the suit are concerned, that they were not served. He does not find, nor has he stated any facts from which any inference could be drawn to the effect, that this non-service of processes in the suit was in any way attributable to the interference of the Plaintiff in the rent suit. It may be conceded, as was laid down by their Lordships of the Judicial Committee in *Radha Raman Saha* v. *Prannath Roy* (9) and *Khagendra Nath Mahato* v. *Prannath Roy* (10), that the mere circumstance that a Defendant has failed to have an *ex parte* decree set aside under sec. 108, C. P. C. or to have an execution sale set aside on the ground of material irregularity, does not debar him from seeking relief in a suit properly framed for the purpose, on the ground that the suit itself was a fraudulent suit, and that the proceedings therein were vitiated by fraud. But to enable the Plaintiff to succeed in a suit so framed, he must specifically allege the circumstances of fraud and he must prove the fraud as laid in the plaint. Reference has been made on behalf of the Respondent to the decision in *Nemai Charan Kanji* v. *Dino Nath Kanji* (11), where certain circumstances were stated as indicia of fraud. That decision, however, is of no assistance to the Respondents, as the Subordinate Judge has not found all the circumstances to exist in the case before us. We must hold accordingly that the facts found by the Subordinate Judge do not constitute fraud and do not afford any basis for cancellation of the *ex parte* decree in the rent suit.

The next question for consideration is, whether the Subordinate Judge, in concurrence with the Court of first instance, has taken an erroneous view as to the effect, if any, of the reversal of the certificate sale upon the decree in the rent suit. At the time when the suit for rent

(4) I. L. R. 32 Bom. 255 (1908).
(5) I. L. R. 11 Bom. 620 : s. c. L. R. 14 I. A. 11 (1887).
(6) I. L. R. 21 Cal. 605 (1894).
(7) I. L. R. 21 Cal. 612 (1894).
(8) I. L. R. 37 Cal. 197 : s. c. 11 C. L. J. 250 (1909).
(9) I. L. R. 28 Cal. 475 : s. c. 5 C. W. N. 756 (1901).
(10) I. L. R. 29 Cal. 395 : s. c. 6 C. W. N. 473 (1902).
(11) 2 C. W. N. 691 (1898).

was instituted, the second Defendant was the only person competent to maintain a suit for rent. He had purchased the property from the first Defendant who was the purchaser at the sale under the provisions of the Public Demands Recovery Act. He duly obtained the sale certificate from the Revenue Authorities, was placed in possession of the property by them, and subsequently got his name registered under the Land Registration Act. At the time of the institution of the rent suit, he was consequently the only person who could claim to recover rent from the tenants. Indeed, the tenants were not entitled under the provisions of sec. 78 of the Land Registration Act and sec. 60 of the Bengal Tenancy Act to plead in answer to the claim that rent was due to another person. The decree was made by a Court of competent jurisdiction and was executed by the Court which made it. The sale, it has been found, was regularly held. Under these circumstances, we cannot hold that the fact that the certificate sale, which was the root of the title of the second Defendant, was subsequently set aside, did in any way affect the validity of the decree in the rent suit. The question of the effect of the cancellation of a decree upon intermediate acts based on it, may sometimes be not altogether free from difficulty, but, as pointed out in *Simpson* v. *Hornbeck* (12), one principle is well-settled, namely, a judgment pronounced by the Court, upon an erroneous view of the law and subject, therefore, to be reversed by an Appellate Tribunal, is treated as valid for all purposes of protection or justification to the party acting under it before reversal, and the same rule applies where the judgment is vacated for irregularity or like reason not attributable or chargeable to the Plaintiff or for which he is not actually or constructively to blame. In the case before us, the certificate under the Public Demands Recoverey Act and the sale consequent thereon, were set aside, because the notice under sec. 10 had not been duly served; for this irregularity, however vital it may be to the purchaser at the certificate sale, a stranger to the proceedings, clearly cannot be held responsible, and it is not possible, on any legal principle to justify the view that all acts of the purchaser on the basis of his purchase at the certificate sale should be deemed nullified as soon as the sale was set aside. The effect of the reversal of the certificate sale is that, as between the original tenure-holder and the purchaser at the certificate sale or his representative in interest, the latter becomes liable to make restitution to the former. But it does not follow that all legal processes, duly and regularly taken at a time when the title of the certificate purchaser or his representatives was in full force, were vitiated by the reversal of the certificate sale. A fruitless attempt has been made to invoke the aid of the well-established doctrine that the Court may, in exceptional cases, take notice of events which have happened since the institution of the suit, so as to do complete justice between the litigants [*Ramratan* v. *Mohant Sahi* (13), *Ramyad* v. *Bindeswari* (14) and *Udit Chobey* v. *Radhika Prosad* (15)]. Nor is there any real analogy between the present case and the class of cases to which reference was made, namely, *Shama Pershad* v. *Hurro Pershad* (16) and *Kali Charan Dutt* v. *Jogesh Chandra Dutt* (17). In these cases, it was held that where decrees have been made on the basis of a decree in an

(12) 8 Lans. 52.

(13) 6 C. L. J. 74 at p. 78 (1907).
(14) 6 C. L. J. 102 (1907).
(15) 6 C. L. J. 662 (1907).
(16) 10 M. I. A. 203 (1865).
(17) 1 C. L. R. 5 (1877).

earlier suit, which was subject to the result of an appeal, the reversal of the earliest decree operated in essence as a reversal of the subsequent decrees based thereon. That clearly is a case of an entirely different description. There is also no analogy between the case before us and another class of cases in which it has been held that where an order has been obtained on the basis of a decree, the cancellation of the decree operates to discharge the order made on the basis thereof. *Nawab Zainul-abdin* v. *Mohammed Asghar Ali* (18), *Mina Kumari* v. *Jagat Sattani* (19) and *Set Umedmal* v. *Srinath Roy* (20). In our opinion, it is plain that the rent decree and the sale held on the basis thereof have not in any way been affected by the cancellation of the certificate sale. Indeed, in the present case, if the Plaintiffs were to succeed, the Defendant would be deprived of the property he has acquired in satisfaction of his claim for rent, and would nevertheless continue liable to make restitution to the tenure-holder, whom he had dispossessed on the strength of his purchase at the certificate sale: such a position as this cannot be supported on any conceivable principle of justice, equity and good conscience.

The result is that, as both the grounds on which the Plaintiffs seek to impeach the title of the second Defendant fail, this appeal must be allowed, the decree of the Subordinate Judge reversed, and that of the Court of first instance restored with costs in all the Courts.

N. G. *Appeal allowed.*

(18) L. R. 15 I. A. 12, 15: s. c. I. L. R. 10 All. 166 (1887).
(19) I. L. R. 10 Cal. 220 (1883).
(20) I. L. R. 27 Cal. 810: s. c. 4 C. W. N. 662 (1900).

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 593 OF 1914.

STEPHEN, J. MULLICK, J. 1914, 27, July.	BALIA KOER, Petitioner, *v.* BANDRAM SAHU, Opposite Party.

Regulation V of 1799, sec. 5—Order if can be made, when no regular suit has been brought by the claimants

When no regular suit has been brought by the persons who claim the property dealt with by the Court, an order under sec. 5 of Reg. V of 1799 is ultra vires.

This was a Rule granted on the 22nd May 1914 against the order of F. M. Luce, Esq., District Judge of Gya, dated 24th April 1914.

The order of the District Judge was as follows:—

"There are three claimants for the moveable properties, consisting of ornaments, cash and notes, left by Bandhu Sahu, who died on 18th October 1913. They are respectively: (1) Mossammat Balo Koer who claims to be the widow of Bandhu, (2) Bodhram Sahu, who claims to be the cousin of Bandhu, and (3) Mahanth Mahabir Das, who claims the property under a verbal gift made by the deceased a few days before his death.

"After examining the Mahanth, I was of opinion that he had no *locus standi* in this case, and that he must establish his claim by means of a regular suit.

"I may note that the Government pleader has not contested the case, and has filed a statement admitting Bodhram to be entitled to the property.

"Mossammat Balo Koer has failed to satisfy me that she has any title to the property. Her story is that she was married in the Sagai form to Bandhoo 6 or 7 years ago. It is admitted that she

was not with him when he died. There is only oral evidence to the alleged marriage, and there are material discrepancies in this evidence, nor does any of the witnesses appear to be independent. Pundit Sao, the brother or step-brother of the woman, denies the marriage, and says that she was outcasted owing to misconduct. There is evidence to show that Bandhu was a leper, and if he was, the marriage is distinctly improbable. I therefore reject the claim of Balo Koer. On the other hand there is good evidence to show that Bodh Ram was the cousin of Bandhu, and this relationship has not been directly denied by the other side. In the absence of any nearer relation it is clear that Bodh Ram is entitled to succeed to the property of the deceased. Under sec. 5 of Reg. V of 1799, I therefore direct that the property be made over to Bodh Ram Sao, but in view of the petition filed by Mahabir Das on 22nd April 1914, the property will not be made over until the expiry of one month from this date."

Babus Gobind Chandra Dey Roy and *Abaninath Bhattacharjee* for the Petitioner.

Babus Umakali Mukherjee and *Satish Chandra Mukherjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

In this case the District Judge has made an order, he says, under sec. 5 of Regulation V of 1799. In form it appears more like an order under sec. 4. He has no jurisdiction to make such an order, for no regular suit has been brought by the persons who claim the property with which he has dealt. His order is therefore *ultra vires* and must be set aside. The Court will then be in possession of the property claimed by the two persons who consider themselves as entitled to it on intestacy. His proper course will be to return the property to the authority from which it came, namely, to the Police. We may observe that it will then be open to the District Magistrate to make over the property to one of the parties or to some other persons taking signature from them, that it should be held in such a way as to be available for any person who may succeed in establishing his right thereto.

The Rule is accordingly made absolute.

We make no order as to costs.

S. C. M. *Rule made absolute.*

[CRIMINAL REFERENCE.]

REF. No. 52 OF 1916.

CHITTY, J.
WALMSLEY, J.
1916,
14, April.

CHAIRMAN OF HUGHLY CHINSURA MUNICIPALITY
v.
KRISTA LAL MULLIK.

Bengal Municipal Act (III B. C. of 1884), ss. 353, 44, 45, 271, 230—Order or consent of Commissioners necessary for prosecution under the Act—Power of Chairman to give such order or consent on behalf of the Commissioners—Vice-Chairman, exercise by, of powers of Chairman—Consent of Chairman subsequently obtained, validating effect of.

The accused was prosecuted under sec. 271 of the Bengal Municipal Act for disobeying a requisition under sec. 230. The report of the offence was made by the Outdoor Inspector and it was submitted to the District Magistrate by the Chairman with a recommendation to prosecute the accused. The Inspector appeared before the Magistrate and was examined as the complainant. The document which was submitted by the Chairman to the Magistrate bore an eight-anna stamp. It further appeared that the notice against the accused was issued on the authority of the Vice-Chairman. There was no written

order of delegation of duties or powers by the Chairman to the Vice-Chairman which could cover this order made by the Vice-Chairman.

Held—*That because the report of the offence made by the Inspector which was submitted by the Chairman to the District Magistrate bore an eight-anna stamp, it did not follow that it must be regarded as a petition of complaint and that the Chairman was merely in the position of a complainant.*

That the order or consent of the Commissioners necessary under sec. 353 for the institution of a prosecution under the Act is an order or consent by the Chairman as representing the Commissioners which the Chairman can give under sec. 44.

That in the present case the order of the Chairman was an order or consent in writing by the Chairman within the meaning of sec. 353 and was sufficient.

That it being clear that the act of the Vice-Chairman was done with the express consent of the Chairman subsequently obtained, the case was covered by the proviso to sec. 45.

This was a Reference under sec. 438, Cr. P. C., made by S. K. Ghosh, Esq., District and Sessions Judge of Hughly, on the 30th March 1916 recommending that the order of Babu Probodh Ch. Chatterjee, Sub-divisional Magistrate of Hughly, dated the 8th January 1916, convicting the accused under sec. 271, Bengal Municipal Act, and sentencing him to pay a fine of Rs. 5 and also to a daily fine of annas eight from 31st May 1915 to 22nd July 1915, may be reversed.

The letter of reference was as follows :—

The Petitioner Krista Lal Mullik has been convicted by the Sub-divisional Magistrate of Hughly under sec. 271 of the Bengal Municipal Act for having disobeyed a requisition under sec. 230 and sentenced to pay a fine of Rs. 5 and also to pay a daily fine of 8 annas from 31st May 1915 to 22nd July 1915, in default to suffer simple imprisonment for a fortnight and also to pay Rs. 2-12 annas as costs. The petitioner was prosecuted at the instance of the Chairman of the Municipality of Hughly-Chinsura for having constructed a privy without the written permission of the Municipal Commissioners within 50 feet of a tank alleged to be used by the inhabitants of the locality. The Sub-divisional Magistrate, without examining anyone, issued summons on the petitioner and on his appearance transferred the case to the file of the Sub-Deputy Magistrate for disposal. The case was heard by two Magistrates in succession and ultimately was taken back to the file of the Sub-divisional Magistrate who passed judgment on 8th January 1916.

The order of the learned Magistrate has been assailed in this court on various grounds, of which only two need be stated. In my opinion, these two are sufficient to justify my recommending that the order of the Magistrate be reversed.

In the first place, under sec. 353 of the Bengal Municipal Act, no prosecution can be instituted without the consent of the Commissioners. Under sec. 44 this means the consent of the Chairman. It is therefore necessary that the prosecution should prove the consent of the Chairman. The learned Magistrate has found that this consent has been given by the document which is marked Ex. 3 and proved by the Overseer, P. W. 1. Unfortunately this document is not very different from the 'tabular form' which was put forward as a document giving sanction but was not accepted by their Lordships as such in the case of *Rasul Bukhsh* v. *Municipal Board of Chapra* (1).

(1) 16 C. W. N. 984 (1912).

It was pointed out in that case that " the only evidence of sanction of prosecution by public authority is a writing under the seal and signature of that authority." The document Ex. 3 contains the signature of the Chairman but does not bear any seal. It was contended in this court that the Municipality may not possess a seal but the impress of a seal actually appears on the notice Ex. 1. On the other hand the document Ex. 3 is headed ' Report of offence ' and is stamped with a stamp of 8 annas, as if it was meant to be a petition of complaint which virtually it was. Therefore the document Ex. 3 does not disclose any authority showing the consent of the Commissioners as required by sec. 353 of the Bengal Municipal Act.

The second point is that the notice Ex. 1 was issued on the authority of the Vice-Chairman and there is no evidence that the latter derived authority from the Chairman. A requisition was issued under sec. 230 of the Act and reading that section with secs. 44 and 45 one would find that the Chairman might delegate his duties or powers to the Vice-Chairman. Having regard to the proviso of sec. 45 it has been contended that the fact of the Chairman having started the prosecution must be taken as an implied consent by him subsequently obtained. But in the case of *Harendra Nath* v. *Chairman of Birnagar Municipality* (3), the facts were similar and it was held thus :—" It is contended that there is no proof in this case that the Vice-Chairman had such power, and since the Vice-Chairman has only such powers as are delegated, it is for the person who alleged that he has such powers, to prove that he has them, when the objection has been raised, no mere presumption under sec. 144 of the Evidence Act that official acts have been rightly done, can dispose of the objection. In the present case, there is no evidence that the Vice-Chairman was empowered to issue notice, and therefore it must be held to be invalid notice ". See also *Chairman of Puri Municipality* v. *Kissori Lal Sen* (4) and *Khiroda Proshad Pal* v. *The Chairman of Howrah Municipality* (2). In this view the notice Ex. 1 appears to be invalid.

These two objections are no doubt very technical, but as was stated in *Rasul Bukhsh* v. *Municipal Board of Chapra* (1) " sanctions and consents which are imposed by any statute must be clearly proved by writing under the hand of the authority which has power to sanction or consent as a condition precedent to any prosecution." This principle applies to both the points above mentioned. I therefore recommend that the order of the Magistrate be revised.

Babu Atulya Churn Bose for the Accused.

Babu Monmothanath Mukerjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a reference by the learned Sessions Judge of Hughly in the matter of one Krista Lal Mullik who was prosecuted under sec. 271 of the Bengal Municipal Act for having disobeyed a requisition under sec. 230 and sentenced to pay fine. The learned Sessions Judge recommends that the conviction and sentence be set aside on two grounds which he admits are technical. The first is that the prosecution was undertaken without the consent of the Commissioners. He considers that, under sec. 44, the Chairman could give such consent. It appears from Ex. 3 in the case that the report of these offences was made by the Outdoor Inspector; that the

(1) 16 C. W. N. 934 (1912).
(2 I. L. R 20 Cal. 418 (1893).
(3) 1 C. L. J. 51 (1904).
(4) 1 C. W. N. ccxliv (1897).

columns of that form were duly filled up; and that in the remarks columns occurred this remark "submitted to the District Magistrate, Hughly, with a recommendation to prosecute the party under secs. 230, 271 of the Bengal Municipal Act." That is signed by Mohendra Chandra Mitter, Chairman, Hughly-Chinsura Municipality. The learned Judge thinks that, because this document bears an eight-anna stamp, it must be regarded as a petition of complaint and that the Chairman of the Municipality was merely in the position of the complainant. We do not so regard it. Sec. 353 says that no prosecution for an offence under this Act shall be instituted without the order or consent of the Commissioners. This is clearly an order or consent by the Chairman as representing the Commisisoners. It does not apepar that the Chairman ever went before the District Magistrate; the complainant who appeared before him was the Outdoor Inspector; and he gave evidence as such complainant, as appears from his deposition. We have been referred on this point to a decision of this Court in *Rasul Bukhsh* v. *Municipal Board of Chapra* (1), in which the Judges are reported to have remarked: "The only evidence of sanction of prosecution of a public authority is a writing under the seal and signature of that authority." We have not been told of any enactment which requires a sanction for prosecution to be under seal. The facts of that case were somewhat different from the facts of the present case, but, so far as a seal was held to be necessary, we are unable to agree with that in the absence of any legislative enactment to that effect. The expression there "sanction of prosecution" is not quite in the wording of sec. 353 which speaks of the "order or consent." Ex. 3 amounting to such order or consent in writing by the Chairman is, we think, sufficient.

The second point is that the notice—Ex. 1—against the accused was issued on the authority of the Vice-Chairman and that there is no evidence that the latter derived authority from the Chairman. The learned Judge has referred to secs. 44 and 45; but he has not directly referred to the proviso to sec. 45. Here it may be assumed that there was no written order delegating to the Vice-Chairman all or any of the duties or powers of a Chairman as defined in the Act which would cover the particular order made by the Vice-Chairman in this case. The proviso, however, to sec. 45 says: "Provided that nothing done by the Vice-Chairman which might have been done under the authority of a written order from the Chairman, shall be invalid for want of or defect of such written order, if it be done with the express or implied consent of the Chairman previously or subsequently obtained." That the act of the Vice-Chairman was done with the express consent of the Chairman subsequently obtained is clear in this case from the order to which we have referred in Ex. 3. It is clear that the Chairman must have given consent to the act of the Vice-Chairman; or he could never have written that order which has been designated a sanction to prosecute. On this point we have been referred to the case of *Khiroda Proshad* v. *The Chairman of the Howrah Municipality* (2); but the facts there were very different from the facts in the present case. There was no evidence of any such consent on the part of the Chairman as appears here. All that there was in that case to justify the order was a verbal order given some months before by the Chairman to the Vice-Chairman to institute all prosecutions under sec. 353.

(1) 16 C. W. N. 934 (1912).

(2) I. L. R. 20 Cal. 448 (1893).

We think, therefore, on the clear reading of the Act that the two points which the learned Judge has put forward cannot be supported. His recommendation to revise the proceedings is rejected.

C. C. M. *Reference discharged.*

PATNA HIGH COURT.
[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM ORIGINAL DECREE
No. 236 OF 1913.

CHAPMAN, J.
ATKINSON, J.
1916,
6, April.

RAJBANS SAHAY, Opposite Party, Appellant,
v.
RAI MAHABIR PRASAD, Applicant, Respondent.

Acquisition of land by Government—Right to compensation—Possession for 12 years by non-payment of rent—Title by adverse possession.

On the acquisition of a piece of land under the Land Acquisition Act it was found that the person in possession had taken possession of it on the death of the last male owner and held possession for more than 12 years without payment of rent. He asserted that he held the land under another person and not under the rival claimant who was the reversionary heir of the last male owner.

Held—*That the person in such possession was entitled to the full compensation paid for its compulsory acquisition, having acquired the right to hold the land rent-free by twelve years' adverse possession.*

This was an appeal against the judgment and decree passed by F. M. Luce, Esq., District Judge of Gya, dated the 18th March 1913.

This appeal arose out of a reference made to the Land Acquisition Judge of Gya under sec. 30 of the Land Acquisition Act with regard to the apportionment of Rs. 580-13-10 compensation awarded for the acquisition of 11 cottas 2 chataks of land situated in village Pahsi Murarpur *alias* Dulhinganj on behalf of the Railway Company under declaration made on 23rd March 1912. The rival claimants were Rai Mahabir Pershad and Babu Rajbans Sahay, Mukhtear. The former claimed that the land formed part of the estate of Rai Gudar Sahai who died in the year 1897, and that under the judgment of the District Judge of Mozafferpur, dated 19th May 1911, he was granted Letters of Administration of the estate of Rai Gudar Sahai. The latter claimed that he held the land as a rent-free tenure under Mussammat Sahodra Koer, daughter-in-law of Rai Gudar Sahai, for a large number of years, and was therefore entitled to the whole of the compensation.

The Land Acquisition Judge found that the land formed part of the estate of Rai Gudar Sahai and the Applicant Rai Mahabir Pershad was entitled to administer the estate. He further found that the Muktear Rajbans Sahai was in actual possession of the land since the year 1899 at least. But he held that he was merely a trespasser and that he could not claim any title by right of adverse possession, inasmuch as he claimed as a tenant and there was no evidence to shew that the landlord ever recognized his claim. He therefore awarded the whole compensation money to Rai Mahabir Pershad. Thereupon Rajbans Sahay preferred the above appeal.

Messrs. Akbari and *Khurshed Hussain* for the Appellant.

No one appeared for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CHAPMAN, J.—A plot of land was acquired for the purposes of the East Indian Railway Company on the 23rd March 1912, a certain sum of Rs. 580 odd was assessed as the compensation

to be paid for the land. For this sum there were two rival claimants Rai Mahabir Prasad and Rajbans Sahay. The plot was originally held by Rai Gudar Sahay. Rai Mahabir Prasad claimed to be the reversioner to the estate left by Rai Gudar Sahay who appears to have died in March 1897, leaving a widow and a daughter, both of whom are since dead. The other claimant Babu Rajbans Sahay claimed to have been the family Mukhtear and to have been in possession of the plot rent-free. His case was that his father had been in possession before him. The finding of the learned District Judge which is based apparently upon evidence common to both sides is that Rajbans Sahay took possession of the property soon after the death of Rai Gudar Sahay during a dispute between the widow of Rai Gudar Sahay and Rai Gudar Sahay's daughter-in-law Sahodra Koer. The Respondent has not appeared but upon the evidence offered on either side there can be no doubt that Rajbans Sahay had been in possession of the property for at least 12 years before the 23rd March 1912 when the property was acquired, and that during that period he has paid no rent for it. He asserts now that the landlord's title lies with Sahodra Koer. It is not clear when he first asserted this, but it is clear that he has been in possession for 12 years and therefore Rai Mahabir Prasad had lost his right to recover possession from him before the land was acquired. At the time of the acquisition Rajbans Sahay appears to have acquired by adverse possession the title to hold the land without paying any rent for it. We are of opinion that the learned District Judge was wrong in awarding the full amount of compensation to Rai Mahabir Parsad and we set aside that direction, and we direct that the amount be paid to the Appellant Rajbans Sahay.

ATKINSON, J.—I entirely concur.

A. K. R.

PATNA HIGH COURT.

[FULL BENCH REFERENCE.*]

IN

APPEAL FROM ORIGINAL ORDER

No. 384 OF 1914.

CHAMIER, C. J. SHARFUDDIN, J. ATKINSON, J. 1916, Heard, 1 and 2, May. Judgment, 4, May.	HAZI ABDUL GANI, Judgment-debtor, Appellant, *v.* RAJA RAM and others, Decree-holders, Respondents.

Execution sale—Purchase by decree holder—Civil Procedure Code (Act V of 1908), Ordrr XXI, r. 95—Delivery of possession—Order, whether appealable—Sec 47, C. P. C., whether applicable.

Where on a decree-holder auction-purchaser applying for delivery of possession of the properties purchased and obtaining possession by order of Court notwithstanding the objection by the judgment-debtor that the properties did not pass by the sale, the judgment-debtor preferred an appeal:

Held, *on a review of the authorities of all the Indian High Courts (which are conflicting), that the Patna High Court should not without very good reason depart from a long course of decisions in the Calcutta High Court where the balance of opinion has been since 1883 strongly in favour of the view that an appeal does not lie.*

This was an appeal against the original order of Babu Hriday Nath Mazumdar, Second Subordinate Judge of Mozafferpore, dated the 6th June 1914.

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* This Full Bench was constituted under R. 11, Chap. II, Part I of the Rules of the High Court at Patna, which runs thus: "Notwithstanding anything to the contrary in the rules the Chief Justice may direct that any application, petition, suit, appeal or reference shall be heard by a Full Bench."

HAZI ABDUL GANI *v.* RAJA RAM.

The facts out of which this appeal arose are shortly these :—One Madhoprosad obtained a money decree for about Rs. 15,000 on 27th November 1908, against the Appellant Haji Abdul Gani. In execution of the decree he purchased with the permission of the Court several properties including that in dispute in March 1912 and obtained delivery of possession on 31st October 1912 with respect to other properties. Madhoprosad died on 4th June 1913. Madhoprosad's heirs, the present Respondents through their mother and guardian Narayan Koer applied on 16th July 1913 for delivery of possession of the properties in dispute under Or. XXI, r. 95 of C. P. C. of 1908, corresponding to sec. 318 of Civil Procedure Code of 1882. The judgment-debtor obstructed and contended that it was not part of the property sold. The lower Court allowed the application of the decree-holder auction-purchaser. Hence this appeal was preferred by the judgment-debtor.

Dr. Dwarka Nath Mitter (with him *Messrs. Sailendra Nath Palit* and *Baikuntha Nath Mitter*) appearing for the Respondents took a preliminary objection that no appeal lay in the case. He contended that the decree-holder's application was one under Or. XXI, r. 95, and the order passed was not appealable under the C. P. C. The case did not fall under sec. 47, C. P. C. To fall under sec. 47, C. P. C., one must be a party to the suit and secondly, the matter must relate to execution, satisfaction and discharge of the decree. The moment a decree-holder becomes an auction-purchaser, he ceases to be a party to the suit; so far as the property purchased is concerned he is no longer a party to the suit. Refers to *Mahabir Pershad Singh* v. *Macnaghten* (20). Art. 138 of the Limitation Act recognises no distinction between a decree-holder purchaser and an ordinary third person auction-purchaser. Order under Or. XXI, r. 95 is not appealable. If decree-holder auction-purchaser is allowed to appeal, the stranger purchaser would have a lesser right which would be very unfair.

[ATKINSON, J.—Court is like an ordinary vendor, must give possession to the vendee, and that is, it relates to the execution of decrees.]

Refers to *Ko Tha Hnyin* v. *Ma Hnin I* (21). Leave to bid is not appealable.

The following Calcutta cases hold that no appeal lies in such cases :—

Seru Mohan Bania v. *Bhagoban Din* (9), *Kishori Mohun Roy* v. *Chunder Nath Pal* (11), *Bhimal Das* v. *Ganesha Koer* (12), *Mohomed Mosraf* v. *Habil Mia* (13) and *Sasi Bhusan Mookerjee* v. *Radha Nath Bose* (14).

The following Calcutta cases hold that appeal lies :—

Madhusudan Das v. *Gobinda Priya Chaudhrain* (5), *Sariatoolla Molla* v. *Raj Kumar Roy* (8) and *Hari Charan* v. *Monmohan* (7).

The Full Bench case of *Bhagwati* v. *Bunwari Lal* (1) holds that no appeal lies.

The Madras High Court holds that appeal lies.

Kattayat v. *Raman Menon* (3), *Sandhu*

(20) I. L. R. 16 Cal. 682, 692 (P. C.) (1877).

(1) I. L. R. 31 All. 82 (F. B.) (1908).
(3) I. L. R. 26 Mad. 740 (1902).
(5) I. L. R. 27 Cal. 34 : s. c. 4 C. W. N. 417 (1899).
(7) 18 C. W. N. 27 (1913).
(8) I. L. R. 27 Cal. 709 (1900).
(9) I. L. R. 9 Cal. 602 (1883).
(11) I. L. R. 14 Cal. 644 (1887).
(12) 1 C. W. N. 658 (1897).
(13) 6 C. L. J. 749 (1904).
(14) 19 C. W. N. 658 : s. c. 20 C. L. J. 438 (1914).
(21) I. L. R. 38 Cal. 717 (P. C.) : s. c. 15 C. W. N. 862 (1911).

HAZI ABDUL GANI v. RAJA RAM.

Taraganar v. *Hussain Sahib* (4) and *Manickka* v. *Rajagopala* (18).

The Bombay High Court also holds that appeal lies.

Sadashiv v. *Narayan Vithal* (2).

The majority of the Calcutta cases being in my favour, this Court ought not to depart from them.

Moulvie Mustafa Khan (with *Mr. Kailaspati Narayan*) for the Appellant submitted that appeal lies under sec. 96, C. P. C. It has been held in several cases that delivery of possession is a step in aid of execution.

Application to withdraw sale-proceeds has also been held to be a step in aid of execution.

That an appeal lies, has been held in *Hari Charan* v. *Monmohan* (7) and the dissenting judgments of the Chief Justice and Knox, J., in *Bhagwati* v. *Banwari Lal* (1).

The Madras High Court and the Bombay High Court are in my favour.

Refers to *Prosunna Kumar Sanyal* v. *Kalidas Sanyal* (17).

If the decree-holder be the auction-purchaser, as he is a party to the suit, he comes within sec. 47, C. P. C.

Refers to *Jagarnath Marwari* v. *Kartick Nath Pandey* (16).

The JUDGMENT OF THE COURT was as follows :—

CHAMIER, C. J.—Madhab Prasad, father of the Respondents, obtained a decree for money against the Appellant in execution of which he caused certain property of the Appellant to be sold. By leave of the Court he purchased it himself. He succeeded in obtaining possession of part of the property but in respect of the remainder he was obstructed by the Appellant who contended that it was not part of the property sold. Madhab Prasad died soon afterwards and his sons the present Respondents applied to the Court under Or. XXI, r. 95 to place them in possession of the disputed property. The Court allowed the application. Hence this appeal. The Respondents contend that no appeal lies.

The question thus raised is one on which there has been much conflict of judicial opinion during the last 30 years or more.

Some Judges have taken the view that an order under sec. 318 of the Code of Civil Procedure, 1882 or Or. XXI, r. 95 of the present Code disposes of a question " relating to the execution, discharge or satisfaction of the decree " within the meaning of sec. 244 of the Code of 1882 or sec. 47 of the present Code, and that where the question arises between the judgment-debtor and an auction-purchaser who was originally Plaintiff in the suit it is a question " arising between the parties to the suit " within the meaning of sec. 244 of the Code of 1882 or sec. 47 of the present Code, and the decision is consequently a decree within the meaning of sec. 2 of either Code and is appealable as such.

Other Judges have held that an appeal does not lie, either because the question is not one " relating to the execution, discharge or satisfaction of the decree " or because the question does not arise between the judgment-debtor and the decree-holder as such but between the judgment-debtor and the auction-purchaser as such.

In the Allahabad High Court after many conflicting decisions the question was referred to a Full Bench of five Judges with the result that three Judges held that an appeal did not lie, and the Chief Justice

(1) I. L. R. 31 All. 82 (F. R.) (1908
(2) I. L. R. 35 Bom. 452 (1911).
(4) I. L. R. 28 Mad. 87 (1904).
(7) 18 C. W. N. 27 (1913).
(16) 7 C. L. J. 486 (1900).
(17) I. L. R. 19 Cal. 683 (1892).
(18) I. L. R. 30 Mad. 507 (1907).

and Knox, J., held that an appeal did lie. [*Bhagwati* v. *Banwari Lal* (1)].

In the Bombay High Court it has been held that an appeal does lie [*Sadashiv* v. [illegible]*yan Kithal* (2)].

In the Madras High Court it is now settled by a long course of decisions that an appeal does lie in such a case, but in two cases the Judges have expressed great doubt as to the correctness of those decisions [see *Kattayat* v. *Raman Menon* (3) and *Sandhu Taraganar* v. *Hussain Sahib* (4)].

In the Calcutta High Court it has been held in three cases that an appeal does lie in such a case [see *Madhusudan Das* v. *Gobinda Priya Chaudhrain* (5), decided without reference to the reported cases on the subject, *Ram Narain Sahoo* v. *Bandi Pershad* (6) and *Hari Charan* v. *Monmohon* (7)]. The case of *Sariatoolla Molla* v. *Raj Kumar Roy* (8) which was referred to deals with a different question but language was used in the judgment which supports the view that an appeal does lie in such a case.

In the same Court it has been held in seven cases either expressly or impliedly that an appeal does not lie [see *Seru Mohan Bania* v. *Bhagoban Din* (9) and *Iswar Pershad* v. *Jai Narain* (10)], Appeal No. 207 of 1884 decided on July 20th, 1885, unreported, *Kishori Mohun Roy* v. *Chunder Nath Pal* (11), *Bhimal Das* v. *Ganesha Koer* (12), *Mohomed Mosraf* v. *Habil Mia* (13) and *Sasi Bhusan Mookerjee* v. *Radha Nath Bose* (14) where all the authorities are reviewed, and the decision in *Bhimal Das* v. *Ganesha Koer* (12) has been expressly approved in *Bhuja Roy* v. *Ram Kumar* (15) and *Jagarnath Marwari* v. *Kartick Nath Pandey* (16).

Much stress was laid upon the decision of their Lordships of the Privy Council in *Prosunna Kumar Sanyal* v. *Kali Das Sanyal* (17), but that case in no way affects the question which we have to decide and an order of the kind there in question is under the present Code of Civil Procedure appealable as an order and not as a decree [see Or. XXI, r. 90 and Or. XLIII, r. 1 (*j*)].

Nor does the decision in *Manickka* v. *Rajagopala* (18) which has been cited affect the present question, for that was a case under sec. 310A of the Code of 1882. The question whether an appeal lies against an order under that section or Or. XXI, r. 89 of the present Code depends upon other considerations [see *Mahomed Akbar Zaman Khan* v. *Sukhdeo Pande* (19)].

I am strongly of opinion that this Court should not without very good reason depart from a long course of decisions in the Calcutta High Court. I consider that the cases which I have referred to show that the balance of opinion in the Calcutta High Court has been since 1883 so strongly in favour of the view that an appeal does not lie in such a case, that we ought to follow

(1) I. L. R. 31 All. 82 (F. B.) (1908).
(2) I. L. R. 35 Bom. 452 (1911).
(3) I. L. R. 26 Mad. 740 (1902).
(4) I. L. R. 28 Mad. 87 (1934).
(5) I. L. R. 27 Cal. 34 : s. c. 4 C. W. N. 417 (1899)
(6) I. L. R. 31 Cal. 737 (1904).
(7) 18 C. W. N. 27 (1913).
(8) I. L. R. 27 Cal. 709 (1900).
(9) I. L. R. 9 Cal. 602 (1883).
(10) I. L. R. 12 Cal. 169 (1885).
(11) I. L. R. 14 Cal. 644 (1887).
(12) 1 C. W. N. 658 (1897).
(13) 6 C. L. J. 749 (1904).
(14) 19 C. W. N. 658 : s. c. 20 C. L. J. 433 (1914)
(15) I. L. R. 26 Cal. 529: s. c. 3 C. W. N. 374 (1899).
(16) 7 C. L. J. 436 (1900).
(17) I. L. R. 19 Cal. 633 (1892).
(18) I. L. R. 30 Mad. 507 (1907).
(19) 13 C. L. J. 467 (1911).

THE

Calcutta Weekly Notes.

Vol. XX.] MONDAY, MAY 29, 1916. 27.

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Government of India (Consolidation) Act Amendment Bill.

In our last issue, we reproduced the protest of the Burma Chamber of Commerce against the proposed cl. (*d*) to sec. 84 of the Government of India (Consolidation) Act, and, as we said, it is by no means a matter for surprise that the Burma Chamber should be the only one of the various public bodies (which are supposed to watch the interests of the Indian public), which have, in any adequate measure, appreciated the gravity of the proposed cl. (*d*) to sec. 84 of the Government of India Act of 1915, since in Burma they have already had a foretaste of the kind of law which that clause is intended to validate, for in Burma the Legislature had actually tried the experiment of placing on the statute book a law (if it is a law!) decreeing that "no Civil Court shall have jurisdiction to determine *any* claim to *any* right over land as against Government." What the consequences of that law were, may, in some measure, be gathered from the one instance in which, solely through the public spirit of a European resident of Rangoon, they obtained some notoriety, *viz.*, the case of *Secretary of State* v. *Moment*, 17 C. W. N. 169.

To properly appreciate the scope of the proposed measure, it should be read along with the provision of cls. (1) and (2) to sec. 32 of the same Act, which is sought to be qualified by it. Those clauses are :—

(1) The Secretary of State in Council may sue [illegible] name of the Secretary of State in Council, as a body corporate.

(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company, if the Government of India Act, 1858, and this Act had not been passed

Cl. (*d*) to sec. 84, if passed into law, will read thus :

A law made by any authority in British India shall not be deemed invalid on account of the following reason (amongst others):- In case of any law, because it bars the right to sue the Secretary of State in particular cases or classes of cases.

The effect of cls. (1) and (2) to sec. 32 is to make the Government in India responsible in a Court of law for every wrongful act of themselves or of their agents committed within the scope of their authority or outside it if the Government have adopted or ratified such act. Under cl. (2) the Government of India is made responsible even for *torts*, in respect of which the Crown in England (but not its agents) can claim complete immunity under the maxim "the King can do no wrong." For other wrongs (including dispossession of specific property, moveable and immoveable) the Crown in England can be proceeded against by petition of right. But for the proposed amendment, a British subject in India would occupy in respect of *legal* redress against wrong done to him by Government, a somewhat better position than a British Subject in the United Kingdom.

The proposed amendment will empower any legislative authority in India to take away this right of redress through Civil Courts, in respect not merely of torts proper, but of any other wrong for which in England a petition of right would be a proper remedy. The Burma Act, for instance, which was pronounced illegal by the Judicial Committee, if applied in England, would seriously contract the operation of the petition of right in that country.

It is true, the Parliament of the United

Kingdom, being a Sovereign Legislature, has power, by statute, not merely to narrow or cut down the remedy by petition of right but to abolish it even. But does any body imagine that any British Parliament will ever venture to touch or even question the right of the subject to proceed against the Crown by petition of right, when this remedy is now allowed by law? The [illegible] will proceed to do it, will have forgotten its [illegible] its history, its long and arduous struggle [illegible] prerogative under the Stuarts, and its present [illegible] dependence on the suffrage of the people, and the ministry which will have the temerity to propose it, will (even if the inconceivable should happen and the Houses acquiesce) receive short shrift at the hands of the constituencies.* Imagine, a British Cabinet seriously bringing before the House of Commons a short bill to the effect that on and after a specified date, His Majesty's Law Courts are to throw out all petitions of right which concern "any claim to any right over land" as against the Crown!

Nobody would mind the Indian Legislatures being *in theory* clothed with the plenary powers of the British Parliament, in this and many other matters, provided the gift was accompanied by guarantees such as *in fact* exist in England that the powers will never be exercised. But the powers implied in the proposed cl. (*d*) are, by no means, being wanted for legislative authorities in India, for purely ornamental purposes. The object of the clause is to repeal *Secretary of State* v. *Moment* and to restore to Provincial Governments in India, Statutes like the Burma Act IV of 1898, sec. 41, cl. (*b*), declaring Civil Courts incompetent to entertain claims against Government in respect of land, and its effect will certainly be to sanction even more drastic measures affecting people's person and property which any of the various legislative bodies in India may at any time go through the form of passing into law.

No authority is more keenly alive than the Government of India to the danger of conferring on individuals and bodies of men in India powers for the exercise of which they have not proved their fitness. The Legislatures of India, the best of which can hardly even now be said to have begun their career as such, have yet to prove their fitness for many things. The fitness for interfering with the people's right of resort to the law Courts in order to test the legality of executive acts, does not come until as in England "the difference between the will of the sovereign and the will of the nation has been terminated by the foundation of a system of real representative Government," by reason whereof a divergence, if it does arise, is also bound soon to disappear. (Dicey, Law of the Constitution, Sixth Edition, p. 80).

His Excellency the Viceroy had had, in early life, the training of an English lawyer, and there are notable lawyers in his Executive Council. It ought not, in these circumstances, to be difficult for the Government of India, whatever may be the case with the Local Governments, to see the force and cogency of the appeal of the Burma Chamber of Commerce to which reference was made in the last issue.

CURRENT INDIAN CASES.

(Civil.)

Decree of Foreign Court.

Veeraraghava Ayyar v. J. D. Muga Salt, I. L. R. 39 Mad. 24.

The Courts of British India are competent to decide before issuing execution whether the Courts of a native state had jurisdiction to pass the judgment which is sought to be enforced by them.

(Criminal.)

Indian Penal Code, secs. 147, 426, 447.

Re Dharmalinga Mudaly, I. L. R. 39 Mad. 57.

A person who takes possession of the site of a public road and builds upon it to the obstruction of the public cannot by his very act of creating a public nuisance be held to have acquired peaceable and effective possession of that site and a member of the public who pulls down that obstruction and exercises his right of way cannot be held to be guilty under secs. 147, 426 or 447, I. P. C.

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* We must not here be understood as speaking with reference to conditions brought about by the War in progress. The Defence of the Realm Act and similar emergency measures have, as a matter of fact, cut down constitutional rights which in normal times would be sufficiently protected by the writ of *habeas corpus* or the petition of right - but only for the duration of the war. Cl. (*d*) to sec. 81 is not proposed as a war measure.

Review.

LAW RELATING TO PRESS AND SEDITION. *By Rai Sahib G. K. Roy, Superintendent (retired), Government of India, Home Department. Printed at the Station Press, Simla. Price Rs. 5.*

This is a volume of 238 pages containing the short but very important enactments which have been placed on the statute book during the last few years relating to seditious meetings and writings, possession and use of explosive substances and other cognate matters. It also contains the emergency legislations rendered necessary by the existence of the war and the various orders and notifications of Government as also the debates in Council on the subject. This book, we presume, is intended for laymen and not for members of the legal profession, to whom it is not likely to commend itself. More attention should have been paid to the printing and general get-up. The price seems to be too high.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before LORDS JUSTICES SWINFEN EADY, PICKFORD and BANKES. *M. Isaacs & Sons (Ltd.)* v. *Salbstein*. 21st March 1916.

The seller of goods is entitled to sue the real buyer for the price of goods sold, although the seller had previously obtained judgment for the price against a wrong person.

The Plaintiffs had sold lemons to Salbstein and his wife, but by some mistake they sued to recover the price from a firm of Salbstein Brothers, and recovered judgment against it. Subsequently, the Plaintiffs discovered that the real buyer was the Defendant, and brought the present action against him for the price. The Court of First Instance dismissed the claim, but on appeal the Divisional Court ordered a new trial. The Court held that the previous judgment against the mistaken buyer had remained unsatisfied, and that the Plaintiffs were not precluded by that judgment from suing the real buyer. The Defendants appealed, but without success.

Lord Justice Swinfen Eady in the course of his judgment said :—

When the Defendants in an action relied for a defence upon a judgment given in some former action, the burden was upon them to show that the judgment relied upon was obtained on grounds and in circumstances which afforded them a defence to the subsequent action. (*Phillips* v. *Ward*, 2 H. and C., 717). It had not been shown that there was any such firm as Salbstein Brothers in existence either when the alleged debt was contracted or when the writ in the former action was issued, or when the judgment against the alleged firm was signed. If the Defendant had shown that there was a Salbstein Bro. was in existence at the material times a third partner in the firm, and that any obligation was only the joint obligation of the partners in the firm, it would have afforded him a complete defence to the present action.

Again, if it had been shown that the Plaintiffs, having a right to elect which of two parties they would sue, either the principal or the agent, had made an election, and had sued one of the parties to judgment, an action against the other party would be thereby barred. Again, if the Defendants or either of them were jointly liable with a real firm of Salbstein Brothers, and the firm only had been sued in the former action, that would have constituted a good defence to the present action. *King* v. *Hoare* (13 M. and W., 494) decided that a judgment recovered against one of two joint debtors was a bar to an action brought against the other.

That decision was approved of by the House of Lords in *Kendall* v. *Hamilton* (4 App. Cas., 504), where Lord Cairns said that the principle on which the rule was founded was that it was the right of persons jointly liable to pay a debt to insist on being sued together. Where, however, an obligation bound two or more persons severally, a judgment against one was no bar to an action against the others.

If, therefore, where the obligations were several, a judgment in an action against one person was not a bar to an action against another, he could see no ground upon which it could be maintained that an action brought in error against a fictitious person or a person who was under no liability could be a bar to a subsequent action brought against a person alleged to be really liable. The cause of action was not the same.

Mr. Bankes had relied strongly upon the decision in *Buckland* v. *Johnson* (15 C. B., 145) as supporting the proposition that if a person, having sold goods to A, sued a stranger for the price and obtained judgment, he could not afterwards sue A. In his opinion, the case would not support any such proposition.

Messrs. Bankes, K. C., and *Flowers* for the Appellants.

Messrs. Newbolt, K. C., and *Turrell* for the Respondents.

B. D.

CHANCERY DIVISION.—Before Mr. Justice Astbury. *Waring and Gillow (Ltd.) v. Gillow and Gillow (Ltd.)*. 27th March 1914.

Similarity of trade names—When the Courts will interfere.

The Plaintiffs, Waring and Gillow, Ltd. claimed an injunction to restrain the Defendant company, Gillow and Gillow, Ltd. from retaining their name, on the ground that the similarity of names was likely to deceive the public into the belief that the Defendant company was the same as the Plaintiff company.

The Court found that there was no initial fraud in the formation and naming of the Defendant company and dismissed the claim.

In the course of his judgment Mr. Justice Astbury said as follows :—

"The sole right to restrain anybody from using any name that he liked in the course of his business was a right in the nature of a trade mark, that was to say, a man had a right to say :—'You must not use a name, whether fictitious or not; you must not use a description, whether true or not, which is to represent, or is calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me.'" (See *per* Lord Justice James in *Lery* v. *Walker*, 10 Ch. D., p. 447). The right to relief in these name cases depended solely on whether the use by the Defendant of the name complained of was calculated to pass off his goods or business as the goods or business of the Plaintiff—*Daimler Motor Company*, 1901 (*Limited*) v. *London Daimler Company* (*Limited*) (24, Reports of Patent Cases, page 379). Proof of initial fraud, however, was not necessary if the use of the name was calculated to lead to that result, though proof of it almost inevitably assisted a Plaintiff in establishing the probability of the deception so intended—*Chivers* v. *Chivers* (*Limited*) (17, Reports of Patent Cases, p. 427). If the name of a Defendant company was one that was calculated to lead to the belief that it was an agency, branch, or department of a Plaintiff company, relief would be granted—*Lloyds* v. *Lolyds Southampton* (*Limited*) (29, Reports of Patent Cases, p. 433). The Courts had long recognized a distinction between the case of a man's using his own name in his business and that of the creation by him of an artificial person or company for which a name had to be chosen *ad hoc*. In the present litigation he (this Lordship) had to deal with the second of these cases.

A limited company might in general take a name embodying that under which a business which it was formed to take over, had previously been lawfully carried on, but a person who had no business or good-will to transfer could not give to a new company the right to use his or any other name which was calculated to deceive in the manner above referred to.

Eight or ten so-called instances of confusion arising from the resemblance of the two names had been deposed to. Three of these merely amounted to a wrong address. The address of the Plaintiff company had been put upon communications intended for the Defendant company, owing apparently to the absence of its name from the directory at the time.

I have found that there was no initial fraud in the formation and naming of the Defendant company, and I do not think, now that all the facts are known, that those responsible for it are guilty of any wrongful conduct in desiring to continue its operations under its present name. Mr. Gillow, moreover, had never been in or left the Plaintiff company, nor did any good-will that he may ever have helped to create belong in any way to it, and he did not, in my judgment, create or attempt to create in the Defendant company a rival in business of the Plaintiffs. Careless people will make mistakes, others will jump to conclusions on unreasonable or insufficient grounds, but it is not to protect Plaintiffs from the consequences of their doing so at the expense of Defendants who are honestly and legitimately carrying on their business that the authorities which I have referred to came into existence, and they do not, I think, when fairly construed, assist the Plaintiff company. They lay down certain rules of fair play between traders and commercial people which the Defendant company is not proved, in my opinion, to have infringed.

The Hon'ble Frank Russell, K.C., and *Messrs. Lincoln Reed* and *Roberts* for the Plaintiffs.

Messrs. Micklem, K.C., and *Cyril Hartree* for the Defendants.

B. D.

it as if it were a settled *cursus curiæ*. To do otherwise would cause great and unnecessary confusion. I would accordingly dismiss this appeal but under the circumstances make no order as to costs.

SHARFUDDIN, J.—I agree.

ATKINSON, J.—I agree.

Per CURIAM.—The order of the Court is that the appeal is dismissed. There will be no order as to costs.

A. K. R. *Appeal dismissed.*

[PRIVY COUNCIL.]

[APPEAL FROM STRAITS SETTLEMENTS, SINGAPORE.]

EARL LOREBURN.
LORD ATKINSON.
LORD PARKER OF WADDINGTON.
LORD SUMNER.
1916,
2, March.

SOONA MAYNA KENA ROONA MEYAPPA CHITTY, Appellant,
v.
SOONA NAVENA SUPPRAMANIAN CHITTY, Respondent.

Straits Settlements Limitation Ordinance, secs. 17 (1) and 22—Death of partner leaving Will—Executor if competent to sue for dissolution before probate obtained—Probate applied for in Court of domicile in India—Suit by administrator pendente lite, ***if may be brought more than three years after testator's death—Substitution of executor in place of administrator*** pendente lite—***Suit if to be regarded as instituted on date of substitution—Civil Procedure Code, secs. 138, 169—Order competent only under latter section, drawn up erroneously, if may enable Defendant to escape liability.***

S, one of two executors named in a Will left by a person who was a native of and domiciled in British India (his co-executor having renounced probate), applied in August 1907 in the Court of the District Judge of Madura in the Madras Presidency for proof of the Will in solemn form (in view of caveats entered against the proof of the Will) and probate was not granted till 10th March 1912. Meanwhile on the 7th March 1910, letters of administration pendente lite *were granted to P by the Supreme Court of the Straits Settlements to the estate of the testator situate within the jurisdiction of that Court, and on 23rd October 1911, P instituted a suit for dissolution of [illegible] against S. N. with [illegible] testator for some [illegible] death (which took place on [illegible] November 1904) carried on a money-lending business in Singapur. The defence was that the suit was time-barred, having been instituted more than three years from the date of the dissolution. Pending the suit, letters of administration* pendente lite *granted to P were cancelled and in lieu thereof letters of administration with the Will annexed were granted to S, and on 14th April 1913, an order was made in the suit striking out P and substituting S as the Plaintiff, whereupon it was further contended in defence that the suit must be deemed to have been instituted on 14th April 1913 under sec. 22 of the Limitation Ordinance and so was time-barred.*

Held—*That the suit was time-barred when it was instituted by P on 23rd October 1911, sec. 17 (1) of the Ordinance not being applicable to the case to save limitation.*

That if it had been within time when instituted by P on 23rd October 1911, the suit would not have been barred by reason of the substitution made on 14th April 1913 and necessitated by a change or devolution of interest pending the suit.

An executor derives his title and authority from the Will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action vest in him before the testator's death and the consequence is that he can institute an action in the character of executor before he proves the Will. He cannot obtain a decree before

probate, not because his title depends upon the probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title.

[illegible] executor, on the other hand, derives title [illegible] his grant and cannot institute [illegible] administrator before he gets his grant.

In the case of a cause of action arising in favour of the estate of a deceased person at or after his death, time will at once begin to run, if there be an executor, even though probate has not been obtained; but if there be no executor, time will run only from the actual grant of letters of administration.

Sec. 17 (1) of the Limitation Ordinance was probably intended to apply this rule.

There is nothing in the ordinance to confine "legal representative" to a person to whom the Court has actually made a grant. But the words "capable of instituting an action" mean capable of instituting an action in which a decree might be obtained. The Will under which the executor claims must be capable of probate.

According to English practice (which, in the absence of local law, was to be followed and adopted in the Straits Settlement) probate may be granted of a Will of a person domiciled abroad upon proof that it is a valid Will according to the law of the domicile and that there are assets within the jurisdiction. It is not necessary that it should be first proved in the Courts of the domicile.

That in this case, probate could be granted since August 1907 to S alone (his co-executor having renounced at some time before August 1907) and the suit instituted more than three years after August 1907 was time-barred.

Quære:—*Whether one of two joint executors can properly institute proceedings on behalf of the estate.*

Sec. 22 contemplates cases in which an action is defective by reason of the person or one of the persons in whom the right of action is vested not being before the Court. It has no application to cases in which the action was originally properly constituted as to parties, but has become defective because there has been a change or devolution of interest. Such cases do not fall within sec. 133 of the Civil Procedure Code (which provides against the defect of an action on the ground of a defect of the first sort and enables the proper party to be added or substituted), but within sec. 109 of the Code, and the proper remedy is by way of an order to carry on proceedings, and not of an order adding or substituting parties. The proviso to sec. 22 of the Ordinance may have been inserted per cautelam and cannot be relied on as controlling the operative words.

The fact that the order was not drawn up in accordance with sec. 109 of the Civil Procedure Code, the only section under which the order was competent, could not be taken advantage of by the Defendant to escape a liability to which he would have been subject, if the order had been made in proper form.

Appeal from a judgment of the Supreme Court of the Straits Settlements (of Singapore), dated 26th June 1914, reversing a judgment of the Court of first instance.

The facts of the case which sufficiently appear from their Lordships' judgment were briefly as follows:—

One Chitty died on the 11th November 1904 leaving a Will and appointing two executors. Pending the trial of an application for a grant of probate, an administrator instituted a suit on the 23rd Octo-

ber 1911 for dissolution of partnership and accounts. The defence was that the suit was barred by limitation inasmuch as it was instituted after the lapse of three years from the date of the dissolution of partnership, that is, the date of the testator's death (11th November 1904).

By an order, dated 14th April 1913, the name of the administrator Plaintiff was struck out, and the name of the present Plaintiff—to whom probate was granted by the Madras High Court on the 10th March 1912—was substituted therefor.

The Plaintiff contended that his right to sue was preserved by sec. 17 (*1*) of the Ordinance No. 6 of 1896.

The Defendant, on the other hand, contended that the suit was barred even against the new Plaintiff under sec. 22 of the said Ordinance which is similar to sec. 22 of the Indian Limitation Act, 1877. The Ordinances were the following :

Sec. 17 (*1*) " When a person who would if he were living have a right to institute a suit or make an application dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application."

Sec. 22 " When after the institution of a suit a new Plaintiff or Defendant is substituted or added the suit shall as regards him be deemed to have been instituted when he was so made a party. Provided that when a Plaintiff dies and the suit is continued by his legal representative it shall as regards him be deemed to have been instituted when it was instituted by the deceased Plaintiff. . . ."

The provisions of the Civil Procedure Code of 1907 of the Straits Settlements relating to the Interlocutory Orders hereinbefore referred to are secs. 133 and 169 and are as follows :—

133. " No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or Judge to be just, order that the names of any parties improperly joined, whether as Plaintiffs or as Defendants, be struck out, and that the names of any parties, whether Plaintiffs or Defendants, who ought to have been joined, or whose presence before the Court may be necessary, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. . . . ."

169. " Where, by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and such new party or parties may be obtained *ex parte*, on application to the Court or a Judge, upon an allegation of such change, or transmission of interest, or liability, or of such person interested having come into existence."

The powers of an administrator *pendente lite* appointed by the Court of the

Straits Settlements are contained in the following paragraph of the said Code :—

Sec. 872. " Pending any suit touching the validity of the Will of a deceased person [illegible] obtaining or revoking any probate [illegible] letters of administration, the Court may appoint an administrator of the estate of the deceased, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate; and every such administrator shall be subject to the immediate control of the Court and shall act under its direction."

The first Court held in favour of the Plaintiff, but the Appellate Court held that the suit was barred by limitation.

Mr. Holman Gregory, K.C., and *Mr. Jowitt* for the Appellant. Sub-sec. 17 (1) of the Limitation Ordinance applies to present suit as it applies to all suits in which the right of action has not accrued to the deceased before his death. There was no personal representative capable of instituting the suit until March 10th, 1910, when the original Plaintiff was granted letters of administration *pendente lite*.

The title of administrator and his right to sue dates from the grant of and not from the death of the deceased.

Tristram and Cooke, Probate Practice, 14th Edn., p. 58.

The testator being domiciled outside Straits Settlements could not institute a suit there until he had obtained administration or probate within that jurisdiction. *Vanquelin* v. *Bourard* (6). Under Straits Settlements, Civil Procedure Code Ordinance, 31 of 1907, sec. 840, executors could obtain administration, but not probate in the Straits Settlements. Respondent himself was disputing the Will, and the executor could not be regarded as " capable of instituting a suit " against him until the Will was admitted to probate in India. The Appellant was not a " new Plaintiff " within the meaning of sec. 22.

The order effected no real change of parties but was consequent upon a transmission of interest within the terms of sec. 169.

Messrs. Upjohn, K.C., and *Latter* for the Respondent.—Even assuming sec. 17 (1) applies to the present suit, time began to run from the death of the testator, or at any rate from the date when the second executor renounced probate : in either case the suit is barred.

Murray v. *East India Co.* (5). According to that decision an executor can institute a suit on behalf of the estate at any time after the death of the testator, probate being merely necessary as evidence of title at the trial. There is no difference in principle in the case of an executor of a testator with a foreign domicile. A Will valid only according to the law of the place of domicile of the deceased is capable of probate in Straits Settlements if there are assets there. *In re Deshais* (7) and *Whyte* v. *Rose* (8).

Will being capable of probate in Straits Settlements it is not material to the present question at what date probate had been obtained. The decision in *Vanquelin* v. *Bourard* (6) relied on by the Appellant refers only to necessity of a grant of administration or probate being obtained in their jurisdiction before suit comes to trial. But even if there was no representative capable of suing before the grant *pendente lite* suit is still barred. The present Appellant who was substituted as Plaintiff by an order, dated 11th April 1913, was a " new Plaintiff " with-

(5) 5 B & Ald. 204 (1821).
(6) 15 C. B. N. S 341 (1860).
(7) 34 L. J. P. 58 (1865).
(8) 8 Q. B, 507 (1842).

(6) 15 C B N. S 341 (1860).

in the meaning of sec. 22 of Limitation Ordinance. The proviso of that section would be unnecessary if this was not so. The order was in fact made under sec. 133 of Civil Procedure Code Ordinance.

Mr. Jowitt replied.—At the date when suit was instituted executor had done nothing in Straits Settlements which amounted either to an acceptance or renunciation of probate. Intermeddling estate in India does not amount to intermeddling in the Straits Settlements. *Lowe* v. *Fairlie* (9) and *Logan* v. *Fairlie* (10).

The suit instituted by the administrator *pendente lite* was therefore not barred when it was commenced, it cannot have become barred by subsequent acts of the executor.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARKER OF WADDINGTON.—The facts of this case are not in dispute. Soona Ahna Suppramanian Chitty, a native of and domiciled in British India (hereinafter referred to as "the testator"), carried on for some years prior to his death a money-lending business in Singapore, in the Straits Settlements, in co-partnership with the Respondent. He died on the 11th November 1901, having by his Will appointed Soona Ravenna Mana Ramasany Chitty and another to be his executors. Caveats were entered against the proof of this Will, and in August 1907, S. R. M. R. Chitty (his co-executor having renounced probate) presented a petition in the Court of the District Judge of Madura, in the Madras Presidency, propounding the Will in solemn form. Ultimately, after protracted litigation, the High Court of Judicature at Madras ordered the District Judge at Madura to grant probate of the Will to S. R. M. R. Chitty, and such probate was on the 10th March 1912 granted accordingly. An appeal from the [illegible] of the High [illegible] dismissed by [illegible] Council.

[illegible] the 7th March 1910, letters of administration *pendente lite* to the estate of the testator, situate within the jurisdiction of the Supreme Court of the Straits Settlements, were granted by that Court to Pana Lana Mana Vina Meyappa Chitty, the attorney of the testator's widow, and on the 23rd October 1911, the administrator *pendente lite* instituted the present action, asking for a declaration that the partnership existing between the testator and the Defendant had been dissolved by the testator's death, and for the usual partnership accounts. The first question their Lordships have to decide is whether this action was at the date of its institution barred by section 4 of the Straits Settlements Ordinance No. 6 of 1836, being an ordinance to amend the law relating to the limitation of suits.

The 4th section of this ordinance provides that (subject to the provisions contained in sections 5 to 25 thereof inclusive) every suit instituted after the period of limitation prescribed therefor by the second schedule thereto shall be dismissed, provided that limitation has been set up as a defence. The period prescribed in the second schedule in the case of an action for an account and a share of the profits of a dissolved partnership is three years from the date of the dissolution. The date of dissolution was in the present case the testator's death; and unless there is something to the contrary contained in sections 5 to 25 of

(9. 2 Madd 103 (1816).
(10) 1 Myl. & Cr. 59 (1825).

the ordinance, it is not disputed that time had run prior to the institution of the present action.

Reliance is, however, placed on sec. 17 [illegible] which provides that [illegible] if he were living, have a right [illegible] make an application [illegible] accrues, the period of [illegible] computed from the time when there is a legal personal representative of the [illegible] capable of instituting or making [illegible] or application. It is contended [illegible] was no legal representative of [illegible] testator capable of instituting this [illegible] ion until the appointment, on the 7th [illegible] arch 1910, of an administrator *pendente* [illegible], and that therefore the period of limitation must be computed from the 7th March 1910.

Assuming, but without deciding, that this is to be deemed to be a suit, which the testator would, if he were living, have a right to institute, their Lordships have come to the conclusion that this contention cannot be upheld. It is quite clear that an executor derives his title and authority from the Will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the Will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An administrator on the other hand, derives title solely under his grant and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled (see *Comyn's Digest* "*Administration*," B. 9 and 10; *Thompson* v. *Reynolds* (1) and *Woolley* v. *Clark* (2).

It would seem, therefore, that an executor is not only the legal representative of his testator, but capable of instituting an action within the meaning of [illegible] sec. 17 (4) of the ordinance in question. [illegible]re is nothing in the ordinance to define "legal representative" to a person to whom the Court has actually made a grant. But, in their Lordships' opinion, the words "capable of instituting an action" mean capable of instituting an action in which a decree might be obtained. The Will under which the executor claims must therefore be capable of probate; otherwise the action must fail. It has to be determined, therefore, whether the testator's Will was in the present case capable of probate in the Straits Settlements. This question depends on the Civil Procedure Code Ordinance No. 31 of 1907.

The 3rd section of this Code provides that where no other provision is made by the Code or any law in force for the time being, the procedure and practice for the time being in force in the Supreme Court of Judicature in England shall, as near as may be, be followed and adopted. There is nothing in the Code or in any law in force in the Straits Settlements precluding the Supreme Court of the Straits Settlements from granting probate of the Will of a person wherever domiciled. The English practice is therefore applicable. According to English practice, probate may be granted of the Will of a person domiciled abroad upon proof that it is a valid Will according to the law of the domicile, and that there are assets within the jurisdiction. It is not necessary that

(1) 3 C & P 123 (1827).
(2) 5 B. & Ald. 744 (1822).

it should be first proved in the Courts of the domicile. [See "*Jarman on Wills*," 6th Ed., Vol. I, p. 7; and *Robinson* v. *Palmer* (3)]. It follows that the testator's Will could have been proved in the Straits Settlements (1) because it was valid according to the law of te domicile as shown by its admiss bate in the Court of the Distric Madura; and (2) because th e were a sets of the testator locally situate in t Straits Settlements.

There was a good deal of disc before their Lordships' board as to what would have been the result had the English statutes of limitation been applicable. This discussion, though perhaps not strictly relevant, was useful as illustrating the principles which ought to guide the Court, and throwing light on the meaning of the ordinances of the Straits Settlements. For the purpose of the English statutes of limitation, time runs from the accrue of the cause of action, but a cause of action does not accrue unless there be someone who can institute the action. In the case of a cause of action arising in favour of the estate of a deceased person at or after his death, time will at once begin to run, if there be an executor, even though probate has not been obtained [*Knox* v. *Gye* (4)]; but if there be no executor, time will run only from the actual grant of letters of administration [*Murray* v. *East India Company* (5)]. It is, in their Lordships' opinion, probable that sec. 17 (*1*) of the ordinance in question was intended to apply this rule. A good deal was also said as to what would be the effect if the executor who might have instituted proceedings subsequently renounced probate. Their Lordships at first thought that this might be important for the purposes of the present case, because it is doubtful whether one of two joint executors can properly inst te proceedings on behalf of their estat On reference, how

y's co-exec ame some time before August 1907. Since August 1907, S. R. M. R. Chitty was therefore sole executor and capab stituting the action The th prescribed by the ordinance must fore in any case have elapsed before t action was instituted.

The 2nd question argued before th Lordships turns upon the effect of sec. 22 of the limitation ordinance. That section provides that when the institution of a suit a new Plaintiff is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party; provided that when a Plaintiff dies, and the suit is continued by his legal representative, it shall as regards him be deemed to have been instituted when it was instituted by the deceased Plaintiff. It appears that after the grant of probate by the Court of the District Judge at Madura the letters of administration *pendente lite* granted to the original Plaintiff in this action were cancelled, and in lieu thereof letters of administration with the Will annexed were granted by the Supreme Court of the Straits Settlements to the Appellant as attorney for the proving executor. Subsequently, on the 14th April 1913, an order was made in the action striking out the original Plaintiff and substituting the Appellant as Plaintiff in the action. It is contended that, as regards the Appellant, the suit therefore must, under sec.

(3) [1901] 2 I. R. 489.
(4) L. R. 5 H. L. 656 (1872).
(5) 5 B & Ald. 204 (1821).

22 of the ordinance, be deemed to have been instituted on the 14th April 1913, at which date the action was barred, even if it was not barred when the action was instituted by the original Plaintiff.

Their Lordships' decision [illegible] to deal with [illegible]

Their Lordships are of opinion that sec. [illegible] contemplates cases in which an action [illegible] by reason of the person [illegible] whom the right of [illegible] before the Court. [illegible] will it be easy [illegible] Procedure Code provisional lawyer, [illegible] the Legislation could not have sovereign [illegible] in the matter of determining party [illegible] Civil Court and withdraw the right person [illegible] jurisdiction early wrong to allow [illegible] for the purpose of avoiding the limitation ordinance, to take advantage of a suit improperly instituted by B. Their Lordships do not think that sec. 22 of the ordinance has any application to cases in which the action was originally properly constituted as to parties, but has become defective because there has been a change or devolution of interest. Such cases do not fall within sec 133, but within sec. 153, of the Civil Procedure Code, and the proper remedy is by way of an order to carry on proceedings, and not of an order adding or substituting parties. The proviso to sec. 22 of the ordinance may have been inserted *per cautelam*, and cannot be relied on as controlling the operative words. The difficulty really arises out of the form of the order of the 14th April 1913. What was required was an order under sec. 169 of the code, and, if the order was competent, it was competent under this section only. Their Lordships do not think that the Respondent can take advantage of the form of order to escape a liability to which he would have been subject if the order had been made in proper form.

Under the circumstances, their Lordships will humbly advise His Majesty that the appeal should be dismissed with

[illegible]rs : *Messrs. Whites & Co.* for the

Solicitor[illegible] *Messrs. Loughborough, [illegible]edge, Nisbet* and *Drew* for the Respondent.

D. *Appeal dismissed with costs.*

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD SHAW. SIR JOHN EDGE. SIR LAWRENCE JENKINS. 1916, Heard, 13, March. Judgment, 21, March.	JAMNA BAI SAHEB MOHITAI AVERGAL, Appellant, *v.* VASANTA RAO ANANDA RAO DHYBAR, Respondent.

Joint promisors, one of whom is a minor—The other of shares minor's immunity—Agreement by guardian on behalf of minor with Court's sanction if binds minor personally.

One of two promisors cannot plead the minority and the consequent immunity of the other as a bar to the promisee's claim against him.

Appeal from a judgment of the Madras High Court (Sir Arnold White, C. J., and Ayling, J.) which is reported in *Sethuram v. Vasanta Rao* (1).

The Plaintiff sued to recover money under a bond which provided as follows :—

"We, the executants aforesaid, hereby agree and bind ourselves conjointly to pay to you Vasant Rao, Anand Rao, Dhybar at Tanjore Rs. 90,000 in consideration of your withdrawing the aforesaid

(1) I. L. R. 34 Mad. 314 (1910).

suit No. 2 of 1896 now pending in the District Court of Tanjore, in which you claim to be heir and legal representative of the deceased Raja Sakharam Saheb of Tanjore, and in consideration of your giving up all rights in the estate and properties of the said Sakharam Saheb.

We further agree to pay the amount within three months from the of our taking delivery of the moval immovable properties of t.. said Raja Sakharam Saheb as scheduled in the aforesaid suit now under the management and custody of the Receiver, appointed the District Court, Tanjore, in the afo said suit.

If we fail to pay the amount within the time specified above, we further agree to pay the same with interest at 6 per cent. per annum from the date of default to the date of realization.

We further stipulate that this bond shall become null and void if you don't withdraw the suit or if your claim to the said estate should be settled by compromise or otherwise.

(Sd.) Yamunabai Powar
(handwriting).

(Sd.) Jamnabai Chavhan
(handwriting)."

The circumstances under which the bond was executed were stated by the Subordinate Judge of Tanjore in the following words :—

" 1st Defendant is the brother of 2nd Defendant and 2nd Defendant is the widow of one Sambu Singh who was the adopted son of late Sakharam Saheb, the son-in-law of late Sivaji Maharajah, the last Mahratta Ruling Prince of Tanjore. Sakharam Saheb died in 1895 and Sambu Singh, his adopted son, had predeceased him. When Sakharam Saheb died, the Collector of Tanjore seems to have taken possession of some movable property which was just then in his possession and secured them with a view afterwards to hand them over to any who might establish his right to the same. The two Defendants set up a Will as if executed Sakharam Saheb, bequea

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The two
Defendants therefore filed O. S. No. 5 of 1895 against the said Chota Raja and his natural father to have the genuineness of the Will declared and its registration ordered; and Chota Raja in his turn filed O. S. No. 36 of 1895 to have his status as the adopted son of Sakharam Saheb's adopted son declared and to recover possession of all the movable and immovable properties of Sakharam Saheb. While the said two suits were pending, the present Plaintiff, claiming to be the daughter's son of one Dadaji, the deceased brother of Sakharam Saheb, filed O. S. No. 2 of 1896 to have his right to the entire property of Sakharam Saheb declared as Sakharam Saheb's heir and to recover possession of the same from Defendants and their Agent Veeraragava Iyengar, and impleaded them as Defendants Nos. 1, 3 and 4 respectively and made Chota Raja the 2nd Defendant. When the three suits came on for hearing, it

JAMNA BAI SAHEB MOHITAI AVERGAL *v.* VASANTA RAO ANANDA RAO DHYBAR.

was arranged between the parties that Defendants Nos. 1 and 2 should execute a bond for the sum of Rs. 90,000 to Plaintiff and that Chota Raja in his turn should [illegible] another for half that sum in favour [illegible] Plaintiff should in

[illegible] aram Sahe [illegible] is lifetime, th[illegible] [illegible]ram Saheb [illegible] [illegible]t and Chota [illegible]ved. 1st [illegible] *item* in that [illegible]rnal grandmother and [illegible]cordingly executed the [illegible]000 in favour of Plain[illegible] [illegible]t friend in that suit, and Pla[illegible] friend in that suit filed a pe[illegible]ourt to withdraw O. S. No. 2 of [illegible]. But when that petition was filed, the District Judge wanted to know whether the Gosha lady who acted as Plaintiff's next friend was aware of the step taken, and having examined the lady on commission and satisfied himself on the matter, allowed the suit to be withdrawn and issued orders to the Receiver to restore all the property in his possession to Defendants with the exception of the jewels taken from the Collector's custody. The stipulation of the said bond was that Defendants Nos. 1 and 2 should pay the principal sum of the suit bond within three months after Defendants and Chota Raja took possession of the scheduled properties from the possession of the Receiver appointed by the Court in O. S. No. 2 of 1896, and that in default, it should be repaid with interest at 6 per cent. per annum on the said sum from that date to the date of payment. It appears that Chota Raja also in his turn executed a bond for Rs. 45,000 in favour of the 1st Defendant, so that O. S. No. 2 of 1896 having been dismissed, O. S. No. 5 of 1897 was decreed in the present 1st Defendant's favour, while in O. S. No. 36 of 1895, 1st Defendant and Chota Raja filed a *razinamah* petition to divide the entire property of Sakharam Saheb in equal moieties and a decree was obtained accordingly.

[illegible] the three suits then filed for the [illegible]perty of Sakharam Saheb terminated, [illegible] it is said that the District Court having directed the Receiver to deliver [illegible]ssession of all the properties back to [illegible]m on 17th September 1897, the 1st Defendant and Chota Raja divided the said property in equal shares soon after it, with the exception of the jewels which the Receiver got possession of from the Collector.

It is said on Plaintiff's side that the Defendants having got possession back of the scheduled properties in O. S. No. 2 of 1896 by the order of the District Court, dated 17th September 1897, Defendants are bound to repay the principal of the suit bond with interest at 6 per cent. from three months after that date. Though Plaintiff several times demanded the payment of the same, Defendants have only paid from time to time an aggregate sum of Rs. 422-1-0 and have not paid the remaining sum. Hence the suit for the balance of the principal and interest due, which amount to Rs. 1,23,597-15-0.

The main point raised in defence by Defendants is that 1st Defendant's guardian not having taken the permission of the Court to execute the suit bond and have O. S. No. 2 of 1896 withdrawn by Plaintiff, the bond is not valid.

Another point is that Defendants not having been able to obtain possession of the jewels, etc., of Sakharam Saheb originally seized by the Collector from the

JAMNA BAI SAHEB MOHITAI AVERGAL v. VASANTA RAO ANANDA RAO DHYBAR.

Receiver appointed in O. S. No. 2 of 1896 until sometime in 1905, Plaintiff had no cause of action to file the suit and much less to claim interest and a sum [illegible] Defendant filed against Chota [illegible] Rs. 45,000 due by the latter to the [illegible] under the bond which the latter ex[illegible] to the former in O. S. No. 68 [illegible] having been dismissed for [illegible] present suit should follow. [illegible] fendant has adopted the de[illegible] by 1st Defendant, and added that thou[illegible] 2nd Defendant also executed the suit b[illegible] jointly with the 1st Defendant [illegible] arrangement between the parties at the time was that the amount of the bond should be recovered from the property of late Sakharam Saheb and though nominally some properties were delivered to this Defendant by the Receiver in O. S. No. 2 of 1896, yet the bulk of the property of Sakharam Saheb having been divided by the 1st Defendant and Chota Raja in equal moieties, this Defendant is not liable to pay anything to Plaintiff."

The Subordinate Judge allowed the claim, and the High Court affirmed that decree. [See *Sethuram* v. *Vasanta Rao* (1)].

Mr. L. DeGruyther, K.C., and *Mr. E. B. Raikes* for Pamna Bai Saheb. Two minors were concerned in the compromise in question, but no sanction of the Court was obtained in regard to the compromise on behalf of the minors under sec. 462 of the Code of Civil Procedure, 1882. The compromise could not therefore stand against the minor. If therefore the compromise fails and is not enforceable, the bond executed by Jamna Bai must also fail. There was no independent obligation for the bond. The whole transaction of which the bond was a part was one entire and indivisible transaction. If as a result of Sethuram's action the compromise is not binding upon him, as [illegible] Vasanta Rao did [illegible]

[illegible] executed up[illegible] Vasanta Ra[illegible] by shape [illegible] [illegible] prece[illegible] he bond [illegible] he gave [illegible] upo[illegible] the compromise. giving up all his rights; [illegible] be put to election. If Rs. 90,000, Sethuram [illegible] As between Sethur[illegible] laintiff they ought to be [illegible] riginal rights. Further, the wor[illegible]dule" in the bond did not refer to the Schedules attached to the plaint, but either to the properties stated in the plaint or entered by the Receiver in the Schedules prepared by him. The contract was to pay on receipt of possession of properties now in the possession of the Receiver. But the Receiver is still in possession of considerable properties. The suit was therefore premature. Reference was made to *Ganesha Row* v. *Tuljaram Row* (2).

Mr. Raikes followed: The obligation to pay under the bond was joint, and therefore Jamna Bai was entitled to abatement. *Kendall* v. *Hamilton* (3).

Sec. 43 of the Indian Contract Act applied. The terms of the bond showed that there were three separate promises to pay jointly, and that the promisee could not compel one promisor alone to perform the whole of the promise. Reference was

(1) I. L. R. 34 Mad 314 (1910).

(2) L. R. 40 I. A. 132: s. c. 17 C. W. N. 765 (1913).

(3) L. R. 4 A. C 504 at p. 516 (1879).

made to :—*Ellesmere Brewery* v. *Cooper* (4), *King* v. *Hoare* (5) and *Underhill* v. *Horwood* (6).

[illegible] Plaintiff should [illegible] Defendant.

and his m[illegible] the subseq[illegible] Code, [illegible] was bo[illegible] se was binding [illegible] ving regard to the facts of the case, it ought to [illegible] cts were fully known to the C[illegible] por was concerned in the co[illegible] at the Court sanctioned [illegible] promise. No formal order giving sanction was necessary under the Code of 1882. The parties were described as minors in the pleadings, and each minor was represented by counsel. In form the Judge did not make an order giving his consent, but in substance he had all the facts before him. *In Manohar Lal* v. *Jadunath Singh* (7) there was nothing to show that all the material facts were before the Court. Same was the case in *Virupakshappa* v. *Shidappa* (8). However, assuming that the bond was not binding upon Sethuram, and that he is allowed to avoid the contract, he must put back the other party in his original position. In other words, we are entitled to continue the present suit against him, in order to enforce my rights. Our equitable rights ought to be considered.

(4) [1896] 1 Q. B. 75 at p. 82.
(5) 13 M. & W. 494, 501, 506 (1844).
(6) 10 Ves. Jun. 209 at p. 225 (1804).
(7) L. R. 33 I. A. 128 : s. c. 10 C. W. N. 895 (1906).
(8) I. L. R. 26 Bom. 109 (1901).

Sir William Garth for Sethuram was not heard.

[illegible]while

[illegible]RDSHIPS' JUDGMENT was deli-

[illegible]mah pe

Of Lawrence Jenkins.—These appeals arise out of a suit on a money bond dated 6th June 1897, expressed to be [illegible] the present Plaintiff, Vasanta [illegible]ert[illegible] the Defendant, Sethuram Saheb, [illegible]nt it is [illegible]ed by his grandmother and [illegible] direct[illegible] guardian, and by the Defendant Jamna [illegible]i.

Defendant Sethuram was then a minor and this was apparent on the face of the bond. The substantial question, therefore, now in dispute is whether Sethuram is under a personal obligation to pay the Plaintiff the amount he claims, and if not, whether this furnishes Jamna Bai with an answer to the suit. The plea that the suit is premature has no real value. It does not touch the merits, and both Courts agree that the objection is not well-founded. This view is in accord with the meaning placed by the Defendants themselves in their written statements on the phrase in the bond which is decisive of this point, and their Lordships see no reason to doubt its accuracy. This plea therefore fails. On the more important question the two Courts are not in complete agreement. The Subordinate Judge passed a decree against both Defendants. The High Court on appeal upheld the decree against Jamna Bai, but dismissed the suit against Sethuram. This has led to the two present appeals. Though the circumstances connected with the passing of the bond are intricate, the real issues involved in the suit are simple. To establish Sethuram's liability the Plaintiff relies on sec. 462 of the Code of 1882. But even if compliance with the terms of this section would have established the

JAMNA BAI SAHEB MOHITAI AVERGAL *v.* VASANTA RAO ANANDA RAO DHYBAR.

claim against Sethuram—a point on which no opinion is now expressed—this no way helps the Plaintiff the requirements of the section h en served in protection of . High Court, therefore, ri not liable t um But th answe Stripp plea adv two promis consequent bar to the p This is a posit tained, and the rejected by the Hig developments in the future it w wrong for their Lordships to make any pronouncement; they will therefore humbly advise His Majesty that each of these appeals should be dismissed. There will be no order as to costs.

B. D. *Appeal dismissed.*

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE No. 3612 OF 1913.

CHITTY, J. WALMSLEY, J. 1916, Heard, 7, April. Judgment, 12, April.	KHIRODE CHANDRA ROY, Defendant, Appellant, *v.* SRIMATI ASHTULLABU and ors., Plaintiffs, Respondents.

Ex parte *decree—Application to set it aside refused—Suit to set aside decree on ground of fraud, if lies.*

A suit by the Defendant to set aside an ex parte decree as fraudulent does not lie after an infructuous application to set it aside under sec. 108 of the Civil Procedure Code of 1882, if the fraud in respect of which the decree is sought to be set aside was properly in issue in the application under sec. 108 and was determined upon such application.

RADHA RAMAN SAHA *v.* PRAN NATH ROY [illegible] MAHATA [illegible] RAN

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The Defendants 3 were m
bers of a joint Hind at the
the decree was obtained and were as
interested in the decree which was obt
by Defendant No. 1 as *karta*.

The present suit was instituted on 7th July 1909 to have the decree set aside as fraudulent and Plaintiff's case was that no summons had been served on the Plaintiff in the rent suit but that a son of the Plaintiff having been informed by the Defendant No. 3 of the suit, came to Court and saw Defendant No. 2 who was a pleader and paid him Rs. 50 in full satisfaction of the claim upon his promising to see that the suit was withdrawn; that subesquently another co-sharer landlord having obtained a decree for rent against the

(2) I. L. R. 28 Cal. 475 : s. c. 5 C. W. N. 756 (1901).
(3) I. L. R. 29 Cal. 395 : s. c. 6 C. W. N. 473 (1902).
(4) 15 C. L. J. 446, 448 (1911).
(5) 10 C. L. J. 428 (1909).
(6) I. L. R. 29 All. 212 (1906).
(7) I. L. R. 29 All. 608 (1907).

KHIRODE CHANDRA ROY *v.* SRIMATI ASHTULLABU.

Plaintiff and put up the holding for sale, Defendant No. 1 preferred a claim petition alleging that he had purchased the holding in [illegible] Plaintiff should not [illegible] and his [illegible] the subsequent [illegible] ring the pen[illegible] Court, th[illegible] substituted [illegible] against its [illegible] as is posses[illegible] there was Kingdom [illegible] as alleged or that [illegible] aking to withdraw the that the Rs. 50 was paid for another in February 1901, that upon the application to set aside the *ex parte* decree the Court had held that between the 7th June 1899, the date on which the applicant appeared and asked for time to file written statement and the 20th June 1899 on which the suit was decreed *ex parte*, no payment had been made by Plaintiff to Defendant No. 2 as alleged, and that in consequence the present suit on the same allegations was not maintainable, and that the decision in the case under sec. 311, C. P. C., was similarly a bar to the suit so far as it sought to set aside the sale.

Both the Courts below were of opinion that the suit was maintainable. But the Court of first instance decided the case against the Plaintiff on the merits and dismissed the suit. The lower Appellate Court reversed this decision, found the fraud alleged established and decreed the suit.

Defendant now preferred this appeal.

[illegible] *Nath Ray* for the Appellant.

[illegible] *anath Chakraburty* and [illegible] for the Respondent.

[illegible] of a suit on [illegible] 6th June 1897, ex[illegible] the present Plain[illegible] was as [illegible] the Defendant, Seth [illegible] it is [illegible] ed by his [illegible] Kasimji [illegible] direct[illegible] and by the the Palintiffs [illegible] guardian, [illegible] claration that [illegible] Defend[illegible]uram was [illegible] of 1899 in the [illegible] was apparent on [illegible] of Howrah and [illegible] resulting on that [illegible] The substantial [illegible] could be set aside as fraudulent, [illegible] the Plaintiff confirmed in possession of the land described in the schedule to the plaint. The sole question arising in this second appeal is whether the present suit is barred by reason of an order under sec. 108 of the Civil Procedure Code of 1882 dismissing an application of the present Plaintiff to set aside the *ex parte* decree in suit No. 188 of 1899. The Court of first instance found that there was fraud on the part of Defendant No. 1 in obtaining the *ex parte* decree but that no payment was made to the Defendant No. 2, as alleged, for the purpose of getting the suit withdrawn. As to the execution proceedings, that Court was of opinion that no fraud had been established. It also found that the Plaintiff's predecessor-in-title knew of the auction-sale and of the possession being delivered to the Defendants before the date when it was alleged that that fraud had become known to him, and it accordingly found that the suit was barred by limitation. On appeal by the Plaintiff, the lower Appellate Court found that the fraud relied upon by the Plaintiff was satisfactorily established, and that the suit was within time, having been

brought within three years of the da[illegible]n the fraud was discovered. On t[illegible]d point—which is the point [illegible]s learned Additional Distr[illegible] that the suit was nc[illegible] the Plaintiff's unsucce[illegible] under secs. 108 and 311 [illegible] cedure C[illegible] allowed [illegible] a decr[illegible] No. 1, [illegible] ed to th[illegible] same as the[illegible]

A number [illegible] us. It was [illegible] of *Pran Nat*[illegible] *Moitra* (1) th[illegible] having applied [illegible] 108 and 311 of the Civil Proce[illegible] of 1882 did not bar the suit then befo[illegible] Court which was for setting aside a decree as fraudulent. That case and a cognate case went up on appeal to Her Majesty in Council. The case just referred to is reported as *Radha Raman Shaha* v. *Pran Nath Roy* (2). There their Lordships of the Judicial Committee said that they had nothing before them but the bare fact that the Plaintiff had endeavoured to get an *ex parte* decree set aside under sec. 108, C. P. C., under which the Court might try whether the summons had been served or whether the Plaintiff had been prevented by any sufficient cause from appearing. It was, therefore, impossible for them to say that the matter now alleged as fraudulent came in any way before the Court under the application which was made by virtue of sec. 108. In the cognate case of *Khagendra Nath Mahata* v. *Pran Nath Roy* (3) more particulars were laid before their Lordships. Lord Robertson, who delivered the judgment of the Court, said: "It is, therefore, necessary to ascertain what [illegible] true grounds and scope of [illegible] pre-

[illegible] re the wi[illegible] as a fraud. *Lal* v. *T*[illegible] d Judges [illegible] those pow[illegible] settled b[illegible] the bank Commi[illegible] on i[illegible] ng in exc[illegible] have just referred) "[illegible] oes n[illegible] Plaintiff, whose applic[illegible]ions to se[illegible] an *ex parte* decree under sec. 108 and sale consequent thereon under secs. [illegible] and 311 of the Code of 1882 have been infructuous, to maintain a suit to set aside the decree on the ground of fraud or for any other valid reason." If the judgment of the Judicial Committee to which we have just referred be carefully read, it will be seen that that proposition is too broadly stated. In that case, however, it was obvious that the order under sec. 108 could not bind the Plaintiff. The Plaintiff was a minor at the date of the original decree and was not represented by any guardian. Some person, it does not appear who, made an application on behalf of the Plaintiff while he was still a minor to have the *ex parte* decree set aside. That application, however, was dismissed for default, and a later application to restore it was subse-

(1) I. L. R. 24 Cal. 546 (1897).

(2) I. L. R. 28 Cal. 475 : s. c. 5 C. W. N. 756 (1901).

(3) I. L. R. 29 Cal. 395 : s. c. 6 C. W. N. 473 (1902).

(4) 15 C. L. J. 446, 448 (1911).

quently rejected. Obviously the Plaintiff in that case could not be said to be bound by the orders which had been made ...inally against him when he was holding or ... Plaintiff should in ... applied for and obtained an *ex* ... decree. There was in this case ... appeal ... the money was due, as ... Plaintiff. The court ... ile ...ation under sec. 108 ... efendant ...intiff had failed to prove ...mah ... by Salebhoy ... of ... the with- ... rise out of a suit on ... 50 was ... 6th June 1897, ex ... 108 was ... present Plain ... that the ... Defendant, both ... ell aware ... ed by his ... on it would ... guardian, and by the ... ppears to be ... h it is now ... efend ...uram was ... of decree. An ... was apparent on ... of learned pleader ... The substantial ... that the fraud in ... could be set ... the de ... was not that, but was ... the ... aise swearing that money was due ... when, as a fact, it was not due. That, ... ling ... 31-7-9. ... o the facts ... holding ... it ought to ... on Narain ... ndant No. ... against its ... as is posses... ...ingdom ... body ... was ... of the application under ... shall not rest upon its own facts and ...m its own merits. It seems, therefore, ...ecessary to see what the fraud actually ... the decree stands, ...ention ... ...ut ... alleged by the Plaintiff was. A perusal of the first 7 paras. of the plaint shows that the fraud alleged in this case was not in the rent suit itself but was the deceit practised upon the Plaintiff or rather upon his son, by which the then Plaintiffs secured the absence of the present Plaintiff Kasimji Adamji on the date that the suit came on for hearing. The allegation was that Salebhoy Kasemji had gone to the pleader and had paid him Rs. 50 on account of the claim which was just under that sum, and the pleader who was the brother of Defendant No. 1 had promised that he would get the suit withdrawn. Instead of doing that, the Defendant No. 1 aided by Defendant No. 2, his brother, the pleader, and Defendant

(5) 10 C. L. J. 420 (1909).

however, is not correct. The fraud alleged was the deceit which was practised upon the Plaintiff's son, and which no doubt facilitated the passing of the *ex parte* decree. We have not been referred to any case in this court precisely in point; but there are two cases decided by the Allahabad High Court in which this distinction has been drawn. In the case of *Puran Chand* v. *Sheodat Rai* (6), it was pointed out that the only real fraud alleged was connected with the non-service of summons. That was a fraud which could be and was decided in the application under sec. 108. It was, therefore, held that the Plaintiff could not be allowed to again litigate that question in a subsequent suit. The Privy Council cases above referred to were distinguished on that ground. In *Nadar Mal* v. *Ranuak Husain* (7), the same view was taken. There the suit was brought by the Plaintiff to set aside a

(6) I. L. R. 29 All. 212 (1906).
(7) I. L. R. 29 All. 608 (1907).

KHIRODE CHANDRA ROY *v.* SRIMATI ASHTULLABU.

decree on the ground of fraud, the [illegible] alleged being that the suit had been properly instituted against the [illegible] of full age when he was, [illegible] In the application u[illegible] question was gone into [illegible] against the Plaintiff [illegible] could not be [illegible] tion in a suit [illegible] of Lord Rh[illegible] referred to [illegible] that their [illegible] that the ref[illegible] sees. 108 and [illegible] question of fra[illegible] suit was based. [illegible] must be whether [illegible] properly raised and [illegible] plications. In the case before us [illegible] alleged and sought to be proved [illegible] clearly the prevention of Kasemji Adamji, the original Plaintiff, from appearing as Defendant in the previous suit. That was found against him in his application under sec. 108 after a full trial and we are of opinion that he cannot be allowed to re-open it in the present suit in which he seeks relief on precisely the same ground.

We accordingly allow the appeal and order that the Plaintiffs' suit do stand dismissed with costs in all the Courts.

N. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 367 OF 1914.

CHAUDHURI, J. NEWBOULD, J. 1916, Heard, 25 and 28, February. Judgment, 23, March.	SURENDRA NARAIN MAHATA, Plaintiff, Appellant, *v.* JUGAL KISHORE GHOSH and others, Defendants, Respondents.

Occupancy holding, non-transferable—Sale by landlord in execution of rent-decree, under Civil Procedure Code, prevented by deposit by purchaser from registered tenant—Withdrawal of deposit by landlord, if amounts to recognition of purchaser as tenant

[illegible] those[illegible] [illegible] the ba[illegible] *re*[illegible]ng in ex[illegible] *the former tenant or* [illegible]loes p[illegible] *tenants of the holding.* [illegible] *therenpon treated as satisfied and* [illegible] *attachment was withdrawn, and th*[illegible] *amount deposited was withdrawn by th*[illegible] *landlord.*

Held—*That, upon such deposit, the landlord could not, as in a case under the Bengal Tenancy Act, contest the right of the purchaser to make the deposit, and the withdrawal of the deposit did not amount to a recognition of the purchaser by the landlord.*

THOMAS BARCLAY *v.* SYED HOSSEIN ALI KHAN (1) *and* NALINI BEHARY RAY *v.* FULMANI DASI (2) *distinguished.*

This was an appeal preferred on the 17th February 1911 against a decree of Mr. S. P. Sen, District Judge of Zillah Birbhum, dated the 11th December 1913, reversing a decree of Babu Nalini Mohan Banerjee,

(1) 6 C. L. J. 601 (1907).
(2) 15 C. L. J. 388 at p. 391 (1912).

SURENDRA NARAIN MAHATA *v.* JUGAL KISHORE GHOSE.

Munsif of Dubrajpur, dated the 30th September 1912.

The facts of the case fully ... ear ... the judgment ...

... order to protect his rights he want... deposit the decretal amount in Court ... landlord decree-holder. ... money was deposited ...ary 1905. No notice ...on appears to have been ...der ... landlord De... difference ...es under ...der the ...e latter ...judgment- ... any holding ...lues, he must ...ale. He may ...decision about ...rty to be sold. ...are Code there is ...tion to ... decretal amount being ...to Court by any person before the ...le, and the Court is not required to decide any question about his interest in the property, as provided in the Bengal Tenancy Act. As soon as the amount is deposited the property is released from attachment and the decree is treated as satisfied. That was the order made in this case. It appears that the pleader of the landlord Defendant withdrew this money several days after it was paid into Court, and an agent of the Defendant No. 2 received the money with other amounts due to him from the pleader. It is contended before us that by withdrawal of the money as aforesaid, the landlord had recognised the right of the Plaintiff as the purchaser of the tenure, and that the Plaintiff was entitled to the holding as against him. The landlord, it is alleged, subsequently split up the two holdings into six, and fraudulently brought six suits for recovery of rent in respect of them, against Lakshmi Narain's heir, or his *benamdar*, that is to say, against the persons in whose names these jotes stood. He caused five of these

...kshmi Narain. ... ... No. 2 then brought a ...being suit No. 748 of 1901, for the ...overy of arrears of rent due on the holding against the registered tenant and obtained a decree. He sued as co-sharer landlord, but claimed the full rent, as having purchased the right of the other co-sharer. The decree was, however, obtained in favour of the landlord and his co-sharer. He then took out execution against the tenant, as of a money-decree under the Civil Procedure Code, not under the provisions of the Bengal Tenancy Act. This was before the Amending Act of 1907, at a time when the law relating to the rights of a co-sharer landlord was not considered quite settled, having regard to certain decisions of this Court. It was then the general practice to execute such decrees as ordinary money-decrees. On the 1st February 1905, the Plaintiff presented a petition (Ex. 5) to the Execution Court saying that he had purchased the holding

SURENDRA NARAIN MAHATA v. KISHORE GHOSE.

decrees to be executed and Def
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went to Court and deposited the
due for rent in the execution proceed
He stated in his petition that he had acquired a right to the holding by purchase, but it has been found that he had acquired none. It is now argued that inasmuch as the money was deposited by him and it was withdrawn by the pleader on behalf of the landlord Defendant, it must be considered to be a recognition of his right by the landlord upon the authority of *Thomas Barclay* v. *Syed Hossein Ali Khan* (1). In that case the holding was advertised for sale under the provisions of the Bengal Tenancy Act. The decretal amount appears to have been deposited by the purchaser and the decree-holder applied for payment of that sum to him. It was accordingly held that he was estopped from denying the purchaser's title later on. It was further held that it was the duty of the landlord in the circumstances to challenge the title

(1) 6 C. L. J. 601 (1907).

of the purchaser under sec. 171 of the Bengal Tenancy Act and to deny that he had
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found by the Appellate Court to be ot
than *bonâ fide*. It appears that as soo
as decrees in the six subsequent rent-sui
were obtained by the Defendant landlord against his registered tenants, the Plaintiff caused one of such tenants, Defendant No. 3, who was also his ploughman, to institute a suit to set aside the decrees on the ground of fraud. If the Plaintiff had validly acquired a transferable interest, or if the Plaintiff considered that the withdrawal of the deposit money by the landlord had operated as a recognition of his title, Defendant No. 3 could not have any possible title to the land, yet the Plaintiff puts him up to institute such a suit. That suit was dismissed in September 1909. Those holdings were advertised for sale in execution under the provisions of the Bengal Tenancy Act in March 1910. The Plaintiff allowed the sale to take place, although he had full knowledge of the

SURENDRA NARAIN MAHATA *v.* JUGAL KI[illegible]E GHOSE.

decrees. He did not come in under sec. 170, cl. (3) or sec. 171 of the Bengal Tenancy Act, nor did he depo[illegible] rent

[illegible] the right to recover the amount he [illegible] the a[illegible]gainst the tenants of the [illegible] a payment made to pro[illegible] if he had acquired, [illegible]his case he had, a valid [illegible]lding [illegible]at right was not [illegible]on sale, but [illegible]est of the [illegible]ording to [illegible]time. [illegible]dismissed

[illegible] *dismissed.*

[illegible]ISDICTION.]

[illegible]RDER

[illegible]913

[illegible] NO. 1 OF 1914.

[illegible]le, and t[illegible]
[illegible] ques[illegible]
[illegible]ERJEE, J.
[illegible]MCROFT, J.
1916,
Heard, 31, March.
Judgment, 4, April.

UMAKANTA SEN CHOWDHURY and others, Petitioners, Appellants,
v.
HIRA LAL RAY, Manager Court of Wards, Opposite Party, Respondent.

Court of Wards Act (IX of 1879), secs. 11, 18A, 51, 55—Estate retained by Court, after some co-sharers ceased to be disqualified, on account of unpaid debts—Sale of property in execution—Application to set aside sale by judgment-debtors not acting through Court of Wards if lies—Estate released pending appeal from order dismissing application—Effect

Some properties of the judgment-debtors whose estate was in charge of the Court of Wards was sold in execution of a decree on 15th April 1912. As the Court of Wards would not apply to set aside the sale, the judgment-debtors themselves applied under sec. 47 and Or. 21, r. 90 of the Civil Procedure Code. The application was rejected on 11th January 1913 and the judgment-debtors

[illegible] the money was paid[illegible]
[illegible] or w[illegible]a proviso that he was re[illegible]ving his right to realise the amount so posited by him from Lakshmi Narain [illegible]ondal or his heir as the tenants on that holding, as he did not admit the amount so deposited was payable by him. An observation of Mr. Justice Coxe in *Nalini Behary Ray* v. *Fulmani Dasi* (2) has been relied upon, namely, "if the landlord withdraws the money, he is bound to recognise the transfer," but that was a case under the Bengal Tenancy Act, and the question was as to whether the landlord could contest the rights of a purchaser to make a deposit of the decretal amount if he disputed his right on the ground that the occupancy holding was not transferable. We are of opinion that Defendant No. 2 cannot be said to have been estopped in this case. We do not see in what way his taking of the money has affected the position or interest of the Plaintiff. He re-

(2) 15 C. L. J. 383 at p. 391 (1912).

UMAKANTA SEN CHOWDHURY v. HIR[illegible]AL RAY.

appealed on 11th April 1913. The [illegible] *was released by the Co*[illegible] *W*[illegible] *the 18th June 1914, bef*[illegible] *heard. One of the* [illegible] *had ceased to be disqua*[illegible] *but as there were* [illegible]*aid de*[illegible] *the Court o*[illegible] *Court of* [illegible] *retain p*[illegible]

Held—[illegible] *of Wards* [illegible] *the sale was*

That the re[illegible] *give a fresh* [illegible] *judgment-debt*[illegible] *the time the rig*[illegible] *not entitled to cl*[illegible] *of the Limitation Act.*

This was an appeal against an [illegible] Babu R. C. Sen, Subordinate [illegible] Barisal, dated the 11th January [illegible]

The facts of the case will appe[illegible] the judgment.

Babus Dwarka Nath Chuckerbutty, Prokash Chandra Majumdar and *Indu Bhusan Ray* for the Appellants in both appeals.

Babus Basanta Kumar Bose and *Bepin Ch. Bose* for the Respondents in Appeal No. 1 of 1914.

No one for the Respondents in Appeal No. 161 of 1913.

THE JUDGMENT OF THE COURT was as follows:—

The decree-holder obtained a decree for money against the judgment-debtors in 1911 when their estate was in charge of the Court of Wards. The decree not being satisfied by the Court the properties of the judgment-debtors were sold on the 15th of April 1912. The Court of Wards did not apply for setting aside the sale and the judgment-debtors after waiting for the Court of Wards to take action in the matter made an application for setting asid[illegible] sale under sec. 17 and Or. 21, [illegible] Code.

[illegible] those por[illegible] the bank [illegible]ng in exe[illegible] was a tree agent in [illegible] does n[illegible] ain the application; [illegible] case the estate having been released pe[illegible] ing appeal we should allow the debtors [illegible] prosecute their original application.

It will be convenient to examine the provisions of the Court of Wards Act before dealing with these grounds.

Sec. 6 (Act IX of 1879) lays down who shall be held to be disqualified proprietors Sec. 7 empowers the Court to take charge of the estate and persons of disqualified proprietors in certain cases. Sec. 8 lays down that when a person ceases to be disqualified the Court would be bound to release him and his property. Sec. 11 lays down that if one or more of several joint owners under the charge of the Court cease to be disqualified the Court will release his share unless he consents to his share remaining in the hands of the Court until the still disqualified co-owners cease to be disqualified. Sec. 13A (introduced by amendment in 1907) lays down an

exception to the preceding sections and provides that notwithstanding the provision of the preceding sections [illegible] Court

[illegible] not considered necessary to have the [illegible] the guardian or next friend of [illegible] litigation respecting that [illegible] mother having been [illegible] guardian *ad litem* of the [illegible] entitled to [illegible] as such until she [illegible] relied on is [illegible] *Singh* v. *Moti* [illegible] held that the [illegible] consent to ap- [illegible] of Gudi- [illegible] been taken [illegible] Court of Wards. [illegible] of the Act itself [illegible] provides that in suits [illegible] manager of the [illegible] or the guardian or [illegible] Wards and sec. 55 lays [illegible] that no suit shall be brought on [illegible] of any Ward by a manager except [illegible] sole, and [illegible] authority of an order of the Court. [illegible] no objection by any question [illegible] been held that the word "suit" [illegible] who also was represented property, as [illegible] miscellaneous proceedings. *Bhupendra Narain Dutt* v. *Baroda Proshad Ray Chowdhury* (1). The Wards were therefore incompetent to prosecute the application in this case except though the manager of the Court of Wards as their next friend.

the manager of his estate under the Court of Wards. An objection was however made in the appeal for the first time and Banerjee, J., said that the objection was of a purely technical character and could not be entertained at that stage specially as the defect might have been cured if the objection had been taken in the first Court and as at the time of the appeal the estate of the applicant was no longer in the hands of the Court of Wards. It is this last distinction which is strongly relied upon in this case, as here also the estate was released pending appeal. The objection however was taken in the Court of first instance.

The next case is that of *Krishna Proshad Singh* v. *Gostha Behary Kundu* (2). There the Court of Wards had not taken possession of the Gudigunda estate and it

The only matter that is left for consideration is the effect of the release of the estate pending appeal. The Appellants were from the 15th June 1914 competent to act for themselves without the intervention of any manager or guardian. They cannot, however, claim the benefit of sec. 7 of the Limitation Act as they were not minors at the time when the right to apply accrued. They were Wards of the Court which assumed all their rights. There is no other provision of law which is relied on for giving them a fresh start. In any case we are unable to say that the lower

(1) I. L. R. 23 Cal. 374 see pp 385, 386 (1895).

(2) 5 C. L. J. 434 (1907).

(3) L. R 40 I. A. 140 : s. c 17 C. W. N. 637 (1891).

(4) I. L. R. 18 Cal. 500 (1891).

UMAKANTA SEN CHOWDHURY *v.* HIRALAL RAY.

Court was wrong in rejecting the ap[illegible] tion when it did reject it. [illegible] pow[illegible] revision also are not avai[illegible] the Appellant and we [illegible] appeal with costs.

The same order is made [illegible] case also.

N. G.

[CRIMIN[illegible]

REV. NOS.

SHARFUDDIN, J.
CHAPMAN, J.
1915,
26, July.

Appointment of special[illegible] Police Act (V of 1861)—Object of appo[illegible] special constables—Proceedings under sec. [illegible] P. C.—Propriety of appointing special [illegible] during pendency of sec. 107, Cr. P. C. ca[illegible]

The Petitioners were appointed [illegible] constables during the pendency of proceedings under sec. 107, Cr. P. C., against some of them and were prosecuted for refusing to serve as such constables.

Held—*That the only legitimate object of appointing special constables is to strengthen the ordinary police force by the addition of suitable persons. When appointments are not made with that object, proceedings under sec. 19 of the Police Act will not be permitted.*

Absence of any provision in the Code of Criminal Procedure for the prevention of disturbance during the pendency of proceedings under sec. 107 pointed out.

These were Rules against the order of D. Weston, Esq., District Magistrate of Mozufferpore, dated 26th May 1915, directing the prosecution of the Petitioners under sec. 19 of the Police Act for refusing to serve as special constables.

The facts will appear sufficiently from the judgment.

Mr. W. Gregory (with *Babu Birbhusan Dutt*, [illegible]

[illegible] those [illegible] the bar [illegible]ng in exc[illegible]

plained that in Jan[illegible]loes n[illegible] last there had been riots [illegible] distur[illegible] over their use of the ferry and in consequence proceedings were instituted against thirteen of the present Petitioners under sec. 107, Code of Criminal Procedure, for the purpose of binding them down to keep the peace. During the pendency of these proceedings the ferry farmers, on the 11th April, again complained that the villagers did not allow them to ply the ferry and prayed that certain persons named by them should be made special constables. The names given include all the present Petitioners. The District Magistrate directed the District Superintendent of Police to depute an Inspector to enquire into the matter, intimating at the same time his willingness to appoint special constables. The Inspector reported that the disturbances had been due to the enhancement of the ferry tolls. He recommended that the persons named by the ferry farmers be

appointed special constables and that in ...ich were then accused and which the meantime a Head Constable and four ...hat ...nder trial. The remain- constables be deputed from the P...erve. ...tioners were then offered ...ates and belts. They ...ary and upon a peon ...all them before the Joint ...comply. An ...g the pro- ...the peti- ...appoint- ...strengthen ...the addition ...as been more ...urt that when ...ot made with ...d, proceedings ...olice Act will not ...does not appear that any instructions ...and performance of any kind of Police ...any questi even issued to the petitioners ...perty, as ...circumstances above set forth ...us to come to the conclusion that it was never really intended to employ the Petitioners as Police Officers.

...petitioners) should not ...ointed special constables. While they ...ere in Mozufferpore awaiting the result ...f their petition to the District Magistrate, six of the petitioners were met by certain Police Officers who asked them to take their belts and other equipment. They refused. This was reported to the District Magistrate on 25th May. On the same date the District Magistrate recorded an order summarily rejecting the petition which the petitioners had made to him on the 19th. On the 26th he directed the prosecution of the six petitioners above referred to under sec. 19 of the Police Act, for refusing to serve as special constables. It does not appear whether the District Magistrate's order rejecting their petition of the 19th was communicated to the petitioners. On the 28th May they were all present in the precincts of the Court House at Mozufferpore in connection with the sec. 107 proceedings

We may note also that the proceedings under sec. 107 are now approaching termination. The matters in issue will be decided and any further action to prevent a breach of the peace will, we hope, then be unnecessary.

In the circumstances we direct that the proceedings against the Petitioners be quashed.

The Code of Criminal Procedure as it stands at present does not provide any obvious remedy for the prevention of disturbance during the pendency of proceedings under sec. 107. It was this difficulty no doubt which led the District Magistrate to have recourse to appointing the persons, reported likely to make disturbance, special constables. We cannot, however, believe that he intended to ac-

PARDIP SINGH *v.* KING-EMPEROR.

tually utilise their services on Police du
for this would have been ction
and would have handicapr
defence in the sec. 10
point out that in t
order under sec. 144 would
sufficed. We th to t
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S. C. M.

which the local inspection was held. The Petitioners were convicted under sec. 1 I. P. C.

Hel offence under sec.

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appeal to the Session
the conviction was upheld t the sen
ces were reduced to fines of Rs. 150 an
Rs. 100 respectively. The Petitioner
moved the High Court and obtained a rule
on the following grounds, *viz.*, (1) that the orders of the Courts below are not in accordance with law and liable to be set aside inasmuch as the facts found do not constitute an offence under sec. 186, I. P. C., (2) that the order of the Court of Appeal below was bad in law inasmuch as the construction put upon Or. 18, r. 18, of the Code of Civil Procedure was entirely erroneous and (3) that the act of the Munsif in encroaching upon the private passage or property of the Petitioners who were not parties to the civil suit in question was not justifiable at law and the Petitioners in obstructing his boat passage acted in the *bonâ fide* belief of their right of private defence of their own property.

The facts will appear from the judg-

CRIMINAL REVIS

REV. No. 27

CHITTY, J.
WALMSLEY, J.
1916,
31, March.

NISHI KANTA P
and others, Acc
Petitioner
v.
THE EMPEROR, Op
Party.

Indian Penal Code (Act XLV of 1860), sec. 186—Obstructing a public servant in the discharge of his public functions—Local inspection by Munsif—Waterways.

In a suit in which a public right of way was claimed there was a dispute not only as to whether the public right of way claimed existed but also as to whether there were not certain other public ways the existence of which would discredit the Plaintiff's allegations in the suit. The Munsif trying the case went to the spot to hold a local inspection; he wanted to pass in a boat along a water-way but was not allowed to do so by the Petitioners who claimed it as their private property. It was found that it was a water-way used at least by the people of a particular locality. None of the Petitioners were parties to the suit pending before the Munsif in

ment of the Sessions Judge in appeal [illegible] he had put it there that day a little which was as follows :— [illegible] me arrival. I ordered them to

" In a suit in which a public [illegible] I was a Munsif holding was claimed, there was [illegible] out water-ways in that [illegible] them to allow me [illegible]. Then they all refused that [illegible] to remove the [illegible] further talk, [illegible] When he [illegible], Nisi Pal [illegible] would let [illegible] not let the [illegible] Munsif says [illegible] abin when the [illegible] come out into [illegible] at to see what [illegible] witnesses depose [illegible] which the boat was [illegible] 3 says ' accused came [illegible] front of the boat, and said that [illegible] ould not allow the boat to pass. [illegible] and [illegible] any questi[illegible]od about one cubit off from the [illegible] blic function, by preve[illegible] perty, as [illegible]. W. 5 says ' The accused came [illegible] and stood by the bows of the boat, [illegible] him from doing so. and held out their hands to check the boat, and said you can't go that way. If you do, there will be a disturbance.'

There is some dispute about the facts. According to the prosecution, the Appellant Nisi Pal put a fence across the way shortly before the arrival of the Munsif, on the same morning. According to Nisi Pal, it was put up 10 or 15 days before. On this point, I accept the prosecution evidence, which includes the evidence of the Munsif himself, that at the time Nisi Pal told him that he had put it up that morning.

The Munsif says that when his boat came to this place, the four Appellants, and some others, stood in front of the boat, and would not let it go on. It was after his boat had been stopped by them that the Munsif noticed that about 8 or 10 cubits ahead the water-way was closed by a new fence of bamboos. The Munsif says : ' I asked them whether they had put it up. Then this Nisi Pal told me

There is no good reason why this evidence should not be accepted. I accept it. I find that the Appellants stood in front of the boat and stopped it, and said that they would not let the Munsif go on. Afterwards, the Appellant Nisi was willing to let the Munsif go on by himself.

The difficult questions in this case are of law. I have no doubt that the main object of the Appellants, and their partisans, was to make it appear rightly or wrongly that there was no right of way. It has been argued that they acted in good faith, and committed no offence. None of the Appellants were parties to the suit.

It is not suggested that any kind of damage would have been done, by the

NISHI KANTA PAL *v.* THE EMPEROR.

passage of people that way. The de
evidence itself is that it
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Cr. 18, P. L
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Munsif was a
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that function, and obstruct him.
not find that they had any right to
He was doing nothing that he
right to do. The accused N
obstructed, or rather completely st
him, most effectively, by constructing a fence specially for the purpose, and then standing there with the other accused, and with them stopping the boat, and telling the Munsif that they would not let him go on. It is true that after the Munsif had taken the names of the men, and gone some distance back, Nisi Pal sought to put himself right, but he had already committed the offence. The gist of the offence lies in the interruption caused to a public servant whilst in the execution of his duties. "It is clear that such interruption was caused. It was open to the accused to take the position that because the Munsif wished to inspect, they allowed the party to pass, but did not admit that there was a public way. But though they knew that he was a Munsif, and merely wanted to inspect, they forcibly stopped him from doing it, because it did not suit them that he should. Either they were afraid, in their own their friends' interests, that he would,

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appearance than that they
It was a way which, on the evidence
their own witnesses, was used habitually by the people of one *para* at least, and those people at least had the right to use it. It should remain open. Yet the accused Nisi Pal completely closed it, and the other accused helped him to make the closing effective. The motives and intentions of the accused can only be surmised. The Munsif must have seemed to them to want to get some idea, from the appearance of the place, as to whether there was a public way along there. The accused probably had an idea as to what the impression would be on the Munsif's mind, if he went along there. They would have an opinion as to whether it would, so far as appearances went, seem to him a public way or not. If it had been narrow and shallow, for instance, they would have been likely to think that he would not get the impression that it was the public way,

NISHI KANTA PAL *v.* THE EMPEROR.

through, for villages in both directions ... hars ... have been committed. The ... If it was broad and deep they mi... anti... ...olute. The fines, if paid, ... the opposite result ... ay ... ...

...*e made absolute.*

...NA ... COURT.

...SDICTION]

...DECREE

...14.

...HAMMAD MIAN, ...ndant No. 1, ... Appellant,

v.

...J MUCKUT PERTAP ... NARAIN, Plaintiff, ... Respondent.

...*ee for pre-emption—Price for pre-emption ... and to be deposited within one month—Decree ... any questio...pplication for extension of time granted ... ng, I hold that the ... perty, as ...lt made within extended time—Civil Pro... ...ons are ...od. ...Code (Act V of 1908), Or. XX, r. 14—Sec. 148, C. P. C.—Court's jurisdiction—Sec. 115.*

I do not think that it is a case for the maximum term of rigorous imprisonment. I uphold the convictions, but reduce the sentences. In place of the unserved terms of imprisonment, I sentence Nisi Pal to a fine of Rs. 150 and the other three accused to fines of Rs. 100 each; and in default of payment of their fines, I sentence each of them to three weeks' rigorous imprisonment.

Babus Manmatha Nath Mukherjee and *Ashitaranjan Ghose* for the Petitioners.

No one appeared for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

In this case we have read the explanation of the Magistrate, but we still adhere to our opinion that the conviction and sentences on the Petitioners cannot stand on the grounds on which the Rule was granted. No offence under sec. 186, I. P. C.,

On the last day fixed for the deposit of money by a decree of pre-emption, the decree-holder applied for extension of time to make the deposit and he deposited the amount within the extended time granted to him (ex parte) *by the Court.*

Held—*That the Court had jurisdiction to extend the time.*

The High Court declined to interfere under sec. 115 of the Civil Procedure Code.

This was a second appeal against the judgment and decree passed by Babu Sarat Chandra Pal, Subordinate Judge of Saran, dated 21st November 1913, reversing the judgment and decree passed by Mr. S. Hasan, Munsif of Chapra, dated the 14th June 1913.

This appeal arose out of a pre-emption suit in which the Plaintiff Babu Mukut Pertab Narain sought to pre-empt the share of Mussamat Surja Koer, Defend-

ABU MUHAMMAD MIAN *v.* BABU [illegible] PERTAP NARAIN.

ant No. 2, comprising of 2 as
share in Mauzas Ku [illegible]
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fendant No. 1
dated 14th May [illegible]
her Am-Mukh[illegible], De
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sale-deed and with the Plaint
ledge. The first Court upheld these contentions and dismissed the Plaintiff's suit. On appeal, the lower Appellate Court held that the Plaintiff was a co-sharer in the three Mauzahs and that he performed the ceremonies required by law and decreed the suit in Plaintiff's favour. The lower Appellate Court further ordered that the Plaintiff's right to pre-empt be declared and that he would get the property on payment of the consideration Rs. 550 to Defendant No. 1, the vendee from Mussamat Surja Koer, within a month. The Plaintiff decree-holder applied for extension of time on the last day fixed for the deposit of the money and the lower Appellate Court granted the prayer and the Plaintiff deposited the money within the extended time.

The Defendant No. 1 thereupon preferred the above second appeal and he got the above rule also upon the Plaintiff,

Opposite Party, to shew cause why the order granting further extension of time a[illegible]ing the decree-holder to deposit

[illegible]

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within one month of the date of th
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deposited and that therefore u
Or. XX, r. 14, the suit *stood in fact* dismissed from the date of the failure to make the necessary deposit. The actual facts of the case are, that on the last day fixed for the deposit of the money, the decree-holder made an application to the Court for an extension of time to make the deposit; that application was granted, a month's time was given and the deposit was made within that month. It is contended that the order granting this extension was made without jurisdiction and should be set aside under sec. 115, the consequence of the setting aside of that order being that the right of pre-emption has not been exercised and the suit fails. I am of opinion that sec. 148 covers a case of this nature. The only authorities which have been put before us in respect

ABU MUHAMMAD MIAN *v.* BABU MUCKUT PER[illegible] JARAIN.

of suits for pre-emption are to be found in *Jai Kishen v. Bhola Nath* (1) and *Jaggar Nath* v. *Jokhu Tewari* (2). [illegible] ier

were instituted against the person [illegible] *the riot had been com-* [illegible] *ed for hearing, the* [illegible] *d in Court, his* [illegible] *in the meantime, and* [illegible] *ed to* [illegible] *n with the case* [illegible] *uitted the* [illegible] *., being* [illegible] *in the* [illegible] *whether* [illegible] *ed to apply* [illegible] *The section* [illegible] *f a complain-* [illegible] *t appear.* [illegible] *ing Magistrate* [illegible] *th the case.*

ne practice of the High Courts has [illegible] *en to refuse to interfere in revi-* [illegible] *le, and to acquittals except for special* [illegible] *any questi[illegible]t in the present case which was* [illegible] *perty, as considerable importance involving* [illegible] *the peace of the district and in which the Magistrate had not exercised his discretion and given reasons for refusing to go on with the case, the order of acquittal should be set aside.*

[illegible] *arged. We make re-* [illegible] *s of the Rule.*

[illegible] ARFUDDIN, J.—I agree.

Appeal dismissed,

[illegible]. K. R. *Rule discharged.*

PATNA HIGH COURT.

[CRIMINAL REVISIONAL JURISDICTION]

Rev. No. 2 of 1916.

CHAMIER, C. J.
JWALA PRASAD, J.
1916,
28, April.

DAMOO SAHU, Petitioner,
v.
JITAN DUSADH, Opposite Party.

Penal Code (Act XLV of 1860), secs. 154 and 155 —Death of complainant—Application by the son of complainant to proceed with the case—Acquittal under sec. 247, Cr. P. C.—Reference under sec. 438, Cr. P. C.—Interference by High Court—Practice in case of acquittals.

On the application of the complainant in a case of rioting which ended in a conviction, proceedings under secs. 154, 155,

(1) I. L. R. 14 All. 529 (1892).
(2) I. L. R. 18 All. 223 (1896).

This was a Reference under sec. 438 of the Criminal Procedure Code, by the District Magistrate of Monghyr, against the order of acquittal passed by the Sub-divisional Officer of Monghyr, dated 11th February 1916.

The facts out of which this Reference arose are shortly as follows:—Loka Mahton and Domoo Sahu are rival zemindars in a village. One Paltan Khan, an influential man of the village was the appointed *gomastha* of Domoo Sahu. Jitan Dosadh, a tenant of the village, was asked to give up service under Loka Mahton and go over to the side of Domoo Sahu. On his refusal to do, Paltan Khan and others appeared at his house in the middle of the

DAMOO SAHU *v.* JITAN DUSADH.

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1916, Jitan's s
asked permission
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he had no option but to acquit the
and so he acquitted him under
Cr. P. C. The District Ma
Monghyr made this reference to
Court under sec. 438, Cr. P. C., recommending that the order of acquittal passed by the Deputy Magistrate be set aside.

Sir Ali Imam who appeared to show cause took a preliminary objection to the matter being entertained, inasmuch as it, being a case of acquittal, ought not to have come before the High Court except as an appeal by the Local Government.

Mr. K. P. Jayaswal (with *Babu Chandra Sekhar Prasad Singh*) in support of the Reference : The High Court has jurisdiction to interfere in cases of acquittal without an appeal by the Government. The power of revision and supervision is unlimited and it has been exercised by all the High Courts in acquittals where the lower Court acted without jurisdiction. The present case was one where the Magistrate has acted without jurisdiction. In a similar case in *Madho Chowdhury* v. *Turab Mian* (1) the High Court of Calcutta held that acquittal under sec. 247 of the Criminal Procedure Code for non-appearance of the complain-

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prosecution impossible.

Sir Ali Imam.—It was a discretio matter in the hand of the Magist whether to go on with the case or not; had the whole material before him. Substitution in the place of a deceased complainant is not allowed. *Purna Chandra* v. *Dengar Chandra* (2). The offence with which the accused has been charged is trivial and it could have been tried summarily. There was no substantial case. Sec. 247, Cr. P. C., covered a case of death. The Local Government alone had the power to move in acquittals. The Reference by a District Magistrate in such a case was without jurisdiction. The case reported in *Madho Chowdhury* v. *Turab Mian* (1) had no reasoning at its back. It was submitted that the High Court would not interfere in a case as this.

Mr. Jayaswal in reply.—There was a

(1) 18 C. W. N. 1211 (1914).

(1) 18 C. W. N. 1211 (1914)
(2) 19 C. W. N. 334 (1915).
(3) I. L. R. 21 Cal. 404 (1893).

DAMOO SAHU *v.* JITAN DUSADH.

substantial case : the riot had been committed in the interest and to the benefit of the accused. The Magistrate [illegible] not

[illegible] and others were placed on their [illegible] were convicted under secs. 379, [illegible] Indian Penal Code. [illegible] have been committed [illegible] Domoo Sahu, [illegible] Paltan Khan, Jitan [illegible] Magistrate [illegible] trial for [illegible] of the [illegible] Magistrated the [illegible] who were [illegible] in the riot [illegible] fresh applica- [illegible] Jitan did so [illegible] fixed for the [illegible] adjournment to [illegible] February 4th, [illegible] son appeared in Court [illegible] uary 11th and asked to be allowed [illegible] and [illegible] with the case. But the Deputy [illegible] any questi[illegible] acquitted the accused under [illegible] perty, as [illegible] of the Code of Criminal Procedure. It is quite clear from the order of acquittal and also from the explanation furnished by the Deputy Magistrate, that he was of opinion that he had no option but to acquit the accused in the circumstances. We have been referred to two cases on the construction of sec. 247 of the Code of Criminal Procedure, namely : *Madho Chowdhury* v. *Turab Mian* (1) and *Purna Chandra* v. *Dengar Chandra* (2). In the former a servant of a zemindar had lodged a complaint of an offence under sec. 426 of the Indian Penal Code. When the case was called on it was found that the complainant was dead and the Magistrate acquitted the accused. The High Court said " when the day came for disposal the servant of the zemindar, who had made the complaint, was dead, and the Magistrate adopted the rather

[illegible]yr in which he record[illegible] [illegible]r of acquittal passed by [illegible] Deputy Magistrate at Monghyr should be set aside. The facts are as follows : —

Loka Mahton and Domoo Sahu are rival zemindars in a village and have been on bad terms with each other for some years. One Paltan Khan, said to have been an influential resident of the village, was appointed Gomasta by Domoo Sahu and succeeded in gaining over most of the villagers to the side of his master. Jitan Dusadh, a tenant in the village and a Goraet of Loka Mahton, was asked by Paltan Khan to give up service under Loka Mahton and go over to the side of Domoo Sahu. Jitan refused, and it is said that in consequence of his refusal, in the middle of the night of January 9th, 1915, Paltan Khan and others appeared at his house and carried off a quantity of paddy belonging to him. Jitan complained to the police and subsequently also to a Magistrate with the result that Paltan

(1) 18 C. W. N. 1211 (1914).
(2) 19 C. W. N. 334 (1915).

Calcutta

Vol. XX.]

EDITORIAL NOTES—
ARTICLE—
Current Indian Case.
CORRESPONDENCE ..
REP

Government of In

The following cor
the Government of India
has been cabled by the Bombay
Association to the Secretary of
India : —

Regarding the amendment of th
solidation Act the Bombay Presi
ciation submit an emphatic protest on
ing grounds :—(1) No opportunity is gi ...ne
people of India to submit views by the timely publication of provisions vitally affecting their interests. (2) No urgency is made out since the Privy Council decision in Moment's case was given as far back as 1912. This undue haste and failure to ascertain public opinion regarding legislation having far-reaching consequences has caused widespread dissatisfaction and alarm. (3) Having regard to the express desire of the Government that no controversial measure be introduced during the war the public view this serious departure with dismay. (4) The Council submit the right to subjects was granted deliberately under the Government of India Act, 1858, to sue the Secretary of State for India as the successor to the East India Company in all matters in which the said Company could have been sued. The present attempt to deprive the people of this right so long enjoyed, valued and cherished has caused the greatest uneasiness and is likely to be a source of the utmost discontent. (5) Provisions making princes and rulers in India and outside and their subjects eligible for all offices open to British Indian subjects raise great constitutional questions going to the very root of the system of administration in British India and may lead to serious and undesirable consequences. (6) The Council earnestly pray that the Bill be altogether dropped, in any event that sufficient time be given to enable the people of India and the various bodies to express their views and that the measure should not be hurried.

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The Bombay Presid... cy ...
amongst its members public men w...
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movement is confined more or less amongst
lawyers who have taken part in public movements.

How is it possible, for instance, to explain to a lay reader the difference between a Legislature being authorised to pass measures which would have the effect of transferring property from a private individual to Government (such, for instance, as the Land Acquisition Act), and the same Legislature being authorised to declare by statute that, when Government has taken possession of property belonging to a private individual, he will not be allowed to prove in a Court of Law that Government has acted contrary to law (*e.g.*, Burma Act IV of 1898 declared *ultra vires* in *Secretary of State* v. *Moment* (17 C. W. N. 169)? Are not these powers in substance and result, to all appearances, alike? The lawyer will at once see that in the former case the statute is public property, and the legality of the Government's act may be tested by reference to the statute and that too

before a Court of Law accustomed to deal with disputes between individual and individual without fear or favour—the decision of the Court being further liable to rectification [illegible] peals to higher tribunals ending in *Mome*[illegible] statu[illegible] take[illegible] alway[illegible] takin[illegible] agains[illegible]

[illegible] any protest from any quarter a bill [illegible] over Civilian British subjects suspect[illegible]ion [illegible] trial by Courts Martial, thus [illegible] the [illegible]lians of "the right to be [illegible]ary." When the bill [illegible]ary of Lords, Lord Hals[illegible], Lord Loreburn and Lord [illegible]dable [illegible]nbination!) joined [illegible]eighty protest[illegible]nent lawyers [illegible] had its way [illegible] lend a deaf [illegible]e amended. [illegible]r the debates

[illegible] Act was a war [illegible]brous protest from [illegible]e House of Lords, [illegible]nd requirements in [illegible] liberty. The Gov[illegible]olidation) Act Amend[illegible] war measure. Its object is [illegible] to give the Indian executive wider [illegible]le, and [illegible]rbitrary powers of interference with [illegible]d liberties of individuals in normal [illegible] any questi[illegible] the Defence of the Realm Act gave [illegible]perty, as [illegible]ish executive during war. If it had [illegible] any part of the United Kingdom, the noble Lords who had compelled from Government the admission that the Defence of the Realm Act had gone too far would surely not have remained quiescent as they appear to have done when the Government of India Bill was read for the second time. What happened (after Lord Islington had moved that the Bill should be read a second time, in the course of which he drew special attention to the clause enabling the appointment to be made to civil posts and military commissions of rulers and subjects of Native States and adjacent territories like Nepal and assured the House that the Bill had been carefully examined by an Advisory Committee, and that it was a definite advance in the political development of India and that he believed it would be accepted in that sense by the Indian Community) is thus reported by *Reuter*.

Lord Sydenham warmly welcomed the opening of the public services to Indians not born in British India and other amendments affecting the relations between the Government of India and Native States, the powers of Councils and the Secretary of State. They might seem small administrative adjustments but they might in certain circumstances prove of vital importance. The administrative results would require careful scrutiny.

Lord Muir Mackenzie thought it advisable that

[illegible]as in [illegible] [illegible]as not studied the [illegible] English Constitution can pos[illegible]how much of it is based on fiction, [illegible]are practical limitations to the omni[illegible]ff the Legislature which are as good [illegible]s insu[illegible]rable, that many of the powers it possesses exist in theory only or can be called into activity in exceptional emergencies and must become dormant as soon as the emergencies pass away. In any case the British Parliament is so constituted that it can never place itself in opposition to the people.

The various occasions since the outbreak of the war, when the British Parliament has, as emergency measures, cut down the constitutional rights of the subject and the contrast which the debates in Parliament on those occasions present to the discussion of the Government of India Act Amendment Bill in the House of Lords furnishes instructive object-lessons on the difference between the Parliament and the Indian Councils as organs of legislation. To cite for instance, what took place at the passing of the Defence of the Realm Act of 1915 in England: it was only four months after the commencement of the war, when the spy fever was at its highest, and the Government carried through the Commons

the Joint-Committee be assisted by memb
the House of Lords who were familiar with
and who would realise the exac ugs
amendments suggested. In
Sydenham, Lords MacDon
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Provincial Insolvency Act—Limitation
TRASI DEVA RAO *v.* PANDIT PARAMES
I. L. R. 39 Mad. 74.
The Limitation Act is not applicab
ceedings under the Provincial Insolven

Hindu Law—Adoption, consent of sapindas.
KALLEPALLE VENKATARAMA REJU *v.* KALLEPALLE PAPAMMA, I. L. R. 39 Mad. 77.
The object of getting the consent of *sapindas* to adoption is to get an independent judgment on the expediency of the proposed adoption, and a *sapinda* who is called upon to exercise his discretion ought to be guided not by reasons personal to himself but ought to act with a deliberate consideration of what is for the benefit of the family especially that part of it which the widow represents. A refusal of consent by a *sapinda* on the ground that by giving his consent he would forfeit the right to property which he would otherwise get is an improper refusal and does not affect the validity of an adoption made in spite of such refusal but with the consent of remoter *sapindas*.

Specific Relief Act (I of 1877), sec. 42.
K. P. RAMA KRISHNA PALLAI *v.* P. P. NARAYANA PALLAI, I. L. R. 39 Mad. 80.
A declaration that a valid personal contract subsists between the Plaintiff and the Defendant is not a right to declare a title to a legal character or a title to right to property and sec. 42 does not contemplate a suit for such declaration. Sec. 42 is not exhaustive as regards the circumstances under which declaratory suits can be maintained.

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Correspondence.

THE GOVERNMENT OF INDIA (CONSOLIDATION) ACT AMENDMENT BILL.

TO THE EDITOR, "CALCUTTA WEEKLY NOTES."

Sir,—An "explanation of the facts in connection with" the proposed cl. (*d*) of sec. 84 of the Government of India Act of 1915, emanating from Simla, and, apparently, from an official source, has been published in the newspaper press. It says:—

"In consequence of this (*i.e.*, sec. 65 of the Government of India Act of 1858), the Secretary of State up to the time of the recent decision of the Privy Council in the *Moment* case was held to occupy practically the same position towards the individual in India in the matter of liability to be sued in the Civil Courts as is occupied by one individual in India towards another individual. The decision in the *Moment* case changed this by interpreting the law to mean that while legislation passed subsequent to the mutiny may affect the rights of one individual against another individual, it is void in so far as it may affect the rights of the individual against the Crown."

I have read the decision in *Moment's* case (see 17 C. W. N. 169) again and again, and fail to find a single passage in the judgment of the Lord Chancellor which lends

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Defendant and
ole that the Secretary of State, even
Crown, is to be in no positio
om that of the old East India Company.
question before their Lordships is not
procedure. It is whether the Govern-
f India can by legislation take away the
right
case involving a right over land. Their Lordships have come to the clear conclusion that the language of sec. 65 of the Act of 1858 renders such legislation *ultra vires*."

The author of this explanation is fair enough to admit that, " in the *Moment* case itself, this decision did substantial justice since it rendered void a somewhat ill-considered provision of a local Burmese Act which had deprived the Burmese Civil Courts of jurisdiction against the Crown in suits brought by private individuals in regard to land." And he is apparently prepared to concede that if it had done *only* that, there would be no case for upsetting the decision. But, to his inspired vision, it appears that " The ruling of the Privy Council does not stop here, but has certain (*sic*) wider results of a clearly anomalous nature. For example, it would enable an individual to sue the Secretary of State on the strength of an unregistered document on which the same individual could not sue anybody else, the reason here being that the Registration Act which regulates this matter was not in force in the days of the East India Company."

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mitted by law, *viz.*, by a regis-
document.

his is not all. The writer conjures up
other anomalies which he is unable to
r he proceeds to say that "if this were
to continue, all kinds of other anomalies
..... follow since decisions arrived at on the law as previously interpreted would become upset." Of the proposed cl. (*d*) he says : " Its only effect is thus (!) to restore the Crown in India to the position it occupied up to the time of the judgment in *Moment's* case." He concludes by assuring the provinces (all except Burma) that, so far as they are concerned, the amendment will leave " matters exactly as they have been in the past " (!). As to Burma, where (according to him) it may have the effect of " rehabilitating " the Burma Act (!) (Burma Act IV of 1898, which was declared *ultra vires* in *Moment's* case and which therefore, until re-enacted under more favourable auspices, is quite dead) the Burma Chamber of Commerce and others in Burma are counselled " not to object to the amendment which is necessary in order to prevent general public inconvenience, but to obtain an amendment of the objectionable provision in the local Burmese Act concerned."

Yours etc.,
" Lex."

Calcutta :
Vakils' Library,
29th May 1916.

DAMOO SAHU *v.* JITAN DUSADH.

extraordinary course, alth[illegible] he knew that the servant was de[illegible] the accused under sec[illegible] Criminal Procedur[illegible] to have been of opinion tha[illegible] trate had no jurisdiction to [illegible] of acquittal in the circumst[illegible]s. In second case, a complaint had been made of offences under secs. 448, 352 and 323 of the Indian Penal Code, but the Magistrate had summoned the accused to answer only a charge under sec. 352 of the Indian Penal Code. The original complainant having died a nephew of deceased asked the Magistrate to him to go on with the case. trate allowed the petition on the apparently, that the accused had b[illegible] guilty of contempt of Court. The lear[illegible] Judges who disposed of this case [illegible] "The case is one under sec. 352 Indian Penal Code which is compo[illegible] able and we see no reason for the substi[illegible] tion of Bisseshur in place of the deceased complainant. An order under sec. 247 ought to have been passed by the Magistrate on the failure of the complainant to appear at the hearing of the case, and sec. 247 empowers the Magistrate to acquit the accused person, unless for some reason he thinks proper to adjourn the case to some other day." They then went on to hold that the reason given by the Magistrate for proceeding with the case was not sufficient and they set his order aside. It is open to doubt whether sec. 247 of the Code was intended to apply to such a case as this. It seems to apply primarily to the case of a complainant who is alive, but does not appear. The closing words of the first paragraph of the section seem to suggest that the case should be adjourned in order to enable the complainant to appear. If sec. 247 does not apply at all to a case of this kind, there was nothing to prevent the Magistrate [illegible]ing on with the proceedings. [illegible] which the Magistrate si[illegible] decided to go on with the proceedings. The District Magistrate points out in his reference that the offence complained of is an offence against [illegible] tranquility, and he s[illegible] registration w[illegible] contemplated [illegible] the [illegible] a who profess[illegible] dismisse[illegible] s the complainant [illegible] taken action. It [illegible] before us ought not to interfere with an acquittal except on appeal by the [illegible] Government. There is no doubt not only [illegible] practice of the High Courts has been to refuse to interfere in revi[illegible] acquittals except for special [illegible] present case if the Magis[illegible] had exercised his discretion and had given reasons for refusing to go on with the case, we might have been disinclined to interfere, but he seems to have thought that he had no option but to acquit the accused. It is a mere accident that the present case was instituted on the complaint of Jitan. It is a case of considerable importance involving the peace of the district, and under the circumstances we think that we ought to set aside the order of acquittal. The Sub-divisional Magistrate's order is accordingly set aside and he is directed to proceed with the trial of the case.

A. K. R. *Order set aside.*

PRIVY COUNCIL.

[Appeal from Bengal.]

Lord Shaw. | Jatindra Nath ... and other...
Sir John Edge. |

...eard, 15, 16, 17 and 20, March. Judgment, 28, March. | Srimati ... Deye Debi and ... ors., Respondents.

...erformance, suit for—Agreement to as... executory or executed—Civil ... XIV of 1882), sec. 232—...writing—Refusal to take ...g time-barred—Di... to intending assignee's.

Defe... had agreed to pur... from the Pl... a mortgage-dec... fused to pay the agreed price an... an assignment of the decree ... decree became incapable of ... owing to the bar of limitation.

Held—*That the decree being ... Plaintiffs were asking for ... specific performance of an agre... which they were unable to perform ... the suit was not maintainable.*

That as the decree had not been transferred by assignment in writing to the Defendant, (as was required by sec. 232 of the Code of Civil Procedure of 1882), the Defendant could not by any application to the Court have kept alive the decree, and the High Court was wrong in holding that it was the Defendant's duty to keep it alive.

Appeal from a judgment of the Calcutta High Court (Sir Francis Maclean, C. J., and Harington and Fletcher, JJ.), dated the 1st March 1909, reversing a judgment of Chitty, J.

The Plaintiffs sued for specific performance of an agreement to sell a decree. The Plaintiffs having allowed the decree to become barred by limitation, Chitty, J., dismissed the claim.

The Appellate Court reversed that decision, holding that it was not the duty of the vendor to keep the decree alive, inasmuch as the decree had become in equity the property of the vendee.

The f... the case are fully stated in ...ment of Chitty, J. :—

...ere not ... Prokash Misser who ... properties wa... Durbhanga and ... Monghyr raised money on these properties. In 1877 he mortgaged his Durbhanga property to one M. J. Wilson by three deeds of 23rd February, 3rd April and 25th April for sums aggregating Rs. 60,000. There were further charges on the property in favour of the Messrs. MacIver, who are referred to in the correspondence as the Kuthial Sahebs. The ...s of these charges are not forthcoming, but it appears that in 1895 the debt to ...hial Sahebs was about Rs. 10,000. ...n April 1890 Nursingh Prokash ...sser executed two mortgages of his ...bhanga and Monghyr properties ...er in favour of Lala Bangsa Gopal ...y for an aggregate sum of ...18,000. Finally on 27th January 1891 Nursingh Prokash Misser mortgaged his Durbhanga and Monghyr properties to Bhupendra Nath Bose for Rs. 2,000.

Early in 1892 Bangsa Gopal Nandey filed a suit No. 87 of 1892 on his mortgages in the Court of the Subordinate Judge at Monghyr. On 26th December 1892 he died. Meanwhile Bhupendra Nath Bose had also filed a suit on his mortgage in the Mozufferpore Court and on 19th June 1893 obtained a decree. A month later, on 28th July 1893 [the date is wrongly given in *Traylokha Nath Bose* v. *Jyoti Prokash Nandi* (2)] a decree wass passed in suit No. 87 of 1892 for Rs. 24,588-15, interest and costs. On 20th August 1893 the Will of Lala Bangsa Gopal Nandey was proved by the executors Sajani Kanta Chatterjee and Jagabundhu Mitra and the executrix the Maharani of Burdwan. On 13th January 1894, Bhupendra Nath Bose

(2, I. L. R. 30 Cal. 761 (1903).

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obtained an order for the sale of the Dubhanga property comprised in his decree and on 20th June 1894 he purchased that property in execution [illegible] 1894, Wilson obtained a decree [illegible] Mozufferpore Court on his three mortgages. On 25th February 1895, Bhupendra Nath Bose obtained symbolical possession of the Durbhanga property so purchased by him, and two days later Wilson took out an order for sale of the same property in execution of his decree. A few days after, on 2nd March 1895, an order for sale was made in suit No. 87 of 1892. The sale under this order was first fixed for 22nd April 1895, then for 7th May 1895 and then for 10th June 1895. This sale was to be of the properties mortgaged to Lala Bangsa Gopal Nandey. It was lastly postponed to 15th June 1895 when no sale was held and the execution proceedings were struck off for [illegible] decree. The 21st of June 1895 was fixed for the sale of the Durbhanga property in execution of Wilson's decree. At this date there was due to Wilson about Rs. 77,000, to the Kuthial Sahebs about Rs. 10,000, to the executors of Lala Bangsa Gopal Nandey on their decree in suit No. 87 of 1892 about Rs. 28,000. It was known that Trailokya Nath Bhose intended to bid and if he possibly could to secure the properties for himself and his brothers Bhupendra Nath Bose and Upendra Nath Bose. The correspondence reveals much anxious discussion among the executors as to what course they should follow. Eventually they determined to bid at the sale, at any rate, up to such a figure as would include their own decretal amount. They had about Rs. 20,000 available, so they borrowed a further sum of Rs. 15,000, and sent Kedar Nath Aditya their Naib Dewan to Mozufferpore with Rs. 35,000 which sum would be sufficient for the 25 per cent. deposit on a sale price of Rs. 1,40,000. Guru Das Chatterji the Dewan of the executors was also at Mozufferpore. Kedar Nath [illegible] Bhose.

The executors were not anxious to purchase the property, but at the same time they were unwilling to let it go at a figure which would leave little or nothing in satisfaction of their own [illegible] cordingly welcomed the [illegible] registration was decree to Trailokya [illegible] who professed securing a certain sum [illegible] sacrifice of a portion of the [illegible] ment.

It was argued for the [illegible] that under the agreement of 20th June 1895, Trailokya Nath Bhose purchased for Rs. 19,000 not only the Plaintiffs' mortgage decree but also their abstention from bidding at the sale on the 21st. I can find no direct evidence of this having formed any part of the agreement and it cannot, I think, be unreasonably inferred from what took place. No doubt in the result the executors did abstain from bidding. They were not, as I have said, desirous of doing so unless it were to secure their own debt. The sale of that having been arranged there was no possible object in their competing at the auction. No doubt, also, Trailokya Nath Bhose by the purchase got rid of one possible competitor. It is, however, incorrect to say that he *thereby* secured the property at a very low price. The sale was a public one, and any one could bid. The executors indeed so far as I can see were not in any way precluded by their agreement from bidding themselves, although of course it was no longer worth their while to do so. Under these circumstances the agreement of 20th June 1895 was entered into at Mozufferpore by Trailokya Nath Bhose on the one side, and the executors acting by Guru Das and

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Kedar Nath on the other. On the next day, 21st June 1895, the sale took place and the property was knocked down to Trailokya Nath Bhose [illegible] JOHN [illegible].

[illegible] property mortgaged to Lala Bangsa Gopal Nandey had been sold for the realisation of Government Revenue and a sum of Rs. 1,016-13 became payable to the exec[illegible] respect of that land. This sum th[illegible]thdrew on the 10th July 1895.

On 15th Janu[illegible]1896 a suit (No. 9 of 1896) was filed in the Court of the Subordinat[illegible]e at Burdwan for the administration of [illegible]angsa Gopal Nandey's estate. The Plaintiffs were his minor sons and the Defendants the executors and executrix. It is however admitted that the suit was really the suit of the Maharani, who was then at variance with the co-executors on several points. *Inter alia* the sale now in question was impugned as a breach of trust, (see para. 18 of the plaint, para. 8 of the Maharani's written statement and para. 7 of the written statement of the executors). On 15th December 1896 an order was made in that suit for the appointment of a Receiver and that order was confirmed on appeal in April 1897. On 28th May 1897, Rudra Prosonno was appointed Receiver in that suit. On 6th April 1898 the parties came to terms, the suit was settled and the estate was handed over to the Receiver by the executors. On 21st May 1898, Karuna Nidhan Mukherji was appointed guardian of the persons and property of the minor sons of Lala Bangsa Gopal Nandey with power to sue. On 8th June 1898 an application was made to the Subordinate Judge at Monghyr for execution of the decree in suit No. 87 of 1892, the decree now in question. This application was struck off on the 11th August 1898. Meanwhile on 20th June 1898 the present suit [illegible] been filed. On 15th July 1899 another [illegible]plication was presented for execution [illegible]decree. It was in respect of this l[illegible]ation that the appeal was prefer[illegible]igh Court and disposed of on 6th[illegible] 1903, this Court being of opinion that the application of 8th June 1898 was out of time. *Traylokha Nath* v. *Jyoti Prokash* (2). It follows therefore that the decree was barred at the time when the present suit for specific performance of the agreement to purchase it was filed.

The claim in the present suit is (1) that the Defendants be directed to pay to the Plaintiffs the sum of Rs. 19,000 on their (*i.e.*, the Plaintiffs) executing a proper deed of assignment assigning to the Defendants the decree in suit No. 87 of 1892, (2) that in the alternative (presumas damages) the Defendants be [illegible] to pay to the Plaintiffs the sum [illegible]24,588-15 the amount of the said [illegible]ee and interest.

A long discussion took place as to what class of property this mortgage-decree belonged. It was admitted that it was not immoveable property; and for that there is direct authority [see *Gous Mohamed* v. *Khawas Ali Khan* (3) and *Raj Nath Lohea* v. *Benoyendra Nath Palit* (4)]. The cases therefore cited by the Defendants' counsel as to the Trusteeship of a vendor for his purchaser do not apply. If it be not immoveable property it follows that it must be moveable property [see Gen. Clauses Act, 1868, sec. 2, (5), (6) and Gen. Clauses Act, 1897, sec. 3, (25) and (34)].

Plaintiffs' counsel argued that it must in that case necessarily fall within the definition of "goods" in sec. 76 of the Indian Contract Act and be governed by

(2) I. L. R. 30 Cal. 761 (1903).
(3) I. L. R. 23 Cal. 450 (1896).
(4) 6 C. W. N. 5 (1901).

the provisions of Chap. VII of that Act. No doubt the words of the section are general and appear to support such a contention, but it is clear that the provisions of the Code cannot be applied without reservation to all kinds of moveable property. Moveable property, which I take to be synonymous with "personal property" in England, is divided into two main classes *choses in possession* and *choses in action*. There are numerous kinds of incorporeal personal property to which many of the sections in Chapter VII could not possibly apply, *e.g.*, the sections as to the passing of the property, delivery and so forth. The distinction has been observed in the Sale of Goods Act, 1893, where "goods" is defined as including "all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money." To take the case of a decree: the law recognises only two modes of transfer, by assignment in writing, or by operation of law. This is plainly indicated by sec. 232 of the Civil Procedure Code. Where (as in this case) it is intended that there should be a registered deed of assignment and that the price should be paid on the execution of such deed, and that deed is absolutely necessary to effect the transfer, how can it be successfully argued that the property in the decree passed immediately on the execution of the agreement to sell? If it did not, what were the obligations of the decree-holders? I am clearly of opinion that they were bound to keep the decree alive, at least if they desired to enforce performance of the agreement. No one else could do so. The intending purchaser would have no *locus standi* to apply to the Court in execution. That was within the decree-holder's sole control. They chose to allow the decree to become time-barred, and I entirely fail to see how they can force a useless and depreciated decree upon the purchaser. It was argued that the decree had a value as waste paper or that it obtained specific performance for the suit. It is unnecessary to say how far this is true and under what circumstances a suit could be brought upon the decree. It might well be that the assignee would find his suit barred by the provisions of sec. 244 Civil Procedure Code. The fact however remains that the character of the decree had been so changed for the worse when the suit was filed, that the purchaser could not be compelled to take it as it was not what he had agreed to buy.

The Appellate judgment was as follows:—

"The learned Judge held that upon the agreement for sale the vendors did become trustees for the purchaser and that the risk of the destruction of the property agreed to be sold was with the vendors until actual payment of the purchase price.

In our opinion after the execution of the contract the vendors did become trustees for the purchaser and the decree in equity became the property of the purchaser subject to his obligation to pay the purchase price. Moreover the learned Judge has ignored the fact that the application to execute the decree was opposed by Trailokya Nath.

We think it would be lamentable in these circumstances to allow this suit to fail simply by reason of the fact that the decree cannot now be enforced against the Monghyr properties which are of very small value.

There can be no doubt that the agreement was entered into by the Defendant in order to induce the executors to abstain

from bidding at the sale of the Durbhanga properties and on the faith of the agreement the executors [illegible] JATINDR[illegible] by 1897 [illegible] old it ca[illegible] doubted if Trailokya Nath had [illegible] the executors to take any step to keep the decree on foot they would have done so. They owed no further duty to the purchaser.

LORD SHAW.
JOHN EDGE.

Tra[illegible]a Nath has had the benefit of the real and substantial part of the agreement and it seems to us that if he had accepted the assignment in May 1897 when the Maharani offered to join, he would have got a perfectly good decree against the Monghyr properties which, as we have already said, are of very small value. We think therefore that Trailokya Nath was not entitled to evade agreement on the ground that the decree has become barred with respect to the Monghyr properties, [illegible] more especially so when he induced [illegible] executors to refrain from bidding at the sale on the faith of the agreement."

Mr. L. DeGruyther, K.C., (and *Sir William Garth*) for the Appellants submitted that the decision of the first Court was right. It was the duty of the vendor to keep the decree alive, but he allowed it to become time-barred. The Appellants were always ready and willing to take the conveyance, but the vendors failed to execute it. When the decree became time-barred it was waste paper, and the Appellants naturally refused to accept it. The conduct of the vendor made completion of the sale impossible. Specific performance is not enforced if the subject-matter of the agreement is destroyed or materially altered by vendor's default. *Lysaght* v. *Edwards* (5) and *Wilson* v. *Clapham* (6). Lewin on Trust (1891) 148.

(5) 2 Ch. D 499 at p. 506 (1876).
(6) 1 Jacob & Walker 36 (1819).

If the decree sold be immoveable property, no title could pass to the vendor without compliance with the provisions of sec. 54 of the [illegible] of Property Act, 1882. If it be a [illegible] nection the effect would be the same under sec. 130. The vendee could not enforce the decree without an assignment in writing under sec. 232 of the Code of Civil Procedure, 1882.

Sir Erle Richards, K.C., (and *Mr. A. M. Dunne*) for the Paintiffs-Respondents submitted that the readiness and willingness of those representing the estate of Bangsa Gopal to carry out the agreement of sale had been established by the evidence. The vendee bought the decree really to get rid of the Plaintiffs' competition at the auction sale, and not with the idea of enforcing the decree. The Respondents did not bid at the sale thereby performing their part of the agreement. The fact that the decree became time-barred was immaterial. The vendor could not be put back into his original position which had been materially altered. The Court ought to look to the substance and not the letter of the contract. It was the vendee's duty to keep the decree alive.

Reference was made to secs. 13, 14, 19 of the Specific Relief Act, 1877, and sec. 56 of the Indian Contract Act.

Mr. A. M. Dunne submitted that in equity the purchaser became the owner of the decree, and from the date of the agreement it was his duty to keep the decree alive. The sale of a decree is a sale of moveable property. See General Clauses Act, sec. 2. The principles contained in secs. 76 and 93 of the Indian Contract Act applied. Sec. 232 of the Code of Civil Procedure did not prevent the application of equity. It recognised a transfer by operation of law, which included the principles of equity.

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Reference was made to *Hay v. Preston* (7) and *Holt v. Marshall* (8) and *Mr. DeGruyth* [illegible] cited.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal from the decree, dated the 1st March 1909, of the High Court at Calcutta, which in appeal set aside the decree, dated the 6th April 1908, of Mr. Justice Chitty, who had tried the suit under the original jurisdiction of that Court.

The suit was brought to obtain a decree for the specific performance of an agreement, dated the 21st June 1895, by which the original Defendant Trailokya Nath Bhose, now deceased, had agreed to purchase from the executors and the executrix (hereinafter referred to as the executors) of Lala Bangsa Gopal Nandey for the price of Rs. 19,000 a decree and all the rights appertaining thereto which the said executors had obtained on the 17th July 1893, against Pandit Nrisingha Prokash Misra on a mortgage. Mr. Justice Chitty dismissed the suit. The High Court in appeal made a decree for specific performance.

The appeal has been argued at considerable length, but the material facts upon which the suit and this appeal depend may be briefly stated. The decree which it was agreed that the executors should assign to Trailokya Nath Bhose was a decree for sale of certain immoveable hypothecated properties, which could also in certain events be executed against the person and other property of the Defendant to the suit in which it was made. Owing to the bar of limitation the decree for sale became incapable of execution on the 1st June 1898, and thereupon Trailokya Nath Bhose refused to pay the agreed price and to take an assignment [illegible] this suit for specific [illegible] fit to obtain specific perfo[illegible] executory agreement, for the comp[illegible] of which something remained to be done in order to put the parties in a position relative to each other in which, by the preliminary agreement of the [illegible]st June 1895, they were intended to be placed. As was pointed out by Lord Selborne, L. C., in *Wolverhampton and Walsall Railway Company* v. *London and North-Western Railway Company* (1), "the expression 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be placed." In this case what remained to be done was, on payment by Trailokya Nath Bhose of the agreed price, the transference to him of the decree for sale of the 17th July 1893. Such a transfer of the decree to Trailokya Nath Bhose could, by reason of sec. 232 of the Code of Civil Procedure, 1882, be effected only by an assignment in writing. On and after the 1st June 1898, the decree, as a decree capable of being executed, could not by reason of the bar of limitation be assigned to Trailokya Nath Bhose. It had become a dead decree: whereas the decree, whatever might be its value, which he had agreed to purchase, and which the executors had agreed to assign to him, was a decree capable of execution.

It has been contended on behalf of the

(7) L. R. 14 Ch. D. 297, 303 (1880): on app. L. R. 18 Ch. D. 1 (1881).

(8) 10 H. of L. 191 (1862).

(1) L. R. 16 Eq. 433 (1873).

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Respondents to this appeal [illegible] the duty of Trailokya Nath [illegible] was not [illegible] the new [illegible] doubted if Trailokya Nath [illegible] 1895 the executors intention which, in their lordships' opinion, cannot be maintained. As the decree had not been transferred by an assignment in writing to Trailokya Nath Bhose, he could not by any aplication to the Court have kept the decree alive.

The Respondents are asking for a decree for the specific performance of an agreement which they, on their part, are unable to perform. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court in appeal should be set aside with costs, and the decree of Mr. Justice Chitty should be restored.

The Plaintiff-Respondents must pay the costs of the appeal.

Solicitor: *Mr. G. C. Farr* for the Appellants.

Solicitors: *Messrs. Watkins* and *Hunter* for the Respondents.

B. D. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 40 OF 1914.

JENKINS, C. J. N. R. CHATTERJEA, J. 1915, 28, May. Judgment, 4, April.	KRISHNA CHANDRA BAGDI, Plaintiff, Appellant, *v.* SATISH CHANDRA BANERJI, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885)—Legitimate purpose and scope of—Governs relations of landlord and tenant only—Sec. 184, Art 3, Sch. III—Special limitation—Dispossession sufficient to deprive tenant of right of suit.

In determining what Art. 3 of Sch. III of the Bengal Tenancy Act means the purpose of the Act, which governs relations of landlord and tenant only, must not be left out of sight. It was not the design of the Act to deprive a tenant of the rights that he otherwise possess against a third person between whom and himself there was no relationship of landlord and tenant. It was only intended to deal with such rights as existed between landlord and tenant.

To deprive a tenant of his right of suit there must be a plain dispossession within the meaning of Art. 3 of the Schedule.

This was an appeal preferred on the 5th January 1914 against a decision of Babu Debendra Bejoy Bosu, Subordinate Judge of Burdwan, dated 27th September 1913, reversing a decision of Babu Sitanath Ghosh, Munsif of Katwa, dated 6th June 1912.

The facts will appear from the judgment of the lower Appellate Court which was as follows:—

"In this appeal the first question to be tried is whether the suit is barred by two years' limitation under the Bengal Tenancy Act.

The suit was for the declaration of the Plaintiffs' right to seven bighas of land which was alleged to have been held within a *jama* of Rs. 9 by the Plaintiffs as heirs of the recorded tenant Muchiram, and from which the Plaintiffs were dispossessed by the Defendants in Ashar 1312. The Plaintiffs also sued for possession. The Defendants pleaded that in execution of a rent-decree the *jama* was sold and purchased by one Ram Chand Roy from whom the Defendant purchased the same. They denied the Plaintiffs' right and possession and pleaded limitation. The lower Court deciding the issues raised in Plaintiffs' favour has decreed the suit. Hence this appeal by the Defendant.

KRISHNA CHANDRA BAGDI *v.* S[illegible]

The first question before me, as [illegible] said, is limitation.

It is admitted that t[illegible] *jama* sto[illegible] the name of one Much[illegible] The *dakhilas* produced by the [illegible]n shows that he paid rent up to 130[illegible] It appears that he died in 1309 or thereafter. The Plaintiff No. 1 is his son. It is alleged on the Plaintiffs' side that Muchiram had a brother named Bipra Das who had a share in the *jama* and who was succeeded by his son Umesh, who is dead and the Plaintiff No. 2 is Umesh's widow.

It however appears that some time after Muchiram's death, the landlords sued for rent due on this *jama* against one Jugal Mohini, who appears to be the daughter of Muchiram, and got a decree. It was in execution of this decree that the *jama* was sold and purchased by one Tara Chand Roy from whom the Defendant purchased the same. It is admitted by the Plaintiffs that the Defendant is in possession since the purchase in Ashar 1313. The Defendant's vendor was inducted into the lands in suit by the landlords either wrongly or rightly it does not matter. Therefore, though the landlords are not made parties in this suit, two years' limitation under the Bengal Tenancy Act is applicable in this case. The law is clear and I need not discuss it.

There are, however, certain facts to be noticed here. It appears that some time after the said auction sale, the landlord's *gomasta*, who gave evidence for the Plaintiff in this suit, colluded with the Plaintiff. So a rent-suit for this *jama* was brought (No. 1119 of 1910) against the Plaintiff No. 1 and decreed *ex parte* and the decretal amount was paid by the Plaintiffs. I have said that this was due to the collusion of the *gomasta*. For Exhibit B shows that the rent of the period 1313 to 1316 was paid by the Defendant; still for [illegible] the [illegible] said does

It is [illegible] decree (in suit [illegible] cution of which the *jama* was sold, brought by fractional co-sharers a[illegible] against a wrong person, and so, by the sale in execution of this decree, the *jama* did not pass. It appears that in the first suit Devendra, Gobesh and Sripati were Plaintiffs. In the second suit Devendra being dead, his heirs were Plaintiffs. Gobesh is a Plaintiff in the second suit also. Only in place of Sripati his minor brothers were added along with him. It thus appears that in this rent-suit 16 annas co-sharer landlords were represented and the suit was for the entire rent. Thus then this plea does not stand. If the suit was a fraudulent one, all the landlords were parties to the fraud and all of them helped to dispossess the Plaintiff.

In this view of the case I hold that the suit is barred under two years' limitation under the Bengal Tenancy Act. The Plaintiffs' suit must fail."

Babu Hira Lal Sanyal for the Appellant.

Babu Hemendra Nath Das for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This suit has been decided adversely to the Plaintiffs on the ground that it is barred by what is commonly called the special law of limitation, that is, the law of limitation as prescribed by the Bengal Tenancy Act. It seems to be overlooked at times in applying the provisions of that Act that it is one to amend and consoldiate certain enactments relating to landlord and tenant and that its preamble shows what was regarded as expedient was to amend

[illegible] BA[illegible]

and [illegible]

to lan[illegible]

Sec[illegible]

[illegible] to the

s[illegible] also the Chap.

[illegible] which it is a part is but a portion [illegible] this Code which governs the relations of land'ord and tenant. In determining what Art. 3 of Sch. III of the Bengal Tenancy Act means we must not leave out of sight the purpose and scope of the Act. It was not the design of the Act, as I understand it, to deprive a tenant of the rights that he otherwise possesses against a third person between whom and himself there was no relationship of landlord and tenant. It was only intended to deal with such rights as existed between landlord and tenant.

I am aware that very extended operation has been attributed to Art. 3 in one case* at any rate. But that is contrary to the general current of decisions and to the spirit of the Act. To deprive a tenant of his right of suit there must be a plain dispossession within the meaning of Art. 3 of the schedule. Bearing in mind what it was that the Act did intend, in my opinion there is no justification here for saying that there was such a dispossession as the learned Subordinate Judge in reversal of the Munsif has thought fit to find. Therefore his decree must be set aside and the case must go back to the lower Appellate Court in order that it may there be determined on the merits apart from the special law of limitation which has no application.

Costs will follow the result.

S. C. M. *Case remanded.*

* *Aminuddin* v. *Ulfatunnissa*, 13 C. W. N. 103 : s. c. 9 C. L. J. 131 (1908) —REP.

[illegible] BANERJI.

[illegible] APPELLATE JURISDICTION.]

[illegible] APPEAL FROM ORDER

500 OF 1914.

FLETCHER, J.
WALMSLEY, J.
1915,
28, June.

[illegible]MATULLA SARKAR [illegible]ors., Judgment-debtors, Appellants,
v.
RAN MAHMUD CHOWDHURY, Decree-holder, Respondent.

Civil Procedure Code (Act V of 1908), sec. 60 (c) —Exemption from attachment of agriculturist's house—Agriculturist, who is—Plea claiming exemption must be set up and proved by judgment-debtor

The agriculturist whose house is protected from attachment by sec. 60 (c) of the Code of Civil Procedure is one belonging to the class of common agriculturists that are known in Bengal, whose main source of livelihood is by cultivation, i.e., *the raiyat who tills the field.*

The plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment-debtor.

This was an appeal preferred on the 17th September 1914, against the order of M. Yusuf, Esq., District Judge of Zillah Rungpur, dated the 23rd May 1914, reversing the order of Babu Asutosh Mitra, Subordinate Judge of that place, dated the 7th March 1914.

The facts will appear from the judgment of the lower Appellate Court, the material portion of which was as follows :—

"The point for determination in this appeal is whether the judgment-debtors (Respondents) are "agriculturists," and as such are entitled to claim exemption from attachment of the six corrugated iron huts in execution of the Appellant's decree against them. It is clear from the evidence that the judgment-debtors are

ASHMATULLA SARKAR *v.* RAN M[illegible]

not mere cultivators, whose [illegible] of livelihood would be [illegible] cult[illegible] lands. One of the [illegible]gment-d[illegible], Asmat, was adm[illegible] an assistant *tehsildar* under hi[illegible]er. He further admits that there are two tenants under the judgment-debtors. He also says that the judgment-debtors were formerly jute-brokers. It is significant that judgment-debtors Nos. 2 and 3 would deny this though the former admits having sold Rs. 21 worth of jute last year. That the judgment-debtors are undoubtedly jute-brokers is, however, clear from the above reluctant admission of Asmat and the following evidence of the judgment-debtors' witness Kanchoo. 'Asmat sometimes purchases some jute and sells it.' Then again, the very fact that the judgment-debtors have no less than six corrugated iron huts besides another "sitting room" is sufficient to indicate that the judgment-debtors do not belong to that class of 'agriculturist' who alone can claim exemption from attachment of their dwelling-houses. The judgment-debtors may be cultivating some lands, but this is not their main occupation. They belong to the middle class and live in that style and earn their living partly as jute-brokers and partly from cultivation. In these circumstances the corrugated iron huts in question are not exempt from liability to attachment."

Babu Jitendra Nath Roy for the Appellant.

Babu Mohini Mohan Chackerberty for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is an appeal from a decision of the learned District Judge of Rungpur reversing the decision of the Subordinate Judge. The Appellants [illegible] the [illegible] The [illegible] only [illegible] is whether the [illegible] culturists and as such are [illegible] claim exemption of six corrugated [illegible] huts which have been attached in execution of a decree against them. Sec. 60 (*c*) of the Code protects from attachment in execution of the whole house occupied by an agriculturist, the common agriculturist such as lives in this country, that is, the raiyat who tills the field. The class of tenant-farmer in the western countries is practically unknown here. These alleged agriculturists in the present case have a small cultivation in the land; but apparently they have been engaged in the jute business and also as middlemen. The learned Judge has on the evidence before him found that these people are not agriculturists within the meaning of sec. 60 (*c*), C. C. P. In that the learned Judge seems to be right. The cases in the Bombay High Court show that the protection given under sec. 60 to the house of an agriculturist is, that his house should be maintained. It has been held that the protection applies only to the house occupied by an agriculturist in that capacity. I should doubt whether these alleged agriculturists who have got six corrugated iron huts belong to the class of common agriculturists that are known in Bengal, whose main source of livelihood is by cultivation. It has also been held that the plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment-debtor. The Judge in any case is entitled to hold that the judgment-debtors have not proved that they are agriculturists in the strict sense of the word as used in sec. 60 (*c*), C. C. P. The learned Vakil who has appeared

...(1918.

...been used in the ... Bombay and it seems to me to ... a fairly accurate definition of the class of agriculturists that is meant to be protected by sec. 60 (*c*), C. C. P. I think the learned Judge was, on the evidence before him, entitled to come to the finding as he did that these judgment-debtors were not agriculturists within the meaning of sec. 60 (*c*). The present appeal, therefore, fails and is dismissed with costs—one gold mohur.

WALMSLEY, J.—I agree.

S. C. M. *Appeal dismissed.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 99 OF 1914.

CHAPMAN, J.
ATKINSON, J.
1916, 16, April.

LAL GAJENDRA NATH SAHI DEO and ors., Plaintiffs, Appellants,
v.
LAL MATHURA NATH SAHI DEO and ors., Defendants, Respondents.

***Custom of primogeniture—Grants by the Maharaja of Chota Nagpur—Impartibility of the estate—Proof of custom, onus of*—Lex loci *custom of Chota Nagpur—Meaning of* putra pautradi.**

Certain grants of jaigirs *by the Maharaja of Chota Nagpur to a person related to him or to his descendants dating from 1768 to 1786 were in terms to the grantee and his sons and grandsons* (putra pautradi). *The family of the grantee had for several generations interpreted the words* "putra pautradi" *in the literal sense, namely, to mean, son and son's son.*

...TRY.

... at the time of these grants ...rds ... t acquired in Chota Nag- ... technical meaning which according to the Privy ... in LALIT MOHUN *v.* CHUKKUN LAL (4) *... y came to have by 1868 when used in Wills executed in Bengal, and the grants in this case did not convey an absolute estate unconditioned and unlimited.*

Per ATKINSON, J.—*That although as held by the Privy Council the words convey an absolute estate in lands descendable from generation to generation coupled with full power of alienation, these words of limitation may be controlled by custom limiting their scope and operation.*

PERKASH LAL *v.* RAMESWAR NATH SINGH (5) *relied on.*

Up to 1862, the lands granted descended regularly according to the rule of primogeniture to the eldest lineal descendant of the eldest son, when the last male descendant of that line dying leaving a widow, the Maharaja proceeded to resume the property whilst two brothers, the descendants of a younger son, claimed to succeed to the property. The disputes terminated in two deeds, one executed by the brothers agreeing that the widow should hold possession of the property as long as she lived upon payment of rent to the Maharaja and that they should take possession after her death, and the other by the Maharaja purporting on receipt of consideration to release the lands to the brothers in equal shares.

Held—*That as there was no failure of heir in the line of the grantee, the Maharaja had no right to resume and the* sanad *to the brothers was a nullity.*

Per CHAPMAN, J.—*That as the younger of the brothers had the right to succeed on*

(4) L. R. 24 I. A. 76: s. c 1 C. W. N. 387 (1897).
(5) I. L. R. 31 Cal. 561, 569 (1904).

LAL GAJENDRA NATH SAHI D

the death of the elder wi[illegible]out his concurrence to the [illegible] widow might hav[illegible] take future trouble.

Per ATKINSON, J.—*That the agreement was ineffective to alter or vary the impartible character of the property or to change its method of devolution.*

Per ATKINSON, J.—*The custom of primogeniture which prevails in Chota Nagpur in the case of grants made by the Maharaja whereby the property so granted is deemed impartible and descends to the eldest male heir by lineal descent applies with greater force in the case of grants of property made between the Maharaja and his relations.*

KOPILNAUTH *v.* GOVERNMENT (2) *referred to.*

Where a custom prevails in one branch of a family it is strong evidence to be relied on that it applies with equal force to another branch of the same family.

GARURADHWAJA PRASAD *v.* SUPERUNDHWAJA PRASAD (3) *relied on.*

The custom is recognised, not only as a family custom prevailing in the Maharaja's family, but also as the lex loci *custom of Chota Nagpur.*

This was a first appeal against the judgment and decree of Babu Sashibhusan Sen, Subordinate Judge of Ranchi, dated the 22nd December 1913, in suit No. 364 of 1912.

The appeal arose out of a suit for recovery of possession of a half share of 17 entire villages and 10 annas of one village named Badla described in Schedule A of the plaint after establishment of Plaintiffs' title thereto. The Plaintiffs also claimed possession by partition and mesne profits.

(2) 22 W. R. 17 (1874).
(3) 5 C. W. N. 33 : s. c. I. L. R. 28 All. 37 (P. C.) (1900).

of
Kamal
D.

dants
Sahi, the eldest son
Sahi,
who was the eldest son of the
said
Kamal Nath Sahi. The Defe
s
Nos. 4 and 5 were the sons of Bisnath Sa
a younger son of the said Gagan Nath Sahi. The Plaintiffs Nos. 2 to 9 claimed a half share of the share claimed by the Plaintiff No. 1 in the property in suit under a *kobala* executed by the latter in their favour, dated 4th July 1912.

The Plaintiffs alleged that the property in suit belonged to one Baijnath Sahi Deo, who was a descendant of the common ancestor of Plaintiff No. 1 and the Defendants Nos. 1-5; that Baijnath Deo died childless in Pous 1919=January 1863 leaving behind him surviving his widow Ananda Koer; that, after the death of Baij Nath, his widow got possession of his property and was allowed to remain in possession thereof by Gagan Nath and Srinath Sahi, the grandfathers of Defendants Nos. 1 to 5, and Plaintiff No. 1 under an *ekrarnama* executed by them in her favour on 15th Magh 1919=19th January 1863, agreeing that they would succeed to the property after her death; that afterwards the Maharaja of Chota Nagpur refused to recognise the title of Ananda Koer to hold the *jagir* property in dispute and wanted to resume it; that for this reason Gagan Nath and Srinath paid Rs. 1,000 as Nazaranna to the Maharaja and obtained a Wa Guzasht *potta*, dated 13th Bhado 1923 = 1866 A. D., each securing a half share in it; that Ananda Koer died in Bhado of 1964 = September 1907 and the Defendants Nos. 1 to 5 took possession of it and promised to give half of the profits to Plaintiff No. 1 and afterwards to divide it half and half between him and the said

[illegible] ATH SAHI DEO.

[illegible] Defendant No. 1 as the eldest [illegible] branch of the family [illegible] to the [illegible]ty in exclusion of the other members of the family; that Plaintiff No. 1 being a junior member of the family had no interest in it nor could claim partition of it; that the *ekrarnama* and Wa Guzasht mentioned in the plaint could not bind the Defendants; and that the *kobala* set up by the Plaintiffs was a mere colourable and collusive transaction creating no right under it. They also pleaded under-valuation, *res judicata*, estoppel, limitation.

[illegible] that Defendant [illegible] was the son of one Lachman Sahi who was the illegitimate son of Baijnath's grandfather; that he falsely claimed the property described in Schedule B of the plaint as given to his father for maintenance; that Lachman Sahi who looked after the affairs of Ananda Koeri, fraudulently got it under the protection of the manager under the Encumbered Estates Act as his maintenance grant; that Defendant No. 6 and his son Defendant No. 7 had no right to the property in suit and could not retain possession of any portion of it: that the incumbrances created in favour of Defendants Nos. 8-22 could not bind the Plaintiffs; that according to the Mitakshara Law governing the family of the Plaintiff No. 1 and the Defendants Nos. 1 to 5 and the terms of the *ekrarnama* and Wa Guzasht mentioned above, the Plaintiff No. 1 was entitled to half of the property in suit; and that he therefore brought the suit for possession after partition and for mesne profits.

The Defendants Nos. 1 to 3 filed a joint written statement. They alleged that the disputed villages formed an estate called the Badla estate which was an impartible estate, held by the eldest son of the senior branch of the family; that the estate was a Thakurai Gaddi to which the eldest heir succeed as Thakur according to the rule of primogeniture prevailing in the family and in Chota Nagpur; that the junior members of the family did not get any share in it but only maintenance and were called *khorposhdars*; that after the death of Thakur Baijnath Sahi Deo, his widow Ananda Koer was allowed to remain in possession as a special case; that after her

The Defendants Nos. 6 and 7 filed a joint written statement. They made a statement of their own right in addition to the pleas raised by the Defendants Nos. 1 to 3.

The Defendants Nos. 18 to 22 filed one written statement. The Defendant No. 18 filed another statement. They declared that their *zurpeshgi* right was valid.

The learned Subordinate Judge after framing several issues held that the *ekrarnama* created no title in favour of the executants, for they had none at that time and that the Wa Guzasht was a confirmatory *potta* granted to them who had no right to the property at the time it was executed and that the said *potta* cannot be the basis of Plaintiffs' title. He further held that the property in dispute formed an impartible estate subject to the custom of succession by rule of primogeniture and so he decided the issues against the Plaintiffs and dismissed the suit. The Plaintiffs thereupon preferred the above appeal.

Messrs. S. Sinha, Kulwant Sahai and *Rai Guru Saran Prosad* for the Plaintiffs-Appellants.

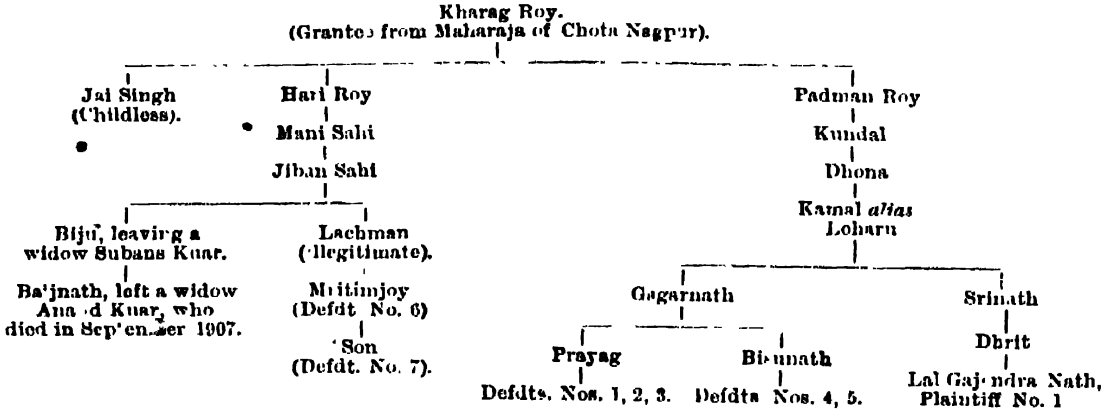
Mr. Sushil Madhub Mullik for the Defendants Nos. 1 to 5 Respondents.

LAL GAJENDRA NATH SAHI DE

Mr. Syed Takbruddin for th
No. 6 Respondent.

The JUDGMENT OF THE COURT was as follows :—

CHAPMAN, J.— This is an appeal by the Plaintiffs. The principal Plaintiff is Lal Gajendra Nath Shah Deo. The other Plaintiffs are transferees from him of portions of the interest claimed in the suit. The Plaintiffs claimed a half share of certain properties originally granted by the Maharaja of Chota Nagpur to Kharag Roy, and prayed for a partition an impa... the rule of primogeniture, ... ound governed the succession, Lal G... ra Nath, Plaintiff No. 1, was not en... to any share in the property, inasmuch as he is descended from a younger son of the junior branch of the family of Kharag Roy. In order to understand the facts of the case it is necessary to set out a portion of the genealogy of the family.



The facts are as follows :—

In the middle of the eighteenth century Kharag Roy came with his father and brothers to Chota Nagpur, and in the year 1765 a '*birt potta*' of a village in Chota Nagpur was executed in his favour by the Maharaja of Chota Nagpur, to whom he was related. The property was leased to Kharag with his son, grandsons, etc. '*Putra Pautradi*', (Ex. C1). In 1768 he was given another *birt potta* by the Maharaja, Ex. C, of 13 villages, and here again it was recited that his son and grandsons should enjoy the property. In 1786 a further grant (Ex. C2) was made by the Maharaja to the then surviving sons of Kharag Roy, Hari Roy and Padman Roy, and it was recited again that their son and grandsons should enjoy the property. A reference to the genealogical table will shew that Baijnath is the 4th in direct male succession from Hari Roy the elder son of Kharag Roy. Baijnath died in December 1862 childless leaving a widow named Anand Kuar. The properties, with the exception of certain properties which had been alienated for maintenance, came into the possession of the widow Anand Kuar. The Maharaja of Chota Nagpur then asserted the right to resume the property upon the ground, no doubt, of the failure of the senior male line of succession. At the same time, the two brothers, Gagan Nath and Srinath, who were descended from Hari Roy's younger brother Padman Roy, claimed to succeed to the property. These disputes resulted in the execution of two deeds, one Ex. 8,

...ATH SAHI DEO.

...and Srinath became en-
...n the death of Baij-
...re is ...gation in the plaint
that Anand Kua... ...idow of Baijnath
became possessed of th... ...perties by right
of inheritance, but the later allegation that
Gagan Nath and Srinath were entitled to
succeed is inconsistent with this. It is
in fact essential to the Plaintiffs' claim to
a half share by right of inheritance to say
that the widow did not inherit for Gagan
Nath and Srinath died in the widow's life-
time, and the Plaintiffs claim through
Srinath.

...the pro-
...as she lived upon payment of
...her to the Maharaja, and that they
...ld take possession of the villages after
...r death. The other deed (Ex. 23) was
executed by the Maharaja of Chota Nagpur
upon the 8th September 1866. The deed
is called a "Wa Guzasht Sanad" and
recites that on receipt of a thousand rupees
the Maharaja releases the properties in
favour of Gagan Nath and Srinath, half
and half. The Plaintiff No. 1 in the pre-
sent suit is descended from Srinath. He
claims Srinath's half share of the pro-
perties under this grant by the Maharaja
of the year 1866, and also by reason of the
right of inheritance. Defendants Nos. 1
to 3 are sons of Gagan Nath's elder son,
and Defendants Nos. 4 and 5 are descend-
ants of Gagan Nath's younger son. De-
fendants Nos. 6 and 7 are the son and
grandson, respectively, of an illegitimate
son of Jiban Sahi the grandson of Hari
Roy. Defendants Nos. 6 and 7 claims cer-
tain of the properties partly upon the
ground of long possession, partly upon the
ground of a "*mokurari*" grant, and partly
upon the ground that they were allowed to
retain the properties for their maintenance.
As I have said, the suit was dismissed
mainly upon the ground that the estate
was impartible, and that the rule of primo-
geniture prevailed in the family, so that,
in any event, the Plaintiff No. 1, who is
descended from a younger son of the junior
branch of the family, inherited no title to
any share of the property.

The written statement of Defendants
Nos. 1 to 3 also alleges that the entire
estate was inherited by Baijnath, and that,
as a special case, his widow was allowed
to remain in possession until her death,
but that the succession in fact remained in
abeyance. These Defendants say that
after the death of Baijnath's widow Defen-
dant No. 1 the eldest male heir of the
senior branch of Gagan Nath's family
entered into possession.

Defendants Nos. 4 and 5 did not con-
test and Defendants Nos. 6 and 7 support
Defendants Nos. 1, 2 and 3.

The only possible inference from the
pleadings of both parties and the evidence
of Plaintiff No. 1 is that the entire estate
(saving certain alienations made by way of
maintenance from time to time) descend-
ed to Hari's son and son's sons, and that
on failure of male issue in the direct line
from Hari, the property went to the then
existing male issue in the direct line from
Padman the younger son of Kharag.

The plaint alleges that the properties
sued for were the hereditary *jagirs* of Baij-
nath Sahi. The Plaintiff says in his evi-
dence that the entire property belonged to
Baijnath. The Plaintiff further alleges

It follows that the Maharaja of Chota
Nagpur had no right to resume on the
death of Baijnath, for there had not been
any failure of heirs male to the grantee
Kharag. The plaint in fact states that the
endeavour to resume was improper. In
so far, therefore, as the Plaintiffs' claim is

based upon the Wa Guzasht Sanad [illegible]
Maharaja in favour of Ga[illegible] N
Srinath in September 1[illegible]
case must fail, for the [illegible]ja no[illegible]
any right to resume [illegible] right to make
that grant.

It remains to consider whether the Plaintiffs can succeed by reason of right of inheritance. The Plaintiffs' case on this alternative ground appears to be that on Baijnath's death Gagan Nath and Srinath both at once inherited each a half share, and that the Plaintiff No. 1 succeeded to Srinath's half share by representation. I assume that the widow did not inherit, for otherwise the Plaintiffs' case must fail. The first question to consider thus is, whether, when the new line of succession opened upon the death of Baijnath, Gagan Nath had the right to succeed to the exclusion of Srinath, or whether both Gagan Nath and Srinath inherited each a half share. I proceed to consider the evidence in favour of the Plaintiffs' contention that Gagan Nath and Srinath both inherited. If they did not both inherit the Plaintiffs who claim through Srinath, have of course no case by right of inheritance. The Appellants' counsel relied, in the first place, on the terms of the leases of 1765 to 1786. The lease is given in each case to the lessee and his son and grandsons, etc. (*putra pautradi*). It has been held by the Privy Council that a modern Hindu Will executed in these terms in Bengal would now create an absolute estate unconditioned and unlimited. If this were the case here, the Plaintiffs, as members of an undivided Mitakshara family, would be entitled to a share, though not to a half share. But none of the Wills dealt with by the Privy Council are earlier than the year 1868. The ground of the decisions appears to have been that the words "*putra pautradi*" had by that time (1868) impossible [illegible]
arrival of our jurisdiction, [illegible]
Chota Nagpur, the words "*putra pautradi*" had acquired a technical significance. I have said, it is not the case of either party that the estate was governed by the ordinary rule of survivorship in the Mitakshara, as it would have been if the interpretation given to the words "*putra pautradi*" by the Privy Council were held to prevail, and "*optimus interpres rerum usus.*" The family have for several generations interpreted the words "*putra pautradi*" in the present case to mean, what in fact they literally mean, son and son's sons. The next point in favour of the Plaintiffs' contention is the fact that Gagan Nath and Srinath executed the joint deed in favour of Baijnath's widow in 1863, and subsequently accepted a joint Sanad from the Maharaja. But it must be remembered that even according to the Defendants' case Srinath would have succeeded in the event of Gagan Nath's death without male issue. It may be that it was with this in view and in order to save future trouble that Srinath's name was joined with Gagan Nath's in the deeds. It is common ground that in spite of the joint grant of some property to the two brothers Hari and Padman in 1786 the elder brother Hari's son succeeded in preference to Padman's. There is further the fact that the deeds of 1863 and 1866 were entered into under the pressure of a threat by the Maharaja to resume the estate. This is stated both in the plaint and in the written statement of Defendants Nos. 1, 2 and 3. The Plaintiffs next rely upon the fact that Defendants Nos. 1, 2 and 3 entered into certain transactions

NATH SAHI [illegible] NATH SAHI DEO.

[illegible] clear ad- [illegible]nath's family had any title to the property. A stronger inference in favour of the Plaintiffs can be drawn from the fact that in this transaction Defendants Nos. 1 and 3 allowed to be joined with them as co-[illegible] or Defendant No. 6, who derived his title to that particular property from a lease from Plaintiff No. 1. That is the sum of the main evidence in support of the Plaintiffs' case.

On the other hand in favour of the opposite contention that Gagan Nath succeeded to the exclusion of Srinath, is the fact that Gagan Nath put this claim to exclusive succession forward so far back as the year 1874 before the Judicial Commissioner of Chota Nagpur. His claim was held to be good (Ex. D); his suit, which was for recovery from the widow Anand Kuar, being defeated only upon the ground that he had entered into the agreement with her in 1863. The learned Subordinate Judge is wrong where he says that Srinath appeared in that suit; but the fact that Srinath did not appear does not do away with the evidence that Gagan Nath then successfully asserted a right to succeed to the exclusion of Srinath. As to the value of the oral evidence I see no reason to differ from the appreciation of it expressed by the learned Subordinate Judge. The other documents put forward have also been rightly estimated by him, for it must not be forgotten that Srinath had a right to succeed upon the death of Gagan Nath without male issue, and that therefore it was not unnatural for Srinath to join with Gagan Nath in signing papers and executing deeds. He was joint in mess with Gagan [illegible] I have found that Hari's son [illegible] to Kharag's estate in preference [illegible] younger brother Padman's [illegible] his w[illegible]hout objection. It is therefore pro[illegible] that Gagan Nath's family had the righ[illegible] succeed to the exclusion of Srinath's, and that this was so, is supported by a substantial preponderance of evidence. Moreover they are in possession. I therefore hold that the Plaintiffs' claim by right of inheritance must fail.

I have carefully considered whether the Plaintiffs could succeed upon the ground that the Wa Guzasht Sanad of 1866 was the result of a family arrangement which could be upheld upon the principle for which *Stapilton* v. *Stapilton* (1) is the leading authority. The story told in the judgment of the Judicial Commissioner in 1874 suggests that upon the death of Baijnath the Maharaja claimed the right to resume, and went so far as to attach the property. All the members of the family assembled and protested, but the Maharaja declined to make any concession further than a grant to the widow for her life. The result was that the brothers agreed to allow the widow to remain in possession for her life, and subsequently took a regrant from the Maharaja, the terms of which were drawn so as to avoid any recognition of any title in the widow while at the same time it discharged the Maharaja from the duty of maintaining her. But no such case was distinctly made in the plaint and I have with reluctance decided that the Plaintiffs should not be allowed to make it now. Indeed their counsel did not respond very readily to my suggestion that he should be permitted to do so. And I have not been uninfluenced by the indications that this litigation is a mere speculative indulgence

(1) 1 Atk 2 (1739).

LAL GAJENDRA NATH SAH[illegible]

on the part of Plaintif[illegible]. 2 t
whom Plaintiff No. [illegible] sold 1
interest.

I have scrupulously avoided deciding any question the decision of which did not appear to be absolutely necessary upon a proper interpretation of the pleadings. I have not, for instance, decided the question of the right of the widow to succeed. The pleadings and the evidence seem to suggest that the widow had no right to succeed, for both parties appear to plead that the grant was limited and conditioned, and the words "*putra pautradi*" if they are words of limitation at all would exclude the widow. I note that in the case before the Judicial Commissioner in 1874 the widow indirectly conceded that if her husband had not obtained a separate share by partition she had no right to succeed. But I express no opinion on the question, for it was not fought out. It is, in my view, important to avoid so far as possible making judicial pronouncements which are not absolutely necessary for the determination of a case as set out by the pleadings of the parties, more especially as such pronouncements tend in any event to precipitate and to fossilise legal conceptions which, in the case of Chota Nagpur, at any rate, are probably transitional and temporary. There is also a peril of an opposite but equally serious kind, I mean the danger of antedating modern ideas.

The case has not been well conducted on behalf of the Plaintiffs at any stage. I would dismiss the appeal with costs.

ATKINSON, J.—This is an action brought by the Plaintiffs for a declaration that they are entitled to an hereditary jagirdari right in one-half of the lands described and set forth in Schedule A to the plaint and that possession of the same may be awarded to them coupled with consequential relief. The Plaintiffs' claim is based

[illegible]
estate and tha[illegible]
the 8th September 1866 the [illegible]
No. 1 is entitled to a half share of su[illegible]
properties. The D[illegible] Nos. [illegible]
and 3 who are r[illegible]
deny that the [illegible]
other Plaint[illegible]
they seek [illegible]
lands; and the De[illegible]
that the lands set o[illegible]
the plaint are old ancestral proper[illegible]
impartible in character and descendable by the rule of primogeniture according to the custom which prevails in Chota Nagpur; and that by reason thereof the Defendant No. 1, being the eldest male heir in the lineal line of descent, is entitled to possession of all the properties enumerated in Schedule A to the exclusion of the Plaintiff No. 1 or the Plaintiffs Nos. 1, 2 to 9. The Plaintiff No. 1 claims a half share of the lands mentioned under the deed of the 8th September 1866; and the Plaintiffs Nos. 2 to 9 represent portions of such half share which the Plaintiff No. 1 assigned to them for value.

However the main contest is between the Plaintiff No. 1 and the Defendant No. 1; and the main question for decision in this case is whether the properties set forth in Schedule A form an impartible estate governed by the rules of primogeniture according to the custom prevailing in Chota Nagpur; or, whether the estate is partible as ordinary joint Hindu property governed by the Mitakshara Law. The main facts of the case are as follows:—

One Kharag Rai, the common ancestor of the Plaintiff No. 1 and the Defendant No. 1, came to the province of Chota Nagpur about the year 1760. He was a relation of the then Maharaja of Chota

NATH SAHI DEO.

...araja and his relations.
repo... (1902-1910) on the survey
and settlement ...e District of Ranchi,
compiled by Mr ... Reid, I. C. S., a
gentleman of high repute and authority,
I find this custom to be well-established
and recognized. At page 110, paragraph
253, speaking of the very tenures under
which the property in this suit are held,
he says as follows :—

" *Jagir* tenures are also impartible :
the law of primogeniture is the rule in
the Maharaja's family. The eldest son
therefore succeeds to the estate, the
younger brothers being entitled only to
maintenance grants." This custom has
always regulated the succession to landed
property among the various *jagirdars* and
other tenure-holders of one of the same
family as the chief. Not only is this so
but nearly all the tenure-holders who are
not of the same family have adopted the
same custom of succession to the exclu-
sion of the ordinary Hindu Law of inherit-
ance. The antiquity of the usage is
proved by the fact that it was recognized
by the Legislature as far back as the
year 1800. Again, I find that Col.
Dalton in the year 1875 says ' the
ordinary Hindu Law does not apply to
these estates (*jagirs*) as by custom and
under the provisions of a resolution passed
in 1800, primogeniture is admittedly the
lex loci ' and on page 112 of Mr. Reid's
report, in paragraph 256, he summarizes
the general custom as to the tenure of
all estates held from the Maharaja and
says " they all follow the law of primo-
geniture : the eldest son manages the
estate and the younger sons obtain
khorposh grants. In some cases the
latter pay a quit-rent to the elder brother
but they continue to hold the *khorposh*
grants even if the estate is transferred by
sale or otherwise alienated, but the

...ie village, *viz.*,
... Dansari and by a subsequent grant
... the same kind the said Maharaja
... this 17... to Kharag Rai
... Nos. 1... and 3 allowe... in the pergana
... with them as co-l... or. Deier... ry to notice the
... who derived his title to that part... harag Rai had
... perty from a lease... om Plaintiff... am Sahi,
That is the sum of the ... e Maharaja grant-
support of the Plaintiffs to Hari Sahi and
... Sahi. Hari Sahi was the eldest
son of Kharag Rai and Padam Sahi was
the second son. The Plaintiff No. ... d
the Defendant No. 1 are the descendants
of Padam Sahi in the direct line of succes-
sion, Hari Sahi's line having become
extinguished on the death of his great-
grandson Baij Nath who died childless.
The Defendant No. 1 is the eldest male
descendant of Gagan Nath and the Plain-
tiff No. 1 is the eldest male descendant of
Srinath who was Gagan Nath's second
brother; the father of Gagan and Srinath
being Lohra Sahi, the great grandson of
Padam Sahi. The properties comprised
in the three grants, which I have men-
tioned, from their respective dates have
descended without question to the eldest
male heirs of the common ancestor Kharag
Rai down to the year 1842, a period of 77
years. In Chota Nagpur the custom of
primogeniture does prevail in the case of
grants made by the Maharaja, whereby
the property so granted by him is deemed
impartible and descends to the eldest
male heir by lineal descent. This custom
was recognized in the case reported in
Kopilnauth v. *Government* (2). This
custom which is recognized in the province
in respect of grants of land made by the
Maharaja, applies with greater force in
the case of grants of property made

(2) 22 W. R. 17 (1874).

LAL GAJENDRA NATH SAHI [illegible]

khorposh grants [illegible] default of male b[illegible] ha[illegible] to be the prevail[illegible]tom a[illegible] no cases whe[illegible] estate is divided even though there were three or four brothers in each generation."

This being then recognized custom of the estate let us examine the facts of this case for the purposes of seeing how obediently was this rule of custom followed and obeyed by the Plaintiffs' ancestors in their dealings with the property now in question. From 1765 to 1842 all the granted properties [illegible] from Kharag Rai to Hari Sahi, Mon[illegible] and Jiban Sahi, each being in turn eldest male heir in direct line of succession to their common ancestor Kharag Rai. Biju Sahi was the father of Baijnath: Biju died prior to 1842 leaving Baijnath his only surviving legitimate son, a minor under the guardianship of his mother Mussammat Suba Koer. At Biju's death all the granted properties were vested in him, as the holder thereof, save as to such, if any, which were granted to the junior members of the family by way of maintenance, and this was so even though the grant of one mouza, namely, the village of Kena, was made in the year 1786 to Hari Sahi and Padam Sahi jointly. Lohra Sahi, the great grandson of Padman Sahi, being the descendant of the second son of Kharag Rai, challenged the right of succession by primogeniture to the estate in the year 1842 as between Musammat Suba Koer, the guardian of Baijnath and himself. By an agreement, dated the 3rd September 1842, Lohra Sahi abandoned his claim and admitted that the estate was impartible by the custom of the family and descended according to the law of primogeniture and agreed, in lieu of his then alleged claim for partition, to take portions of the [illegible] [illegible] [illegible]

[illegible] SAHI DEO.

[illegible]niture, the Judicial
[illegible]r, Mr. [illegible], in his judgment,
dated the 22nd May [illegible], held that the
estate sought to be [illegible]vered was im-
partible : he denied Gagan Nath's relief in
that action because he held that Gagan
Nath was bound by the agreement of the
23rd January 1863, and that as against him
the male heir, the widow was rightfully
and lawfully in possession of the property
under the provisions of that agreement.
This judgment is of vital importance,
and though it can not operate in any
[illegible] as *res judicata*, we are entitled to
[illegible] considerable weight to its authority,
[illegible]ing the judgment of a Court of compe-
tent jurisdiction which has never been
impugned. The widow died in 1907 and
she was predeceased by Gagan Nath and
Srinath, and, on her death, the eldest
male issue in the lineal line entitled to
succeed to the property as the heir of
Baijnath was the Defendant No. 1. The
Defendant No. 1 entered into possession
of the property as the male heir; and
claims that he is entitled to hold the entire
estate that is left after the portions
assigned by way of maintenance grants
have been deducted, and he assumes the
right and title of Thakur. Thus from
1765 to 1907, there has been only one
attempt to challenge the impartibility of
this estate and its method of succession
by the rule of primogeniture; and this
attempt failed in 1842. As against this
the question as to impartibility of the
estate and the custom of descent were
established by the judgment of 1874 of
the Judicial Commissioner of Chota
Nagpur. The line of descent by primoge-
niture, coupled with the impartibility of
the estate, has continued from 1765 to
1907, a period of 142 years. The widow's
period of possession does not operate to
defeat this conclusion. She was put

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[illegible]
[illegible]ice
on th[illegible] village
speci[illegible] Bansari and by a subsequent
se[illegible] the same kind the said [illegible]s
[illegible] 1765 [illegible] her
[illegible] from this tra[illegible] to which
[illegible]art Nos. 1[illegible]9 and [illegible]llowed stated in
[illegible] with them as co-l[illegible] or Defendant state is
[illegible] who derived his title to that particular in-
[illegible]perty from a lease [illegible]m Plaintiff *posh*
That is the sum of the import during
support of the Plaintiff Baijnath died
[illegible] was no failure of male heirs [illegible]
[illegible] Nath and Srinath, grandfathers [illegible]
the Plaintiff No. 1 and the Defendant
No. 1, were alive and in being—and the
succession of the family estate then, in
the events that happened, passed to Gagan
Nath as the eldest male heir; and thus
it appears clear that there was no failure
of male heirs to warrant the Maharaja in
claiming to resume possession of the pro-
perty as if in default of heirs. I shall,
however, revert to this aspect of the case
at a later stage. I pass by also for the
present the agreement of the 23rd January
1863 made between Gagan Nath, Srinath
and Musammat Suba Koer. Between
1842 to 1862, a period of 20 years, no
question arises as to the succession of these
ancestral estates. In 1862 the widow of
Baijnath seems to have been in posses-
sion of the ancestral property, not by
virtue of any inheritable right, but by
reason of some special license conferred
upon her, and she remained in posses-
sion until her death. In 1874, Gagan Nath,
the grandfather of the Defendant No. 1
who was a party to the agreement of the
23rd January 1863, claimed to recover
possession of the family property from the
widow of Baijnath who was then in pos-
session of the same. Relying on the
estate being impartible and descendable

LAL GAJENDRA NATH SAHI DEO

into possession by the male h
life; and never, from
of the widow in 190
tion that the estate
partible and did
succession by pri
when these two questions were firmly established by the judgment of Mr. Davis. The documents and the admitted facts coupled with the oral evidence satisfy me beyond doubt that this estate is by custom impartible and follows the line of succession by primogeniture. In my opini
the custom alleged in this case by
Defendant No. 1 has been proved to
satisfaction to be a custom invariable,
tain, continuous and ancient. The o
evidence is conflicting, but on a full consideration of all the evidence I incline to the opinion that the oral testimony adduced by the Defendant No. 1 is more reliable and trustworthy and consistent with the facts and the history of this case than the evidence adduced by the Plaintiffs. The onus is on the Defendant to prove the custom he relies on. I think he has done so; and the Privy Council have laid it down that where a custom prevails in one branch of a family it is strong evidence to be relied on that it applies with equal force to another branch of the same family *Garuradhwaja Prasad* v. *Superundhwaja Prasad* (3). I think the custom alleged in this case prevails in all estates granted by the Maharaja of Chota Nagpur; and every authority I have been able to refer to recognizes this custom, not only as a family custom prevailing in the Maharaja's family, but also as the *lex loci* custom of Chota Nagpur.

As to the agreement of the 23rd January 1863 made between the widow of Musammat Suba Koer and Gagan Nath

(3) 5 C. W. N. 33: s c. I. L. R. 23 All. 37 (1900).

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to bargain with; he was not the male heir entitled to succeed—he had at best only a *spes successionis* in this property. His claim to be jointly entitled to succeed with Gagan Nath was, as I have stated, by custom of the family unsustainable. If this agreement had any vitality it could only bind the parties to it; and could not affect or fetter the rights of the reversioners. The agreement of the 23rd January 1863 has therefore no operative legal effect to alter or vary the impartible character of this property or to change its method of devolution; and so far as it is relied on by the Plaintiff to support the theory of partibility of the estate, it is valueless, being grounded on mistake; or alternatively at best as an admission by persons whose admissions cannot bind or defeat the legal and legitimate interest of reversioners whether in existence at the time or thereafter to be born.

The next question that arises is as to the grant of the 8th September 1866 made by the Maharaja to Gagan Nath and Srinath jointly of all the same lands contained in and granted by the three original grants of 1765, 1769 and 1786. After the death of Baijnath childless, the Maharaja con-

...NATH SAHI DEO.

...1. Manifestly there was no ...63 or 1866 to justify ...right o... part of the Maharaja ...possessi... the property in dispute, because there w... then in existence lineal male heirs entitled to succeed to the ancestral estates in accordance with the custom which we find to have been so conclusively established.

It therefore becomes unnecessary for us to decide the question as to whether or not the widow of Baijnath on his death became entitled to an estate of inheritance in the ancestral property. This issue is not raised specifically by the pleadings; and I deprecate deciding points not raised, and unnecessary for the purposes of the decision of the particular case before us. I therefore refrain from considering the applicability of the decision of the Privy Council in the case reported in *Thakurani Tara Kumari* v. *Chaturbhuj Narayan Singh* (6), and for the reasons given, it is unnecessary to do so.

In my view the prior existing grants of 1765, 1769 and 1786 were in 1866 subsisting, valid legal grants and that the regrant dated the 8th September 1866 was a mere nullity. If, however, the grant of 1866 had any legal force or efficacy, I am of opinion it would operate as a graft upon the prior existing right and interest; and that the grantees thereunder, Gagan Nath and Srinath, would be constructively trustees for the lineal male heir or heirs of Baijnath.

The Plaintiffs' case is entirely based on this document of the 8th September 1866 In my view that document is in law and on the facts of this case a nullity and thus it follows that the Plaintiffs' case must fail. The question as to whether the Wa Guzasht regrant of 1866 could be supported on the principle recognized by

...nce dated the 22... the villa... the ... Dansari and by a subsequen... quen... the said ... title... Plaintiffs ... her ... to whom ... of ... fact that in this ... of words ... Nos. 1 and 3 allow ... limit... with them as co-... or Deih... he estate ... who derived his title to that part... perty from a lease ... *Khorposh* ... That is the sum ... support ... Baijnave been ... survey ... was no failure ... of survey an abs... Nath ... the lands descen... was ... Plair... ual estat... ...d thereon coupled ... full power of alienation ... *Lalit Mo...* ...ing ... *Chukkun Lal* (4). Authority, however, is ... to be found that these words of limitation may be controlled by custom limiting their scope and operation; and it is stated that in Chota Nagpur that custom ascribes to these words the meaning "so long as there are lineal male descendants entitled to inherit." *Perkash Lal* v. *Rameswar Nath Singh* (5). Custom conclusively proved and established can override or modify the ordinary law. Whether the case in *Perkash Lal* v. *Rameswar Nath Singh* (5) be good or bad law, it is immaterial to consider in the present case; but assuming that the words of limitation are controlled in Chota Nagpur by the custom alleged to exist there, in my opinion there was no failure of heirs within the meaning of that custom to warrant or justify the Maharaja's right of resumption. There was a lineal heir in existence entitled to succeed to the ancestral estates on the determination of the estate of inheritance vested in Baijnath, in the person of Gagan Nath, the grandfather of the De-

(4) L. R. 24 I. A. 76: s. c. 1 C. W. N. 387 (1897).

(5) I. L. R. 31 Cal. 561, 569 (1904).

(6) 19 C. W. N. 1119 (1915).

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REPORTS (*See* Index).

Birthday honours and the Bench and the Bar.

We note with pleasure that the birthday honours list this year does not ignore, as it did sometimes in the past, the Calcutta High Court Bench and the conferment of a Knighthood on the Hon'ble Mr. Justice Chitty, who is now a very senior Judge of the Court, is appropriate. The conferment of a K.C.I.E. on the Hon'ble Nawab Samsul Huda will also be welcomed by the legal profession. The public may be little aware of the useful work that he has done as a member of the Executive Council to the Government of Bengal, but the legal profession is aware that in many hard cases the prerogative of mercy has been very appropriately exercised by the Government, under his advice. Amongst his other duties he was in charge of the judicial portfolio and it is well-known that in cases where the aggrieved persons or the public memorialised the Government for reprieve or commutation of sentences, the Hon'ble Member used to give the matter a thorough judicial consideration and the orders passed by Government in such cases have, as a rule, met with public approval.

Rule to issue if one of a Bench of Judges is of opinion that it should.

Where a Bench is composed of two judges and one of them is of opinion that a rule should issue and the other is not, it has generally been the rule that the opinion of the senior judge should prevail. But, we believe, that there has

[illegible] was [illegible]
[illegible] contr[illegible] [illegible]
[illegible]ment on a [illegible]ding [illegible]wo of the judges were of opinion that no prejudice could result from the comment, and that in any case the report of the application would sufficiently prevent such prejudice. But the third judge thought that the rule *nisi* should issue. The Court thereupon ordered the rule to issue, being of opinion that where one judge thought that there was a *primâ facie* case to be answered, his colleagues should allow the rule to go. It goes without saying, however, that at the showing of cause the opinion of the majority on the fuller materials before them should prevail. The matter of procedure referred to above is noticed by our contemporary of the English *Law Journal* in its issue of the 22nd April last.

PAYMENT OF DECRETAL AMOUNT OUT OF COURT.

Questions of payment out of Court to the decree-holder have so often arisen for decision before our Courts that we have almost an overwhelming amount of case-law on the subject. But, unfortunately, in spite of this abundance of case-law, the troubles of a lawyer having to deal with such questions have remained as great as ever. The law on the subject has been laid down in Or. XXI, r. 2 of the Civil Procedure Code of 1908, which is a mere reproduction, with slight modifications, of the old sec. 258 of the Code of 1882. Sub-r. (*l*) of the old sec. 258 did not read the words "of any kind" after the word "decree" in the first portion thereof; conse-

has already made. So the judgment-
naturally take all possible care to
corded in Court. But the
decree-holder is on an altogether
reason of his omission
to certify, he runs the *immediate* risk, because
the non-recognition of payment means to him
a chance of being paid over again. There-
fore it is rather the decree-holder's interest to
omit to certify. It is for this reason that the
Legislature has imposed on him the imperative
duty of certifying the payment by use of the
word *shall* in sub-r. (1). The imposition of an
imperative duty naturally implies that some
penalty must follow its violation. The legis-
lature, while it enacted the section, must have
thought the necessity of making some provision to
prevent the decree-holder from falling off from
the said duty. It is perhaps with this end in view
that an amendment has been effected in the
said sub-r. (3). It is worth our while to notice
that from the old sec. 258 (which provided that
an uncertified payment or adjustment could
not be recognised *as a payment or adjustment
of the decree* by any Court executing the
decree), the words in italics have been omitted.
The presence of the italicised words in the old
section restricted the non-recognition of uncerti-
fied payments to a very limited scope: and
consequently under the old section it was main-
tained that there was nothing in the law to
prevent the recognition of an uncertified pay-
ment or adjustment for the purpose of prolong-
ing the period of limitation for applying for
execution under sec. 20 of the Limitation Act.
But the above italicised words have been
omitted from the last paragraph of the present
section (Or. XXI, r. 2). The object of such
omission, as the Select Committee itself puts it,
is to make it clear that the Court cannot recog-
nise a payment or adjustment which has not
been certified for *any purpose whatsoever*:
Therefore it now follows that an "uncertified
payment or adjustment" cannot operate to pro-
long the period of limitation for applying for
execution under the Limitation Act. This is
the sense in which we understood the section,
and which we thought was fully warranted by
the alterations in the last paragraph of the new
section. We were very confident that the fear
of limitation suggested in the last sub-rule
would act as a powerful check on the decree-
holder and lead him to perform the duty which
sub-r. (1) has so reasonably imposed on him.
But unfortunately the recent cases of *Eusuff-
zeman* v. *Sanchia*, 28 C. L. J. 390 and *Maha-*

bir Thakur v. *King-Emperor*, 23 C. [illegible] have considerably shaken our confidence in the position seeming to us a view of the [illegible] to overlook the significan[illegible] the ar[illegible] in the law and which, [illegible] apprehension, operate to the serious prejudice of the judgment-debtor. Of course, it will not be correct to say that the principles enunciated in these two cases are wholly novel or wholly unsupported by precedents. The case in 23 C. L. J. 390 thus lays down—"the decree-holder might either apply to certify payment before execution or might do so on his application for execution of the decree. Under Or. XXI, r. 2 of the Civil Procedure Code the certification need not be a certification on some day or at some time different from that on which the application for execution is made." This is of course not the first expression of judicial opinion as to there being no time-limit for the decree-holder to certify payment. The language of Art. 174 of Sch. I of the Limitation Act (1908) shows that the limitation prescribed therein applies only in the case of an application under sub-r. (2) of Or. XXI, r. 2. Consequently, it has been held in an old Bombay case (*Tukaram* v. *Babaji*, 21 Bom. 122) that the decree-holder can apply to have a payment certified *at any time*. This view may receive support also from Or. XXI, r. 11, cl. (2), which makes the specification of a previous payment or adjustment in an execution-application compulsory. So literally speaking we have very little to complain of in the 23 C. L. J. case when it lays down that "the decree-holder might either apply to certify payment before execution or might do so on his application for execution of the decree." The case of *Mahabir Thakur* v. *King-Emperor*, 23 C. L. J. 423, even goes a step further, and lays down that a decree-holder is not bound to certify in writing a payment or adjustment of his decree; it may be done orally either by himself or any person who can properly represent him. Absolutely speaking, the soundness of these cases cannot be questioned. But a real difficulty arises when we seek to apply them to sub-r. (3); sub-r. (3) suggests that there can be some such thing as an uncertified payment even in cases where a question of limitation-saving payment is involved; or in other words, there may be cases in which notwithstanding the factum of payment being established by proof, the Court may refuse to recognise such a payment as a means of saving limitation by reason of its remaining uncertified. But in view of the two cases above re-

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[illegible] ntage the [illegible] decree-h[illegible] break an[illegible]

imperative provision of law with impunity. A little reflection will make it clear that these two cases have wholly defeated the real purpose of the section and have completely frustrated the object of the newly-introduced amendments. So far as the cases under the old Code are concerned, we have very little to say against them, as they had not the amendments before them. But what purpose, we may ask, has been served by the new amendments if the law still is, as we find it, in the cases of 23 C. L. J. In this state of perplexity one might naturally ask—Is it possible to work out a compromise between these conflicting views? It is not an easy affair to get a ready answer to this question. We are however apt to think, that if we construe Or. XXI, r. 2, read with sec. 20 of the Limitation Act so as to maintain that so far as a decree is concerned, it is only a *certified payment* that can save it from limitation, a real solution of the present difficulty can be arrived at. If it could be so maintained, we could have asserted that in order to save limitation, not only the *payment* should be made before the expiry of the period of limitation, but the *certification* thereof should also be before the said period. But how it can be so construed it is for the jurists and Judges to say. However, we place this view before the profession, and would anxiously wait till some future time when the point in question may again come up before the High Court for argument and consideration and await the decision with interest.

A. C. GHOSE, M.A., B.L.,
Vakil.

Criminal ... ney-...

All. ...

A searc... ...e village ...ictate can only ... Bansari and by a subsequent ...nce. 165 of the same kind the said ... ... Lal ... that in this ... to ... of words and be ... Nos. 162 and 163 allowed ... limit- ... with them as co-l... or Deity ... he estate ... who derived his title to that party ... property from a lease ... That is the sum of the po... have been ... support of ... Baij... was no failu... ...vey an abs... ... Nadal estat... the lands descen... was ... ed may ... neration ... and th... ...ill ... the ... ...ng (if any) proof ... alienation behalf ... the prosecution and record their depositions. It is clear from the language of the section that the Court which records the proceedings under it must first of all record an order that in its opinion it has been proved that the accused has absconded and there is no immediate prospect of his arrest. Without such an order the evidence is inadmissible.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before THE MASTER OF THE ROLLS, LORD JUSTICE WARRINGTON and MR. JUSTICE BRAY. *Slingsby* v. *Slingsby*. 13th March 1916.

Held that the calling in by the Trial Judge of a sculptor, friend of the Judge, who gave it as his opinion that the child bore a strong resemblance or likeness to the father, was wrong.

This was an appeal from a decision of Mr. Justice Bargrave Deane who declared in favour of the legitimacy of the claimant, (see 19 C. W. N., p. 103n). The Appellate Court was unanimously of opinion that the claimant had failed to prove his legitimacy. In the course of his judgment, the Master of the Rolls said :—

I think it is desirable to state what in my view is the true position of the Court of Appeal in a case like this and what is our duty in the matter. I cannot do better than quote the language of Lord Lindley when Master of the Rolls in *Coghlan* v. *Cumberland* (1898, 1 Ch., 704) :—

"The case was not tried with a jury and the appeal from the Judge is not governed by the rules ... has to new trials after a trial and verdict ... Even when, as in this case, the appeal ... of fact, the Court of Appeal ... or at its duty is to rehear the ... the C... must consider the materials ... Judge ... such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong.

When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has in having seen and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses.

But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.

It is important to remember that there is no presumption of legitimacy in the present case. It is a pure question of fact whether the petitioner is a child of the body of Mr. Slingsby. The burden of proof undoubtedly rests upon the petitioner. We are in the same position as the learned Judge, except that he saw Mrs. Slingsby in the witness-box. All the material witnesses were examined on commission.

In the course of the discussion we have held that the calling in of a distinguished sculptor friend, Sir George Frampton, to give his opinion, was wrong. I do not say the learned Judge might not attach some importance to a likeness, which he thought he could himself trace, but, if it be evidence, it is of the slightest possible importance and cannot be set against the several facts which I have mentioned.

Sir Edward Carson, K.C., Mr. T. R. D. Wright, and *Mr. J. M. Gover* for the Appellants.

Messrs. Tindal Atkinson, K.C., Schiller, K.C., and *E. W. Hansell* for the Petitioner.

Mr. J. H. W. Pilcher for the Attorney-General.

B. D.

LAL GAJENDRA NATH SAHI DEO

the Courts of law and equity as [illegible] ment by way of family [illegible] to bind the reversion [illegible] was not before us, or even pressed by the plaintiffs' Counsel in this Court, or before the Subordinate Judge. If my view as to the legal validity of the regrant of 1866 be correct, then there was no legal or substantial claim capable of being in dispute between the parties at the time upon which any settlement by way of a compromise could operate; and in addition no such claim is suggested directly or indirectly any part of the Plaintiffs' plaint. Plaintiff No. 1 has elected to stand on the regrant of 1866 as forming the basis of his claim and by that election he must now stand or fall. One word as to the lease of the 15th April 1908 to Mr. Ambler. Reliance is placed on the recitals therein contained "we the declarants as heirs according to the Mitakshara Law" and "members of a joint Hindu family." These recitals are not inconsistent with the estate being impartible. They were relied upon to prove that the estate by admission was partible but an impartible estate may be and often is joint as the junior members of the family have a right of maintenance thereunto even though the property passes to the eldest male heir as the legal owner of the property. As to the claim of Plaintiff No. 1 to recover the property set forth in Schedule B to the plaint from the Defendants Nos. 6 and 7, I am clearly of opinion that he has failed to establish the charges of fraud that he has made or to establish in any sense his right to these properties or any part thereof. Consequently in my opinion the Plaintiffs' claim in this action should be dismissed with costs in all Courts.

A. K. R. *Appeal dismissed.*

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Art. 1. [illegible]

for transmission of decree and [illegible] same, if revivor—Issue of notice under sec. 248, Civil Procedure Code (Act XIV of 1882), if proper—Application or execution if to follow or precede transmission and to be made to which Court—Question whether decree capable of execution if may be determined on application for transmission—Order, if quasi judicial and may be delegated to Registrar—Civil Procedure Code (Act XIV of 1882), sec. 637.

The word "revivor" in Art. 183 to Sch. I of the Limitation Act does not mean the same thing as one or more of the matters which are mentioned in Art. 182, cls. (5) and (6) to Sch. I of the Act.

To constitute a "revivor" of a decree within the meaning of Art. 183 of Sch. I of the Limitation Act, there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it; and such determination must be by a Court or person duly qualified to make it.

An application for transmission of a decree is not an application for execution.

No notice under sec. 248 of the Civil Procedure Code of 1882 can be properly issued upon such an application. The notice required by that section must, when the decree has been transmitted, be issued

[illegible]ULL.

[illegible]Jookerjee, JJ., (sitting in [illegible]or ginal Side) on the 5th [illegible]April [illegible]de[illegible]

sent [illegible]
to [illegible]
of [illegible]ne village [illegible]ict
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[illegible]kind the said [illegible]he
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[illegible]Nos. 1[illegible]9 and 3 allo[illegible]tates limit-[illegible]
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he derived his title to that party[illegible]as[illegible]
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[illegible]Nandal estat[illegible]ence[illegible]Nand h[illegible]
[illegible]eneration [illegible]nd th[illegible]all t[illegible]ing
order of alien[illegible]perate a[illegible]or of the decree.

That looking into the substance of the matter there was no determination that the decree was capable of execution.

That to determine whether the decree was or was not capable of execution was a judicial act which could not be delegated to the Registrar under sec. 637 of the Civil Procedure Code of 1882.

Per MOOKERJEE, J.—*Sec. 230 of the Code makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution.*

The appeal was from an order of the 2nd August 1915 made by Chaudhuri, J., refusing to set aside an order for attachment, dated the 10th June 1915.

The material facts are set out in the judgments of Sanderson, C. J., and Mookerjee, J.

The substance of the application of the 1st June 1908 and the order thereon of the 30th June 1908 will appear from the judgments.

The appeal was first heard by a Court consisting of Sanderson, C. J., and

[illegible]*Jackson* (with him *Mr. B. N. Bose*) for the Appellant. There is no revivor under Art. 183 of the Limitation Act in this case. The notice issued by the Master under sec. 248, C. P. C. (1882) ought to have been issued by the Court to which the decree was sent for execution. That Court only can decide whether the decree is barred. Unless such a decision is there is no "revivor." *Kamini* v. *Aghore Nath Mukherji* (1). history of *scire facias* is reviewed fully in *Jogendra Chandra Roy* v. *Shyam Das* (2). It would be infructuous if I appeared on the notice which was wrongly issued on me. *Sripati* v. *Shamaldhone* (11).

[MOOKERJEE, J.—*Beni Madho* v. *Shiva Narain* (7).]

Refers to *Chutterpat Singh* v. *Daya Chand Marwari* (13). *Suja Hossein* v. *Manohar Das* (5) is rightly decided. Mr. Justice Norris deals fully with this question. This case has been followed. *Suja Hossein* v. *Manohar Das* (4) is wrongly decided. Mere order for transmission is not an order in execution. *Sundar Singh* v. *Doru Shankar* (21), *Jewandas* v. *Ranchordas* (22), *Khetpal* v. *Tikam Singh* (14) and *Sreenath* v. *Romesh Chandra* (19). The Registrar has no jurisdiction to issue execution in this way.

(1) 11 C. L. J. 91, 93 (1909).
(2) I. L. R. 36 Cal. 513 : s. c. 9 C. L. J. 271 (1909).
(4) I. L. R. 24 Cal. 244 (1896).
(5) I. L. R. 22 Cal. 921 (1895).
(7) 4 All. L. J. 405 (1907).
(11) 15 C. W. N. 661 : s. c. 15 C. L. J. 123 (1910).
(13) 11 I. C. 216 (1911).
(14) I. L. R. 34 All. 316 (1912).
(19) 12 C. W. N. 898 (1908).
(21) I. L. R. 20 All. 78, 79 (1897).
(22) I. L. R. 35 Bom. 103, 108 (1910).

CHUTTERPAT SINGH v. RAI BAHADU

The rules now are di[illegible] Hon.
Rules and Orders (191 [illegible] 204

Mr. B. L. Mitter [illegible] the Res[illegible]

This application is made under sec. 235, C. P. C. (1882). We state the mode in which we seek the Court's assistance. The mode is by execution. Decree being more than a year old, notice under sec: 248, C. P. C. (1882) was issued. The form for such application is to be found in Belchamber's Rules: Rule 370, p. 199. This was the only form available on the Original Side before the present rules came into ope tion in 1914. Cause not having be shown order was made "as prayed," *i.e* by attachment. This application, thus, being for execution, the Court had jurisdiction to decide whether application under sec. 235, C. P. C. (1882) lay. That order is not appealed from and stands. The notice having been issued, and the judgment-debtor having made default, order for execution as prayed being made, this would amount to "revivor." *Suja Hossein* v. *Manohar Das* (4).

[SANDERSON, C. J.—The order made by Sale, J., is not the same as here.]

Mr. Mitter.—It is stronger here inasmuch as the Master made the order. *Suja Hossein* v. *Manohar Das* (4) has been followed in *Umrao Singh* v. *Lachmi Narain* (6) and in this Court in *Bhabani Charan* v. *Protap Chunder* (16). Refers to *Manohar Das* v. *Futteh Chand* (10). Moreover where it is decided that decree ought to be transmitted judicial discretion has been exercised, it is not a matter of course and therefore would amount to a "revivor."

[Upon this hearing, the Court decided to refer the matter to a Full Bench.]

(4) I. L. R. 24 Cal. 244 (1896).
(6) I. L. R. 26 All. 361 (1904).
(10) I. L. R. 30 Cal. 979 (1903).
(16) 8 C. W. N. 575 (1904).

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[illegible] the a[illegible] for execution. [illegible]'s Rules and Orders, p. 204, Notes, show that the former practice has now been given up. All the cases relied upon by the other side are based on *Suja Hossein* v. *Manohar Das* (4) which is wrongly decided. It purports to be a review of *Suja Hossein* v. *Manohar Das* (5), is really a judgment by two Judges overruling the decision of two other Judges for which there is no authority. They ought to have referred to the Full Bench. *Suja* v. *Manohar* (5) deals fully with all the questions raised and gives reasons for the conclusions arrived at. *Suja Hossein* v. *Manohar Das* (4). The decision in *Suja* v. *Manohar* (5) ought to be followed. It has been followed in *Jeewundas* v. *Ranchoddas* (22). Comments on *Umrao Singh* v. *Lachmi Narain* (6). It only relies on *Suja* v. *Manohar* (4) and *Bhabani Charan* v. *Protap Chunder* (16) gives an entirely incorrect description of what is decided in *Suja* v. *Manohar* (4) and *Beni Madho* v.

(4) I. L. R. 24 Cal. 244 (1896).
(5) I. L. R. 22 Cal. 921 (1895).
(6) I. L. R. 26 All. 361 (1904).
(16) 8 C. W. N. 575 (1904).
(22) I. L. R. 35 Bom. 103, 108 (1910).

[illegible]HAL [illegible]LL.

[illegible] J., in *Ashootosh* v. [illegible]*Haran* [illegible]der. Same point arose in [illegible]*Narain* v. [illegible]*Chandrabati* (9). These two cases show that procedure of revivor which existed in the Supreme Court was consolidated and made simple by provision in sec. 216 of the Civil Procedure Code of 1859 and by sec. 248 of the Civil Procedure Code of 1882. Revivor must be by reference to the proceedings in Court which passed the decree just as in the case of death of a party to the suit.

The arguments against me is that no such notice can issue unless execution is applied for. Here I have applied for execution. The form of my application is under sec. 235, C. P. C. (1882). The Court had jurisdiction to entertain the application for execution, though we asked for transmission as the relief sought was not in the power of the Court to give. Notice under sec. 248, C. P. C. (1882) was a necessary preliminary to the order.

[SANDERSON, C. J.—The form may be one for execution. But in substance it was not an application for execution.]

Moreover the Civil Procedure Code (1882) gives this Court jurisdiction to issue notice. When a decree is transferred for execution to another Court the Court which passed the decree still retained jurisdiction. *Srihari* v. *Murari* (18).

[SANDERSON, C. J.—This point was not in issue in that case. It was assumed. Also specific provision is made in the Civil Procedure Code (1882) by sec. 239.]

Relies on r. 370 in Belchamber's Rules and Orders. This rule is mandatory, also *intra vires*. The High Court may pass such rules as are consistent with the Code. This rule is not inconsistent with sec. 248, C. P. C. (1882). Further, the charter gives the High Court the power to make

[illegible]*Shi*[illegible] too [illegible] reli[illegible] reason by [illegible]hose i[illegible]nent in *Chatterpat Singh* v. [illegible] Dist[illegible]ct [illegible]uari [illegible] the said [illegible]s [illegible]nd [illegible]0) [illegible] 1709 [illegible] his [illegible]ya v. [illegible] that in this t[illegible]n to v[illegible] of words and the [illegible] Nos. 1[illegible]0 and 3 allow[illegible]tes limit[illegible]r[illegible]ith them as co-l[illegible]r Deb[illegible]he estate [illegible]he derived his title to that part[illegible] [illegible]rty from a lease[illegible]on[illegible] *[illegible]purpose* [illegible]hat is the sum of the po[illegible]ave been [illegible]pport of t[illegible]Baij[illegible] [illegible]as no failu[illegible]vey an abs[illegible]d though [illegible]rial estat[illegible] the lands descen[illegible] was [illegible]neration [illegible]nd th[illegible]ll t[illegible]Na[illegible]d h[illegible]d [illegible]cution of alien[illegible]Le [illegible]ng[illegible] transmitte[illegible]uld still [illegible] the question of limitation does not affect the order of the Court which finds the decree capable of execution and sends it for execution. No question about limitation at the date of transmission arose here as the decree at that date was still capable of execution. Relies on *Beni Madho* v. *Shiva Narain* (7).

Even if the order for transmission is not of itself sufficient to revive the decree, the notice which was issued was the notice contemplated for "revivor" under Art. 183 and that itself was sufficient to revive the decree in the same way as Art. 182 dealing with the decrees of mofussil Courts.

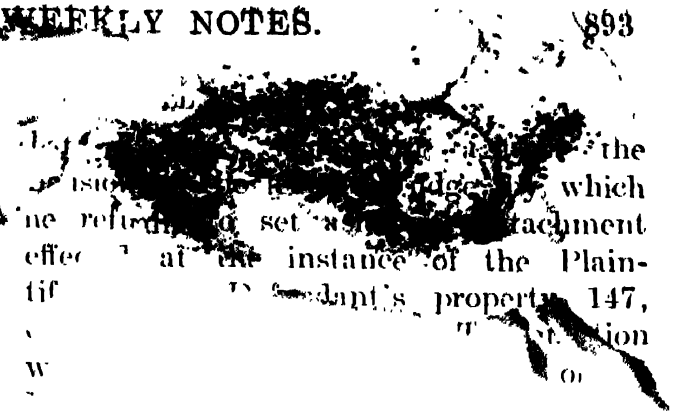
Submits "revivor" in Art. 183 *re* a decree in the Original Side means the same thing as Cls. (5) and (6) of Art. 182.

[SANDERSON, C. J.—The scope of the two articles is different, *e.g.*, there is no question of acknowledgment in Art. 183.]

That is an additional advantage of a High Court decree. "Revivor" is ex-

(1) 11 C. L. J. 91, 93 (1909).
(4) I. L. R. 24 Cal. 244 (1896).
(7) 4 All. L. J. 405 (1907).
(10) I. L. R. 30 Cal. 979 (1903).
(13) 11 I. C. 216 (1911).
(8) I. L. R. 6 Cal. 504 (1880).
(9) I. L. R. 20 Cal. 551 (1892).
(18) I. L. R. 18 Cal. 257 (1886).

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rules. This r. 370 he[illegible] HOL[illegible] ever since in the O[illegible] Side

[MOOKERJEE, J.—[illegible] 370 is [illegible] in the two earlier compilations of the Original Side Rules and Orders, *viz.*, Clarke and Smoult and Ryan.]

The power under which these rules are made would be found in 1865, Letters Patent, cl. 37. Also refers to Cls. 47, 49, 50 and 61 of the Letters Patent.

Issue of notice when followed by [illegible] order has the effect of "revivor." "leave to execute" revives the d[illegible] The Master has power to order execu[illegible] it is a *quasi*-judicial act. Sec. 637 P. C. (1882), also Supplemental r. 51 cl. 30 in Belchamber's Rules and Orders. Rightly or wrongly notice under sec. 248, C. P. C. (1882) was made on it. This is certainly revivor.

Mr. Jackson in reply.—Arts. 182 and 183 of the 2nd Schedule of the Limitation Act are different and should not be mixed up together. The Master's order is *ultra vires*. It is a judicial act; he cannot decide that this is a decree capable of execution; he can only issue notice according to the Code. If I object the matter must come before the Court. If r. 515B (30) Belchamber's Rules and Orders gives the Master such power, the rule is *ultra vires* as it is not framed in accordance with the Act. *Baijnath* v. *Ahmed Musaji Saleji* (20). The Advocate-General does not meet the arguments in the judgment in *Sripati* v. *Samaldhone* (11) and *Mungal Proshad* v. *Girija Kant* (23) does not apply to this case.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an ap-

[illegible] the [illegible] which [illegible] set [illegible] tachment effec[illegible] at [illegible] instance of the Plaintiff [illegible] dant's [illegible] property, 147, [illegible] [illegible] ion w[illegible] o[illegible]

[illegible] [illegible] art for the payment money against the Defendant.

2nd September 1896.—An application was made for the transmission of a certified copy of the decree to the Purnea Court.

15th May 1899.—Application for execution by arrest and imprisonment of the Defendant was made: the former application having been returned unexecuted.

12th February 1900.—An order on the last mentioned application was made returnable on the 12th March 1900.

12th March 1900.—The time was extended for three months.

1st June 1906.—An application was made in the High Court for the transmission of a copy of the decree to Murshidabad for the attachment of property.

30th June 1908.—Order for transmission was made.

17th July 1908.—Copy of the decree was transmitted.

18th January 1915.—Application was made for execution by attachment of 147, Cotton Street.

10th June 1915.—Order was made for execution.

(11) 15 C. W. N 661: s. c. 15 C. L. J. 123 (1910).

(20) I. L. R. 40 Cal. 219: s c. 17 C. W. N. 395 (1912)

(23) L. R. 8 I. A 123 (1881).

C... RPAT... v. RAI BA... ...LL.

...th July 1915.—Notice of appli... ...has ... ...thereto has been given by the Defendant to set aside the atta... ...signed, to the person liable to ment was issued. ...rincipal ...nterest, or his agent, to the person entitled thereto or his agent,

2nd August 1915.—The applicat... was heard and refused, and it is fr... der of ... the said ... ...ne... ...1... ...its ... ...in this ... ...of words and ... ...s. 149 and 3... ...allow ... ...tate's limit- ...ith them as co-... or Deb... he estate ...who derived his title to that party ... ...inh... perty from a lease ... ...er... That is the sum of ... ...ave been ... This ... support of ... ...Baij... ...vey an abs... ...nd ... was no fa... ...the lands descen... ...was ... Nr. dal estat... ...Na... ...d h... alive ... ...ration ... ...th... ...ing execution. ...

The clause which is applicable to this matter is Art. 183 of the First Schedule of Act IX of 1908. The first column describes the application as follows :—" To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, or an order of His Majesty in Council." The second column prescribes the period of limitation, *viz.*, 12 years. The third column specifies the time from which the period of limitation begins to run as follows : " when a right to enforce the judgment, decree or order accrues to some person capable of releasing the right." It is clear that if the matter stopped there the decree would not be enforceable, for it was made on the 21st May 1896 and the application for execution, which is now material, was not made until the 18th January 1915. But there is a proviso contained in Art. 183 which runs as follows :—" Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment thereof has been given in writing signed by the person liable to pay the principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be," and it is in respect of this proviso that the question which has been referred to the Full Bench arises.

It is not denied that the order which was made on the 12th February 1900, for execution of the decree by the arrest of the Defendant constituted " revivor " within the meaning of the clause : but it is said on behalf of the Defendant that more than 12 years has elapsed since such revivor and that the decree is no longer enforceable. On the other hand the Plaintiff alleges that the application of the 1st June 1908 and the order of 30th June 1908 constituted a revivor within the meaning of the clause and consequently that the decree is still capable of being enforced, inasmuch as the application was made on the 18th January 1915, a date within the period of 12 years counting such period from June 1908. It is necessary, therefore, to consider in the first instance what was the nature of the application of the 1st June 1908 and the proceedings in connection therewith. The particulars of the application are shown by the entry in the last column of the form on which the application was made as follows :—" By transmission of certified copy of the said decree together with a certificate of non-satisfaction to the Court of the District Judge of Murshidabad within whose jurisdiction the Defendant has property and by attachment and sale of which the Plaintiff's claim may be satisfied.

The Defendant has no property within

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the jurisdiction of th[illegible] Hon[illegible] whereby the decree [illegible] be sa[illegible]

This was obviously an appli[illegible] transmission of a copy of the decree under secs. 223 and 224 of the Civil Procedure Code of 1882, the Code which was in force at the date of the application. The particulars of the application show that it was intended to bring it within cl. (*b*) of sec. 223, and the procedure which the Court was asked to make use of was that provided by sec. 224 of the Act.

The application, however, was [illegible] upon a form which was applicable to application under sec. 235 of the 1882 [illegible] which deals with an application for execution and which sets out the particulars which must be included in a tabular form which the applicant or some other person acquainted with the facts must verify.

Upon that application being made, an order was made by the Registrar that notice under sec. 248 should issue. Notice was thereupon served upon the Defendant calling upon him to show cause why the decree should not be executed against him.

On the 30th June 1908 the following order was made by the Registrar: "Upon reading the notice and the affidavit of service, no cause being shown, let execution issue as prayed" and in consequence of this order a copy of the decree with a certificate of non-satisfaction was transmitted to the Murshidabad Court.

It was argued first that the order was in itself a "revivor" within the meaning of Art. 183 of the Schedule of the Limitation Act.

The test of what constitutes such a "revivor" is in my judgment correctly laid down by Mookerjee, J., in *Kamini Debi* v. *Aghore Nath Mukherji* (1), as follows:—"The essence of the matter is

[illegible] to constitute a revivor of the decree [illegible] there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is [illegible] and I think it [illegible] determ[illegible] s[illegible]

[illegible] decree [illegible] in a ce[illegible] of non-satisfaction [illegible] no more, and the order made in substance was that the application should be granted. The actual words of the order were "Let execution issue as prayed." These words necessitate a reference to the application which, as already stated, was not an application for execution but for the transmission of a certified copy of the decree. It was said during the argument that the application had to be made on the form, above-mentioned, as there was no other form provided: To my mind the use of a particular form cannot affect the matter when once it is established that the application was not for execution, but merely for transmission of a copy of the decree. All that happened in reality was an application to the Registrar for transmission of the copy of the decree, a direction by him that notice of such application should be given to the judgment-debtor, and on his non-appearance an order that the copy of the decree should be transmitted in accordance with the application. Under these circumstances, in my judgment, there was no determination that the decree was still capable of execution, and the order of the

(1) 11 C. L. J. 91, 98 (1909).

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30th June 1908 did not constitute a revivor within the meaning of cl. 183.

It was further argued, however, that the notice issued under the direction of the Registrar dated [illegible] and [illegible] was a notice under sec. 248 of the Code of Civil Procedure *facias* [illegible] cedure when properly and rightly used would constitute a revivor—see *Jogendra Chandra Roy* v. *Shyam Das* (2); but in my judgment secs. 248 and 249 were not applicable to the matter in question. These sections deal with an application for the execution of a decree and provide for notice being given to the party against whom execution is applied for, and if he does not appear, or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

They have no relation, in my opinion, to an application for the transmission of a copy of the decree under sec. 223 which may be ordered according to the words of the section "on the application of the decree-holder." The notice therefore which was issued under sec. 248 was inapplicable to the proceedings in question. But it was urged by the learned Advocate-General that if the Court has in fact sent notice to the debtor and has in fact adjudicated upon the matter, something has

(2) I. L. R. 36 Cal. 543; s. c. 9 C. L. J. 271 (1909).

[illegible] LL.

[illegible] to show that the decree is [illegible] execu[illegible]

[illegible] it would be unreasonable so to hold when, having regard to the facts of the case, it is plain that the Registrar did not adjudicate upon the question whether the decree was capable of execution, but merely ordered a copy of the decree to be transmitted to the Murshidabad Court, [illegible]ith a certificate of non-satisfaction. [illegible]rther, even assuming that the notice [illegible] rightly sent, and in accordance with [illegible]rovisions of the Act, by the Registrar, [illegible]ould be pointed out that the Registrar [illegible]uld have no jurisdiction to adjudicate [illegible]pon any matter such as limitation, with reference to the question whether the decree was capable of execution. Such a question would, in my judgment, have to be determined by the Court itself under sec. 249 of the Civil Procedure Code.

It is true that by sec. 637 of the Civil Procedure Code any non-judicial or *quasi*-judicial act which the Code requires to be done by a Judge, may be done by the Registrar, and the Court may by rule declare what shall be deemed to be non-judicial or *quasi*-judicial acts within the meaning of the section. R. 515A, which came into force on 1st September 1905, provided that certain applications therein specified should be made to the Registrar or Master, and that all acts done by the Registrar or Master under this Rule should be deemed to be *quasi*-judicial. No. 30 under the said rule refers to applications for order for execution of a decree or order for arrest, attachment, sale or otherwise, with power to order issue of notice under sec. 248, C. P. C., where such notice is necessary. But it is clear that the Registrar was not thereby clothed with authority to decide such a question as arises in this case, *viz.*, whether the decree was barred by the Statute of Limitation.

CHUTTERPAT SINGH *v.* RAI BAHADUR SAH & SOOMARIMULL.

It was argued, however, that r. 370 of the Rules then in force, which are set out in Mr. Belchamber's book, showed that it was incumbent upon the Registrar to issue the notice. This Rule came into force on the 1st April 1878, judging from the note attached to r. 345 in Mr. Belchamber's book and therefore before the 1882 Code. It may or may not have been consistent with the Code which was in force at the date when it was passed but in my judgment it was not consistent with the scheme of the Code of 1882. Under that Act the application for a transmission of the copy of the decree to another Court under sec. 223 was a procedure under which the question whether the decree was capable of execution was intended to be left to the Court to which the copy of the decree was transmitted: a procedure different in its essentials from the procedure provided for an application for execution dealt with in subsequent sections of the Act. In any event I think it is safe to say that these rules must be read as modified by the C. P. C. of 1882 under which the application in this case was made, and in my judgment the notice issued and order made under the above-mentioned circumstances did not operate as a revivor within the meaning of Art. 183 of the Limitation Act, Sch. I.

It is necessary to notice a further argument by the learned Advocate-General, *viz.*, that with regard to a decree on the Original Side the word "Revivor" in Art. 183 means the same thing as one or more of the matters which are mentioned in Art. 189, sub-cls. 5 and 6.

With this I cannot agree. I think the fact that the word "Revivor" is used in Art. 183, instead of the different matters specified in Art. 182 being set out again or referred to in Art. 183 as might have been done, shows that something different to such matters was intended. Further the conditions dealt with by the two clauses are essentially different and the period of limitation vary materially.

[redacted] mentioned reasons in [redacted] NO. [redacted] OF THE [redacted] [redacted] pertinent [redacted] [redacted] [redacted]

1882. But even if it was this does not assist the creditor. For if the Registrar had power to issue as a "*quasi*-judicial act" notice under sec. 248 he had no po[illegible] determine [illegible]ally [illegible] the [illegible]ed [illegible]one [illegible]ot [illegible]o. case[illegible] be said [illegible] either could or did decide that the decree was capable of execution. The proceedings taken did not in my opinion operate as a revivor within the meaning of Art. 183 of the Limitation Act. The decree was transmitted to Murshidabad and so far as appears from the proceedings before us nothing was done on the order and nothing was attempted to be done in execution until nearly seven years later. I would therefore answer the question referred to us in the negative and I agree in the order passed.

MOOKERJEE, J.—The facts material for the determination of the question of law referred to the Full Bench for decision, are not set out in the order of reference and may be briefly recited here.

On the 21st May 1896, the Respondents obtained an *ex parte* decree for money against the Appellant on the Original Side of this Court. After intermediate proceedings which need not be described in detail at this stage, the decree-holders, on the 18th January 1915, made the present application for execution of the decree by attachment of premises No. 147, Cotton Street, in this city. The judgment-debtor objected that the application was barred by limitation under Art. 183 of the Schedule to the Indian Limitation Act, 1908, which was in force at the date of the application and governed it, on the principle that the law of limitation applicable to a proceeding is, unless there is a distinct provision to the contrary, the law in force at the date of the institution of the proceeding [*Lala Soni Ram* v. *Kanhaiya Lal* (3)]. The objection was overruled by Mr. Justice Chaudhuri on the 2nd August 1915 and the propriety of his decision is in question before us.

It is plain that the application for execution is *primâ facie* barred under Art. 183, which requires an application to enforce a decree of a Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, to be made within twelve years from the date when a present right to enforce the decree accrues to some person capable of releasing the right. As the application for execution, with which we are here concerned, was made on the 18th January 1915 in respect of a decree dated the 21st May 1896, the decree-holders seek to escape the bar of limitation by reliance upon that portion of the proviso to Art. 183, which lays down that when the decree has been revived, the prescribed period of twelve years shall be computed from the date of such revivor. It is thus incumbent upon the decree-holders to establish that the decree was revived within twelve years from the 21st May 1896, and that since the date of such revivor, twelve years had not elapsed on the 18th January 1915. To substantiate this position, they rely on an application made by them on the 1st June 1908 and the order passed thereupon on the 30th June 1908; the combined effect of the ap-

(3) L. R. 40 I. A. 74: s. c. 17 C. W. N. 605; I. L. R. 35 All. 227; 17 C. L. J. 488 (1913).

plication and the order was, it is argued, to revive the decree within the meaning of the proviso to Art. 183. This view is supported by the decision in *Suja Hossein* v. *Manohar Das* (4), though a contrary view had been accepted when that case was heard in the first instance. *Suja Hossein* v. *Manohar Das* (5). The contention of the decree-holders also receives some support from the decisions in *Umrao Singh* v. *Lachmi Narain* (6) and *Bc Madho* v. *Shiva Narain* (7). The corr ness of these decisions has, however, impugned before us on behalf of the ment-debtor.

There is no definition of the term " vivor " in the Indian Limitation Acts of 1859, 1871, 1877 and 1908. But the historical review contained in the judgments in the case of *Ashootosh* v. *Doorga Charan* (8), *Futteh Narain* v. *Chandrabati* (9) and *Jogendra Chandra* v. *Syamdas* (2) shows beyond doubt that the procedure for revivor of judgment on the Original Side of this Court was substantially analogous to the writ of *scire facias* under the Common Law (r. 195 of the Rules of 1851 on the Plea side of the Supreme Court). That procedure was subsequently embodied in secs. 248 and 249 of the Civil Procedure Code of 1882 and later on reproduced as Or. 21, rr. 22 and 23 of the Code of 1908. Under these provisions, where an application for execution is made, a notice is required to issue to the person against whom execution is applied for, if more than one year has elapsed from the date of the decree.

(2) I. L. R. 36 Cal. 543 : s. c. 9 C. L. J. 271 (1909).
(4) I. L. R. 24 Cal. 244 (1896).
(5) I. L. R. 22 Cal. 921 (1895).
(6) I. L. R. 26 All. 361 (1904).
(7) 4 All. L. J 405 (1907).
(8) I. L. R 6 Cal. 501 (1880).
(9) I. L. R. 20 Cal. 551 (1892).

The notice calls upon him to show caus why the decree should not be executed against him. If he does not appear o does not show cause to the satisfaction o the Court, the Court orders the decree t be executed. The order for the execution thereof [illegible] must

determin[illegible]st be m[illegible] juris diction and by a competent tribunal Tested in the light of this principle wha is the true position of the decree-holder in the case before us? On the 1st June 1908, they applied for transmission of the decree from the Original Side of thi Court to the district of Murshidabad, o the allegation that the judgment-debto had no property within the local limits o the ordinary original jurisdiction of thi Court, while he had property within th jurisdiction of the other Court. The application, though made obviously under sec. 223, cl. (*b*) of the Code of 1882, was described as one under sec. 235 for execution of the decree; this was indisputably misleading and if we look to the substance of the matter as we must do, we cannot attribute to the application a character it did not really possess; what is essential in matters of this description is the substance and not the mere form. The Master recorded the following order on the application on the 1st June 1908: " Let notice issue under sec. 248 (*a*)." This

(1) 11 C. L. J. 91, 98 (1909).
(10, I. L. R. 30 Cal. 979 (1903).

clearly was not in conformity with the Code which contemplates the issue of a notice under sec. 248 on the basis of, not an application for transfer of a decree under sec. 223, but an actual application for [illegible] under sec. 235. The [illegible] and [illegible] v. [illegible] for [illegible] application [illegible] execut[illegible] *Monmohony* v. *Bireswar* (12), *Chutterpat* v. *Daya Chand* (13) and *Khetpal* v. *Tikam Singh* (14) which dissents from *Ram Sahay* v. *Nanni* (15)]. It is not necessary for us to consider whether, as indicated in *Bhabani Charan* v. *Protap Chunder* (16), an application for transmission of a decree may not be deemed an application to take a step in aid of execution: nor is it necessary to discuss whether, as indicated in *Husain Ahmed Kaka* v. *Saju Mahomed Sahid* (17), a Court may not decide the question of limitation even before transmission of the decree, or, whether, as ruled in *Srihari Mandal* v. *Murari Choudhury* (18), even after transmission the original Court may not, under sec. 239 of the Code of 1882, decide the question of limitation when execution had been stayed in the Court to which the decree has been transferred. For the purposes of the present case, it is sufficient to hold that sec. 230 makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution, while the explanation to sec. 248 shows that the notice required by that section must, where the decree has been transmitted, be issued by the Court to which the decree has been sent for execution. Consequently, the issue of the notice in this case under sec. [illegible] on the basis of the application for transmission of the decree, was not in conformity with the Code of 1882 which was in force at the time. It is said, however, that the action taken by the Master was in accord with the Rules framed by the Court when the Code of 1859 was in force. [*Sreenath* v. *Romesh Chandra* (19)]. It is needless to investigate whether the Rules, when first framed, were consistent with the Code of 1859 for, even if they were, it is plain that after 1882 they could be deemed operative only in so far as they were consistent with the Code of 1882. [*Baijnath* v. *Ahmed Musaji Saleji* (20)]. It is significant that the Rules framed after the Code of 1908, have been made consistent with that Code and a notice under Or. XXI, r. 22 is no longer required to be issued upon an application for transmission under sec. 39. We next pass on to the order made by the Master on the 30th June 1908 on return of affidavit of service of the notice under sec. 248: "Upon reading the notice and the affidavit of service, no cause being shown, let execution issue as prayed." The language of the concluding portion of this order is significant: what was prayed was transmission of the decree, and what was actually done pursuant to this order

(11) 15 C. W. N. 661: s. c. 15 C. L. J. 123 (1910).
(12) I. L. R. 16 Cal. 744 (1889).
(13) 11 I. C. 216 (1911).
(14) I. L. R. 34 All. 396 (1912).
(15) Weekly Notes, 1886, p. 139.
(16) 8 C. W. N. 575 (1904).
(17) I. L. R. 15 Bom. 28 (1890).
(18) I. L. R. 13 Cal. 257 (1886).
(19) 12 C. W. N. 898 (1908).
(20) 1 L. R. 40 Cal. 219: s. c. 17 C. W. N. 395 (1912).

of the Master, was not the issue of any process of execution, but only a transmission of the decree on the 17th July 1908. Here again if we look to the substance of the matter as we must do, we find that there was in reality no determination by the Master that the decree was still capable of execution. It is further plain that the Master had no authority to make such a determination; for sec. 249 requires that the Court should consider objection if any and determine wh the decree should or should not be e ed. This is clearly a judicial act v cannot be delegated to a Master u sec. 637 of the Code of 1882, and it worthy of note that although r. 515 (a invests the Master with power to order issue of a notice under sec. 248, it does not authorise him to give a decision under sec. 249. It is, I think, incontestable that there was not in this case an order under sec. 249 by the Master, and, that, if there was, the order must be treated as made without jurisdiction. My conclusion consequently is that upon the application for transmission of the decree under sec. 223, a notice under sec. 248 could not properly be issued, that such notice, though issued, did not by itself operate as revivor of the decree, and that there was not in fact and could not in law be such a determination by the Master under sec. 249 as would operate to revive the decree.

It is not necessary to examine in detail the contention that Art. 183 should be construed in the light of Art. 182 and that whatever is sufficient to keep alive a decree for the purposes of Art. 182, should be deemed sufficient for the purposes of Art. 183. There is, in my opinion, no basis whatever for this contention: the scheme and scope of the two Articles are radically distinct, and no useful purpose would be served by an endeavour to amalgamate or to interpret one by reference to the other.

On these grounds, I agree that this appeal must be allowed with costs through [illegible] order of [illegible] the [illegible] and [illegible]

[illegible] Solicitors, for [illegible] spondents.

M. N. B. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION]

APPEALS FROM ORIGINAL DECREES NOS. 222 AND 266 OF 1912.

CHAUDHURI, J. NEWBOULD, J. 1916, Heard, 15 to 18 & 25, February. Judgment, 8, May.	ASITA MOHON GHOSH MOULIK, Plaintiff, Appellant, *v.* NIRODE MOHON GHOSH MOULIK, Defendant, Respondent.

Hindu Law—Dayabhaga—Kayasthas, in Bengal, Sudras—Adoption, amongst Kayasthas, religious ceremonies if essential—Religious ceremonies postponed after actual giving and taking—Adoption during pollution through birth of agnate——Validity—Afterborn natural son of Sudra, and adopted son, shares of, if equal—Agreement by adoptive father to give equal share, if valid—Properties held by adoptive father as shebait, adopted son if may claim to hold as shebait jointly with afterborn son—Pittrikritya, and Debakritta—Proof that property has been endowed as debutter—Permanent image, if essential to valid dedication—Income of dedicated property exceeding expenses, if conclusive that debsheba only a charge on the property—Dattaka Chandrika, authority of.

ASITA MOHON GHOSH MOULIK *v.* NIRODE MOHON GHOSH MOULIK.

Kayasthas, according to the law prevalent in Bengal, are considered as Sudras. No religious ceremony is necessary for an adoption amongst Kayasthas, mere giving and taking of a son being sufficient to give it [illegible] and [illegible] not [illegible] rely, and acceptance of a son [illegible] acts.

SANTAPPAYYA *v.* RANGAPPAYYA (2) *followed.*

Such pollution results from the knowledge of the fact of birth.

In laying down the rule that the adopted son of a Sudra shares the inheritance equally with the afterborn natural son, the Dattaka Chandrika has in no way deviated from the smritis, *and the rule, which has been accepted as correct by both the Madras and Calcutta High Courts, should not be departed from.*

An ekrar-patra *of the adoptive father covenanting that an afterborn natural son of his shall not be entitled to claim a larger share but will divide the inheritance equally with the son he was adopting, is valid and operative.*

SURENDRA KESHAB ROY *v.* DOORGA SOONDARY DASSEE (11) *and* BHALA NAHANA *v.* PRABHU HARI (12) *referred to.*

It is now settled law that, as regards inheritance, the adopted son holds in all respects the same position as an aurasa *son except in some special matters. An* aurasa *son has a superior right in respect of* pitri-matri krityas *but there is no such preference in respect of* shevas *or* deva krityas.

Held—*Therefore, that an adopted son of a Sudra was entitled to inherit* debutter *properties in the right of* shebaitship, *jointly with an afterborn natural son.*

A permanent image is not absolutely essential for dedication to a Thakur.

Where the intention of the donor appears to have been to dedicate the property absolutely to deva sheba, *the fact that the income of the property exceeded the expenses of the* sheba *and the* shebaits *frequently dealt with the property or the income as personal property would not make the property secular subject to a charge for the* deva sheba.

These were appeals preferred on the 6th July and 9th August 1912 respectively against the decree of Babu Kunja Behary Gupta, Additional Subordinate Judge of Birbhum, dated the 30th March 1912.

The facts of the case will fully appear from the judgment.

Babus Dwarka Nath Chakrabarty, Karunamoy Bose, Hemendra Nath Sen, Taril Mohon Dass and *Bimal Ch. Roy* for the Appellant in No. 222.

Babus Mohendra Nath Roy, Bepin Behary Ghosh, Lalit Mohan Ghosh, Karunamoy Ghosh and *Jogesh Ch. Bose* for the Respondent in No. 222.

Babus Mohendra Nath Roy, Bepin Behary Ghosh, Lalit Mohan Ghosh and *Jnan Ranjan Chatterjee* for the Appellant in No. 266.

Babus Karunamoy Bose and *Bimal Chandra Roy* for the Respondent in No. 266.

The JUDGMENT OF THE COURT was as follows :—

One Radha Mohan Ghosh Moulik,

(2) I. L. R. 18 Mad. 397, 398 (1894).
(11) I. L. R. 19 Cal. 513, 536 (1892).
(12) I. L. R. 2 Bom. 67 (1877).

ASITA MOHON GHOSH MOULIK *v.* NIRODE MOHON GHOSH MOULIK.

a Bengali Kayastha Zemindar of the District of Murshidabad, governed by the Dayabhaga School of Hindu Law, died intestate on the 16th Vadro 1310 (2nd September 1903). In the Collectorate Register he was recorded as the proprietor of certain zemindari properties and as *shebait* of certain *debutter* properties. Shortly after his death Sailendra Mohon Ghosh Moulik applied for registration [illegible] his name under the Registration Act respect of eight annas of both the z[illegible] dari and *debutter* properties, allegin[illegible] he had been adopted by Radha Moh[illegible] his son on the 26th Joista 1283 (7th [illegible] 1876) and that Asita Mohon Ghosh Mou[illegible] who was born on the 29th May 1289 as the afterborn natural son of Radha Mohon Ghosh Moulik was entitled to the other eight annas. Asita Mohon objected to Sailendra's application denying his adoption and applied for registration of his name in respect of the entire sixteen annas as the only son and heir of Radha Mohon. The Land Registration Officers held that Sailendra was the adopted son of Radha Mohon and registered his name in respect of eight annas of the zemindari properties only and Asita's name in respect of the other eight annas and as *shebait* of the entire *debutter* properties. Sailendra died on the 22nd Aswin 1312 (8th October 1905), leaving Nirode Mohon and Khirode Mohon, his sons. They instituted Suit No. 79 of 1909 in the Birbhum Court for a declaration that they were eititled as *shebaits* by descent from their father to eight annas of such properties as were *debutter*. They asserted that the properties set out in Schedule "Kha" and "Ga" to their plaint were not *debutter*, and prayed for a declaration that they were entitled to one-half of these properties as proprietor, but submitted in the alternative that if the Court found that those properties were charged with *deva sheba* expenses, they should be declared entitled thereto and to possession thereof as proprietors, subject to such charge, or if the Court found them to be [illegible] *debutter*, they sub[illegible] that th[illegible] entitled th[illegible]

[illegible] *debutter* [illegible] of Radha Gobind [illegible]. Both these suits were tried together (see Order No. 18, dated 31st January 1910, in Suit No. 79 of 1909 and Order No. 8 of same date in Suit No. 134 of 1909) and one judgment has been delivered in both.

The learned Subordinate Judge has held (*i*) As to the adoption :—

(1) That Radha Mohon's family is a family of Bengal Kayasthas, who are Sudras, amongst whom the ceremony of "giving and taking" only, is necessary for the validity of an adoption.

(2) That Sailendra Mohon was given by his natural father Kumar Narendra Chandra Roy to Radha Mohon Ghosh Moulik who took the boy in adoption on the 26th Joista 1283 (7th June 1876) and that the adoption was not contrary to law or custom in any respect.

That an *ekrar-patra* (Ex. 13) was executed by Radha Mohon addressed to Kumar Norendra Chandra Roy, the natural father of Sailendra Mohon, and a deed of gift (Ex. 64) was executed by Kumar Narendra Chandra Roy in favour of Radha Mohon at the time of the said

adoption and that both the documents are genuine, valid and operative.

(3) That being Sudras, Sailendra as the adopted son of Radha Mohon was entitled to share equally with Asita Mohon [illegible] afterborn natural son a[illegible] entitled accor[illegible]ge

[illegible]

tainin[illegible] Kuti[illegible] pur) were not *debutter* bu[illegible]he others were absolute *debutter* and not merely charged with *deva sheba* expenses.

(*iii*) That Sailendra Mohon had no right to be a *shebait* in respect of the *deva sheba* or the *debutter* properties in the presence of the natural-born son Asita Mohon, and therefore Sailendra's sons had no such right.

He has thus decreed that the sons of Sailendra are entitled to one-half of all the secular properties including Binderpur, Harishchandrapur, Taraf Mandar (appertaining to Huda Kutubpur and Fatehpur).

It appears that Sailendra's sons have effected mortgages and granted Putni leases in favour of Defendants Nos. 3 to 6 in Suit No. 134 of 1909. The learned Subordinate Judge has held that they are not binding on Asita Mohon.

Asita Mohon and the sons of Sailendra have filed separate appeals against such portions of the judgment and decree as are adverse to their respective contentions. Defendants Nos. 3 to 6 have not appealed. Asita Mohon's appeal being the earlier one in order of date, came up first, but both appeals have been heard together at the request of the parties.

We intend to deal with the findings of the Subordinate Judge in the order above set out.

(*i*) As to the adoption :—

(1) We agree with the learned Subordinate Judge that Kayasthas according to the law prevalent in Bengal are considered as Sudras. The question has frequently arisen in connection with cases of adoption and it is settled that as amongst Sudras, no religious ceremony is in their case necessary, but that the mere giving and taking of a son is sufficient to give validity to adoption amongst them. See *Raj Coomar Lall* v. *Bissessor Dayal* (1). As to Bengali Kayasthas being Sudras see the passage from Shyama Charan Sirkar's Vyavastha Darpana quoted in *Raj Coomar Lall* v. *Bissessor Dayal* (1). They have been treated as Sudras in our Courts for a long series of years and their status as such cannot now be questioned. Asita Mohon did not submit anything to the contrary in his plaint or written statement. No issue was raised as to whether Kayasthas are Sudras or not, when issues were settled in the trial Court. It appears, however, that during the examination of Banwari Lal Ghosh, Asita Mohon's witness (No. 22), questions were sought to be put to him about some Kayasthas recently taking the sacred thread, which the learned Subordinate Judge disallowed. See Order No. 110 of the 2nd February 1912 in Suit No. 79 of 1909. We think that the learned Subordinate Judge rightly disallowed such questions. During the argument before us nothing was urged by Asita Mohon's learned Vakil on this point, but the concluding sentence of the learned junior Vakil's address in reply was, that his client having raised the

(1) I. L. R. 10 Cal. 688, 691 (1884).

point although they as his Vakils had not argued it, it was not to be considered that the point was abandoned. We do not think the question ought now to be allowed to be raised. Bengali Kayasthas have been uniformly treated as Sudras in our Courts and the question does not appear capable of serious argument, although attempts may have recently been made by some members of the community to trace their descent from Khatriyas, and some of them may have actually taken the sacred thread as belonging to the regenerate classes.

As to the factum of adoption :—

Sailendra Mohon was the second son of Kumar Norendra Chandra Roy of Sheoraphuli, the brother of Nagendrabala, wife of Radha Mohon and mother of Asita Mohon. Norendra has been examined. He deposed to giving the boy in adoption to Radha Mohon on the 26th Joista 1283 (7th June 1876). On that very day the *ekrarnama patra* (Ex. 13) and Deed of Gift (Ex. 64) were executed and registered and exchanged by and between the natural father and the adopter. The child was then 7 or 8 months old. Nogendra made over the child at his own house at Sheoraphuli to Radha Mohon who took him as his adopted son in the presence of a large number of people who had been invited to witness the ceremony. Within a month thereafter the boy was removed to Radha Mohon's house at Panchthopi, where the *namkaran* and *annaprasan* ceremony of the boy and the *putresthi jag* were performed. At these subsequent ceremonies Norendra the natural father was not present. The boy was named Sailendra Mohon Ghosh Moulik, Ghosh Moulik being the caste name of Radha Mohon, and was brought up in Radha's family as his adopted son. Sailendra and Asita Mohon who was subsequently born were taken by Radha Mohon himself on the same date (3rd August 1891) to the same school, the Metropolitan Institution in Calcutta, and admitted there as students. All the members of the family of Radha Mohon, their [illegible]ions and agnates, [illegible]s, servan[illegible]s and oth[illegible]ed with [illegible] ed

are [illegible]ndra [illegible]a Mohon "father" and Nagendrabala "mother" and his natural father Norendra as "Mama" (maternal uncle in his relationship as the brother of Nagendrabala). Asita used to address Sailendra as "*dada*" (eldest brother). After Radha Mohon's death, which took place in Vadro 1310, invitation letters for the *shrad*, Ex. 16 (1) and 16 (2), were issued in the name of Sailendra and this was done by Asita Mohon. At the *shrad*, gifts were dedicated by Sailendra. In fact the evidence that Sailendra was known as and treated and enjoyed the status of a son during Radha Mohon's lifetime and also right up to Sailendra's death is so overwhelming that both in the trial Court and before us, the facts proved by his sons about such treatment were not seriously challenged. Learned Vakil for Asita Mohon conceded that these facts undoubtedly raised a very strong presumption that Sailendra had been duly adopted. He went further and said that if no direct evidence of the giving and taking had been given, the Court would have been justified upon that presump-

tion in upholding the validity of the adoption, but he argued that inasmuch as some direct evidence was given, the question whether giving and taking of the child actually took place or not must rest upon that evidence and not upon any [illegible] If that evidence is u[illegible]factory [illegible]n raised [illegible]t, he [illegible]riti[illegible]ra[illegible] sai[illegible] actually [illegible] the time. According to Norendra the baby was brought in the arms of a maidservant to the *baitakkhana* (the outer apartments) and made over to him and he " from his arms made over the baby to Radha Mohon Babu's arms " who took it in his lap and went " inside," meaning the inner apartments, and he followed. " That was the giving and taking." Asked if anything was said on that occasion the witness answered : " I said I make over the baby to you at the free will and consent of myself and my wife (' and he accepted it and said ') I have already taken the child, you bless him and he went inside " : the portion within brackets the witness is said to have volunteered. It is so noted in the deposition.

Jogendra's version is—" From the inner apartments a maidservant brought the child. Kumar Norendra Chandra took the child from her and made over the child to Radha Mohon.

Q.—What did Norendra Chandra say when he made over the child?

A.—Norendra said " You have been requesting me for the child for a year. You may take him now."

Q.—What did he want the child for?

A.—He wanted the child for *dattak grahan* (adoption). Radha Mohon took the child in his arms and went to the inner apartments and Norendra also followed him. I have narrated the conversation as I heard it.

There is no discrepancy between these two versions of any value. It must be remembered that the witnesses were speaking in 1912 of what happened in 1876, 36 years ago. That Norendra failed to remember that Jogendra was present at the spot, indicates that they had not been comparing notes. Most of the other persons said to have been present on that occasion are dead. One Lalit Mohon Ghosh is still alive, but it is in evidence that he was ill and bed-ridden when the case was being heard. As against the above evidence we have that of Nogendrabala the mother of Asita Mohon. Her denial is of no value. In fact she has so palpably told untruths even in respect of matters not seriously contested by Asita Mohon that the trial Court was quite right in disregarding it. We are unable to attach any weight to her evidence.

It was at first argued that the recitals in the *ekrar-patra* and Deed of Gift showed that no giving and taking had taken place on the 26th Joista 1283, but later on the learned Vakil modified his argument by saying that although the *ekrar-patra* (Ex. 13) might be read as supporting the statement that the giving and taking had taken place, the Deed of Gift was so worded as to show the contrary, that is to say, it showed that " the giving and taking " was to take place on a future date.

Now Ex. 13 is quite clear. It contains the following recitals :—

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"You (Norendra) have of your own free will made a gift of your second son to me and executed a deed of gift. I (Radha Mohon) also of my own free will and in good faith adopt the aforesaid according to the *Shastras*." This passage leaves no room for ambiguity. The argument was, however, based upon the opening sentence of the document which reads thus in the translation put before the Court, *viz.*—"Being without any issue I (Radha Mohon) *intend to adopt a son*," which was construed to mean that he had not yet adopted the boy, but only intended doing so. The passage has, however, been mistranslated. The words used are "*ami grahancchchook hawaya*" which mean "I having desired to take a son." This translation was accepted as correct by the learned Vakil and he withdrew his argument so far as the *ekrar* was concerned.

The argument as to the Deed of Gift (Ex. 64) executed by Norendra is based on the following passage :—

"By adopting him as a son according to the rites prescribed by the Shastras, by performing the *namkaran* and other ceremonies, by bringing him up as your son, by performing all the ceremonies at different stages of life, by making him a successor to your properties, etc., etc., you (Radha Mohon) shall live in the enjoyment of perfect felicity."

It is argued that this passage shows that the rites were to be performed later and that inasmuch as the *namkaran* as a matter of fact did take place later at Panchthopi, it was intended that everything in connection with the adoption was to take place later. This is plausible, but overlooks two passages in the earlier part of the document, namely :—

(*a*) "Accordingly, I give you my younger son for adoption by divesting myself of all rights in him." This is the translation in the paper book, but the passage correctly translated should read thus—"I am giving you my younger son in adoption by divesting myself, etc." That is the correct translation that was accepted [illegible] Appellant's Vakil [illegible] Bengali in the [illegible] "[illegible]

[illegible] taking [illegible] place on that [illegible] now otherwise had the right to the son vested in Radha Mohon from that day. That is the essential element in an adoption between Sudras. No doubt the *putresthi jag* and *namkaran* took place afterwards, but they are not essential ceremonies. It is also significant that Norendra was not present at Panchthopi where these ceremonies took place afterwards. If the "giving and taking" was to have taken place later at Panchthopi why did not Norendra go there? The only explanation is that the formal giving and taking had taken place before at Sheoraphuli.

The Bengali passage "*apani patha shastramushare dattak dan grahan kariya*" has been translated as "by adopting him" according to the rites prescribed by the Shastras. The verbal form "*kariya*" in Bengali may be rendered either as "by adopting him," or "having adopted him." We are unable to draw the conclusion suggested by the learned Vakil having regard to the two passages from the same document above given. We must not also forget that Ex. 13 and Ex. 64 are contemporaneous documents.

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It is quite true that at the time of the adoption Radha Mohon and his wife were not old and that the lady was not past child-bearing age, but they had been married many years and were without a child. Adoptions had before been taken in their family. In [illegible] Radha [illegible] sons. [illegible] adoption amongst others an English [illegible] in her brother's family.

To account for Norendra swearing that he had given Sailendra in adoption to Radha Mohon it has been suggested that Norendra was in very poor circumstances and was anxious to thrust the child on his brother-in-law, as too heavy a burden upon himself. Norendra was not however in straitened circumstances at that time. We do not see any reason why he should be disbelieved, because he has since suffered from misfortunes and has lost his properties, he belonging to a Kayastha family of rank which at that time enjoyed a high status. We see no reason to doubt his evidence and are of opinion that the giving and taking took place as deposed to by him and Jogendra.

It has also been suggested that the adoption was unlikely as on that date Radha Mohon was in *asouch*, owing to a birth in the family of one Mohendra Narain, an agnate of his. The Subordinate Judge is right in holding that it is not proved that any message about such birth reached Radha Mohon on that date. Such *asouch* results from knowledge of the fact. It is not shown that Radha Mohon knew of such birth at that time. Besides, it has been held that pollution on account of the birth of a relative does not vitiate an adoption. It is only a bar to religious acts and renders religious ceremonies inefficacious, but gift and acceptance are secular acts. See *Santappayya* v. *Rangappayya* (2).

It is argued that it is unlikely that the "giving and taking" took place in the *baithakkhana* in Norendra's house, when he had a *thakurbari*, but it is not a religious ceremony and only a secular act.

We have now dealt with all the points raised before us in connection with the adoption and hold that Sailendra Mohon was validly adopted.

We shall now deal with the decision of the learned Subordinate Judge that being Sudras, Sailendra the adopted son was entitled to share equally with Asita Mohon the afterborn natural son, and that he was so entitled also according to the terms of *ekrar-patra* (Ex. 13).

There has been considerable divergence of opinion between the different High Courts in India relating to the shares of an adopted son and an afterborn natural son amongst the three regenerate classes, but this is a case of Sudras, which has not been the subject of much judicial discussion.

Mayne thus deals with it in the second portion of sec. 168, Hindu Law, pp. 224-225 (8th Ed.).

"According to a text of Vriddha Gautama, an adopted and an afterborn son share equally. This text is said in the Dattaka Chandrika to apply only to Sudras, and in the Dattaka Mimamsa it is explained away altogether as referring to an afterborn son destitute of good qualities. The High Court of Madras,

(2) I. L. R. 18 Mad. 397, 398 (1894).

following Mr. W. MacNaghten and Sir Thomas Strange, say it is in force among all Sudras in Southern India, and M. Gibelin says it is the rule among all classes in Pondichery. It is the rule still in Northern Ceylon. Babu Shamachurn says that in Bengal this rule only applies to the lower class of Sudras."

Clear authority for the proposition the they share equally is to be found in Dattaka Chandrika. See V, secs. 29

The Dattaka Chandrika is a wor doubted authority in Bengal. special treatise on the subject of a and "possesses at present" in the of Mayne "an authority over other v. on the same subject." See sec. 30, Hindu Law, p. 30 (8th Ed.).

MacNaghten (W. H.) says—"In questions relative to the law of adoption the doctrine of the Dattaka Chandrika is adhered to in Bengal."

In *Rungama* v. *Atchama* (3) their Lordships in the Privy Council said on page 97 referring to the Dattaka Chandrika and the Dattaka Mimamsa, as follows:—"We think that these treatises are more distinct than the work of Jagannath; they are written on the particular subject of adoption; they enjoy, as we understand, the highest reputation throughout India."

In the *Collector of Madura* v. *Mootto Ramlinga Sathupathy* (4) their Lordships on p. 437 said—"Of the Dattaka Mimamsa and Dattaka Chandrika the two treatises on particular subject of adoption, Sir William MacNaghten says, that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal."

In *Waman Raghupati Bova* v. *Krishna-*

(3) 4 M. I. A. 1 (1846).
(4) 12 M. I. A. 397 (1868).

ji Rashiraj Bova (5) a Full Bench of the Court said on p. 159—"The Dattaka Mimamsa and Dattaka Chandrika are regarded in this Court as the leading authority on the subject adoption and although their title to high authority has been disput and we may be fa tic Court ent

ring t nt of the Board n p. 131—"The date of the Dattaka Chandrika is not certain: but it is at all events very much later than the Smritis." After dealing with the observations of West & Buhler in their Hindu Law, 3rd Ed., p. 11, his Lordship says on p. 132—"Both works have had a high place in the estimation of Hindu Lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Knox, J., in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But, so far as saying that caution is required in accepting their glosses when they deviate from or add to the Smritis, their

(5) I. L. R. 14 Bom. 249 (1889).
(6) L. R. 26 I. A. 113: s. c. 3 C. W. N. 427 (1899).

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Lordships are prepared to concur with the learned Judge."

In *Bhagwan Singh* v. *Bhagwan Singh* (7) their Lordships on p. 161 say—" Their authority (Dattaka Mimamsa and Dattaka Chandrika's) has been affirmed as part of the general Hindu Law, founded on the Smriti as a source from which the Schools of ... derive ..."

wandas ... referred to the Dattaka Chandrika as a work of authority and held that the position of the adopted son is accurately defined in the Dattaka Chandrika and Dattaka Mimamsa.

Having regard to these series of decisions the Dattaka Chandrika must be considered as a work of great authority.

Strange in his Hindu Law, p. 99 (Ed. 1830) states—" Amongst the Sudras the afterborn son and the adopted share equally the parental estate ": but no authority is cited in support. Apparently the authority upon which it is based is the Dattaka Chandrika.

Although the high authority of the Dattaka Chandrika has been accepted by the Privy Council in a series of cases, some recent text-writers, among them Golap Chandra Shastri in his Hindu Law (4th Ed.), have tried to question the authority of the Dattaka Chandrika, the work being said to be a literary forgery and " according to rumour " written in support of an adoption case which was then pending in the Calcutta High Court. The author speaks of the rule relating to Sudras as being a novel one enunciated for the first time in the Dattaka Chandrika.

From this and the observations of the Privy Council in the case of *Balusu* v. *Balusu* (6) that caution is required in accepting its glosses, where it deviates from ... adds to the Smritis, it has been submitted that no weight ought to be attached ... passages in the Dattaka Chandrika referred to inasmuch as it is contended that the learned author has, in laying down the above rule, deviated from the Smritis or added to them.

Before examining this contention, we should point out that the rule as laid down in the Dattaka Chandrika relating to the shares of the Sudra's adopted son and the afterborn natural son that they share equally, was accepted without question by the Madras High Court in *Raja* v. *Subbaraya* (9), one of the Judges in that case being Mr. Justice Muthusami Ayyar, who was a great Hindu lawyer. The correctness of that decision has never been questioned. It has been quoted by the Privy Council in the case of *Nagindra Bhugwandas* v. *Bachoo Hurkissendas* (8) above cited without disapprobation.

In *Baramanund Mahanti* v. *Krishna Charan Patnaik* (10) a Bench of this Court accepted the law as laid down in the Dattaka Chandrika on this point. Their Lordships said—" It is however unnecessary to decide this point in the present case, namely, as to whether the adopted son took the father's full share as the families are Sudras and by para. 29 of the Dattaka Chandrika, sec. 5 of the pre-

(7) L. R. 26 I. A. 153 : s. c 3 C. W. N. 454 (1899).
(8) 20 C. W. N. 702 : s. c. 23 C. L. J. 395 (1915).
(6) L. R. 26 I. A. 113 : s c 3 C. W N. 427 (1899).
(8) 20 C. W. N. 702 : s c 23 C. L. J. 395 (1915)
(9) I. L. R. 7 Mad. 253 (1883).
(10) 14 C. L. J. 183 (1884).

ceding para. 25 does not apply to families of that caste."

There are no other decided cases exactly on the point. We feel bound to attach great weight to the fact that these decisions have remained unchallenged for over thirty years.

It has been pointed out to us that in the Dattaka Mimamsa, Vols. 40 to 44, Vyavastha Darpana, 1012 to 104[illegible], Vyvastha Chandrika (Ed. 1880), Vol. p. 169, Dayakrama Sangraha, Chap. cl. 28, Dayatattwa by Raghu[illegible] Chap. 11, Vol. 37, Dayabhaga, Ch[illegible] sec. 9, Vol. 13, Vyasahara Ma[illegible] Mandalik's Ed., p. 60, and Mitaks[illegible] Chap. I, sec. XII, Vols. 24 to 25, [illegible] special rule as to Sudras has been laid down.

In order to examine the contention that the rule laid down in the Dattaka Chandrika has added to or deviated from the Smritis, it is necessary to quote the following passages from the work which give the authorities in support of the rule :—

V. sec. 29.—"The mode however of partition between the son of the wife, the son given and the rest and the legitimate son which has been propounded in what proceeded does not apply to the Sudra class."

V. sec. 30.—"Since in the following texts of Manu and Yajnavalkya, respectively, a share equally to that of the real legitimate son is prescribed for the son even by a female slave of a man of the class in question and the heirship with the daughter's son of such son only when having no brother is intimated; the equal partition of the son of the wife, the son given and the rest, with the real legitimate son whilst the father lives and their succession to the moiety of the share of such son, where the father may be dead at the time of partition, follow *a fortiori*. And otherwise there would be a great inconsistency if, where the son of the wife, the son given, and the rest took the fourth of the share of the legitimate son, the son by a female slave, whose title is infinitely inferior in respect to these, were to take an equal share with the legitimate son. Manu. "But a son begotten by a Sudra on would make [illegible] slave or Before dealing with the slave may, is necessary to give a share of the heritage justly to follow law established. Yajnavalkya. "[illegible] son begotten by a Sudra alt[illegible] of five rows the may take a share by In[illegible] not cloth[illegible] tive. But if the father be has [illegible] to as whether sons should make him (E[illegible] moiety of a share; and one who learned others may inherit the whole property in default of daughter's sons."

V. sec. 31.—"If according to this authority, where there may be no son of the wife and the rest, but there may be a wife and daughters, the daughter's son be entitled to share (with the son by a female slave) : the rule for the succession of the daughter (or other proper heir) would be infringed; therefore, if any even in the series of heirs down to the daughter's son exist, the son by a female slave does not take the whole estate; but only shares equally with such heirs."

V. sec. 32.—"Accordingly, the text subjoined must be construed as *referring* merely to Sudras, "A son *given* being thus adopted, if by any chance a legitimate should be born, let *them* be equal partakers of the father's estate." So also in the following text the equal participation of all lawfully begotten Sudras having been first propounded, the succession to equal shares, of the other sons likewise, is subsequently declared by the sentence, ("If there be an hundred sons") occurring therein. "For a Sudra is ordained a wife of his own class and no other.

Those begotten on her shall have equal share; if there be an hundred sons (the same mode of partition shall obtain)." If the sentence in question be referred to the real legitimate son only, the position contained in it being obtained from what preceded, its repetition would be unmeaning."

The Dattaka Chandrika [illegible] Yajnavalkya as [illegible] tion laid down by [illegible]

The passage in Manu

दास्यां वा दासदास्यां वा यः
सेऽनुज्ञातो हरेदंशमिति धर्म

Manu IX, sec.

Translated by Grady thus :—

" But a son, begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage, *if permitted by the other sons* : thus is the law established." अनुज्ञातः (*anugnatas*) has been rendered as if permitted by the other sons, which is wrong—it means *if permitted or directed by the father*. See Kallukbhatta's note on the above passage. He reads " *iti dharmo vyavasthita*," as " *iti shastra vyavastha niyata*," that is to say, this is the established *vyavastha* of the Shastras.

The Dattaka Chandrika also supports itself by Manu IX, 157 which runs thus :—

" For a Sudra is ordained a wife of his own class, and no other : all, produced by her, shall have equal shares though she have a hundred sons."

The Dattaka Chandrika says that the " Hundred Sons " must refer to different classes of sons, otherwise it would be merely a repetition of the earlier general rule laid down in Manu, and unmeaning.

The Dattaka Chandrika also supports itself by the following from Yajnavalkya :—

133. A son begotten by a Sudra even though upon a female slave, may take a share by choice.

134. But after the death of the father, the brothers should make him a half sharer; if he have no brothers, he may take the whole property, unless there are sons of daughters.

The Mitakshara note on the above is [illegible] " A son begotten by a Sudra on a female slave, obtains a share by choice (*kamatah*) [illegible] is, by the option of the father. But [illegible] the death of), the father, if there be [illegible] a wedded wife, then these brothers [illegible] make that son of the female slave, [illegible] sharer. That is, they should give [illegible] a half from their own allotment. However, should there be no sons of a wedded wife, the son of the female slave shall take the whole estate, provided there be no daughters of a wedded wife, nor their sons. But if there be such, the son of the female slave participates for half a share only. From the mention of a Sudra in this place, moreover, (it follows that) the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor even a half, much remote (is the chance of his claiming) the whole. But, if he be docile, he receives a bare maintenance." (Collection of Hindu Law Texts edited by Gharpure, published by Nirnaya Sagar Press, Bombay, 1910).

The translation of these passages by MacNaghten and Colebrooke (Tankalankar's Edition, 1870, p. 331) is practically the same, but we have quoted the above passage from Gharpure, as he follows the text more closely.

It appears from the above that the law does not give the illegitimate son of a Sudra a right to a share in his father's lifetime. The father may, if he chooses, (कामतः) give him an equal share with his

legitimate sons, and it is only upon the father's death that he becomes entitled to a moiety of the share of the legitimate son.

The law does not require even a Sudra father to recognise such a son, probably with a view to discourage alliances with female slaves. Instead of creating a moral obligation for the maintenance of such a son out of the father's estate upon the takers of the inheritance, the law giving the illegitimate son of a Sudra the right to an equal share. The Dattaka Chandrika argues that if the illegitimate son of a Sudra gets an equal share, the adopted son, who is superior, *a fortiori* gets such a share. This, it is said, proceeds upon an assumption that the adopted son is superior to the son by a female slave. The right of the son by a female slave, it is argued, is based upon consanguinity, whereas an adopted son has no such claim. How then, it is asked, is he superior? That amongst the regenerate classes the adopted son is superior to the illegitimate son, is not questioned. He has a legal status, the illegitimate son has none. Even amongst Sudras the son by a female slave is not legitimate, and has no status as a son unless his father chooses to give it to him. The superiority of the adopted son in their case also follows by analogy. The adopted son is voluntarily brought into the family and given the position of a son. It does not therefore appear to us that the Dattaka Chandrika has made an incorrect assumption in asserting that amongst Sudras the adopted son is superior to the son by a female slave.

The first text referred to in the Dattaka Chandrika in V, 32, is evidently that in Vriddha Gautama which is quoted in the Dattaka Mimamsa thus (see sec. V, 43): As for the text of Vriddha Gautama "A given son abounding in good qualities (*yatha jate*) existing should a legitimate son be born at any time; let both be equal sharers of the father's whole estate."

It will be noticed that the Dattaka Chandrika uses the words *tatha jate* meaning (subsequently born) instead of *yatha jate*. A slight typographical variation would make *yatha jate* into *tatha jate*, a[illegible] Before dealing with which really is the is necessary to gi[illegible] *Tatha jate* gives a th[illegible]ugustly to fol[illegible]d is an ordinary ex[illegible] *jate* is not. It has alt[illegible]eswar[illegible] ingenuity of com[illegible] In[illegible] not cle[illegible]thay it has been con[illegible] has[illegible] to as whone possessed of good (Ev[illegible]e very convincing. This is how t[illegible]amed (ka Mimamsa reads it. "That (passage) must be construed as supposing the former possessed of good qualities, and the legitimate son, destitute of same: on account of the epithet '*yatha jate*' (abounding in good qualities). He, in whom there is a *jata*, that is an assemblage (*samuha*) of good qualities, (implied by *yatha*), is *yatha jata*—one abounding in good qualities. This is the meaning; for, the term, "*yatha*" is significant of similitude, depending on quality."

The meaning given in Dattaka Mimamsa is said to receive support from Manu IX—141, which runs thus:—

"Of the man, to whom a son has been given, according to a subsequent law, *adorned with every virtue*, ("उपपन्नोगुणैः" 'Upapannogunai'): that son shall take a fifth or sixth part of the heritage, though brought from a different family."

The Dattaka Chandrika, says that the above passage from Vriddha Gautama, really refers to Sudras only, which seems to me to be a natural and logical conclusion. His argument is that it refers to a separate class—not to the regenerate classes, as otherwise the unequal shares

mentioned for the regenerate classes in the Smriti cannot be reconciled. To reconcile Vriddha Gautama's text with those texts a forced interpretation has to be given after adopting such an unusual expression as यथाजाते for a natural and easily intelligible expression as तथाजाते

The Mitakshara says in the passage above quoted that [illegible] wife should give the slave half from the[illegible] This is made clear by Balam II, 22-23, also Subod[illegible] (same edition) which [illegible] the entire estate, a half regarded as his share, [illegible] one-half of the amount allotted [illegible] legitimate issue."

This question about the Sudra adopted son and an afterborn legitimate son's share has been dealt with in Dattaka Siromoni compiled by Prof. Bharat Chandra Siromoni of the Sanskrit College at Calcutta, an eminent Sanskrit scholar held in high respect in Bengal. It is a very valuable treatise on the law of adoption, which was published in 1867.

It comprises the following treatises on the law of adoption :—1. Dattaka Mimamsa : 2. Dattaka Chandrika : 3. Dattaka Nirnaya, (a compilation by Srinath Bhatta, a celebrated Pundit referred to in MacNaghten's Consideration on Hindu Law, Preface, p. xiii) : 4. Dattaka Tilaka (referred to as a fragment of valuable commentary on Hindu Jurisprudence by Bhavadeva, an old writer on Hindu rituals also mentioned in Colebrooke's Digest) : 5. Dattaka Darpana (a modern digest) : 6. Dattaka Kaumudi (referred to in MacNaghten's Principles and Precedents of Hindu Law, Vol. II, p. 200) : 7. Dattaka Didhiti (referred to as a work of authority in the evidence of Ramcoomar Siromoni in *Srimutty Degumberry Deby* v. *Srimutty Taramony Daby* (11) : 8 Dattaka Siddhanta Munjuri (also a Modern Digest).

After discussing the various authorities in Chapter X the learned author of Dattaka Siromoni concludes thus :—see p. 194/2.

[illegible] औरसेन सह दत्तस्य समांश एव शास्त्रार्थः ।

The meaning of the Shastras is that [illegible]ongst Sudras the adopted son takes [illegible]al share with the *aurasa* son.

In Dattaka Kaumudi, p. 25, we have the following :—

तथा विधानमाचार्यैः प्रमाणं परिकीर्तितं । २८०
दत्ते पुत्रे यदाजाते कदाचित् स्यौरसे भवेत्
पितुर्वित्तस्य सर्वस्य भवेतां समभागिनौ ॥ २८१

The proof of this is set out in Vidhanamala. If after the adoption an *aurasa* son be born (*yada jate*) they become equal sharers of the whole of the father's estate. It will be noticed that in the above the reading is again different. It is neither *yatha jate* or *tatha jate* but *yada jate* which means when born, which is practically the same as *tatha jate*.

Vidhanamala is undoubtedly an ancient work of authority. Dattaka Didhiti also supports the same view. Having regard to the above we cannot say that the Dattaka Chandrika has in any way deviated from the Smritis, and inasmuch as the rule laid down in the Dattaka Chandrika in the case of Sudras has been accepted as correct by both the Madras and Calcutta High Courts, we think the matter must rest there.

In this case the adopted son also takes an equal share according to the *ekrarpatra* (Ex. 13) which runs thus :—

"If by the blessing of God, a son of

(11) Macnaghten's Hindu Law, Ed. 1824, App. xiii.

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my loins is born, both of them shall be equally entitled to all the aforesaid moveable and immoveable properties which may be left by me, and the son born of my loins shall not be entitled to claim a larger share in them, and if he does so, it shall be rejected."

We hold that the *ekrar* is valid and operative.

In the Andul case, namely, that of *Surendra Keshab Roy* v. *Doorga Soondary Dassee* (12), the *ekrar* was held binding as between the Ranis, the adoptive mothers, and it was further held that the adopted sons could insist upon the performance of the contract by which each Rani bound herself to the other to deal with the estate in their favour. In *Bhala Nahana* v. *Prabhu Hari* (13) it was held that where a person by an express promise to settle his property upon the boy induced his parents to give him in adoption, but died without having executed a settlement, that the equity to compel the heir and legal representative of the adoptive father specifically to perform his contract, survived, and that the property in the hands of the widow, the heir-in-law in that case, was bound by that contract.

Asita Mohon the afterborn son also relies upon the *ekrar* (Ex. 13) in support of his contention that according to its terms the *debutter* properties do not go to the adopted son or his heirs.

We hold that in law and according to the *ekrar* Sailendra was entitled to one-half of the secular properties and his sons are now entitled thereto.

Debutter—

The appeals so far as they relate to the *debutter* properties fall under the following heads :—

1. That the properties alleged to be *debutter* are not so.

2. That in law the adopted son has no right to be treated as a *shebait* in respect of the *debutter* properties in the presence of the natural-born son.

3. That in this case the adopted son cannot make any such claim having regard to the *ekrar*.

Before dealing with these contentions it is necessary to give a short account of the history of the Bhubaneswari *debutter* properties and the [illegible] with it. It is necessary to [illegible] has not clear [illegible] time of Nrisingha Deb (Ex. [illegible]) to as who died about 1200 B. S. [illegible] left him surviving his brother named Gobind Deb, his widow Lakshiswari, a son named Badan Chandra Ghosh Moulik and Brojomoni a daughter. Badan Chandra died on the 6th Sravan 1213. He executed two documents on the day of his death, namely, a *muktari-patra* (Ex. 14) in favour of his mother Lakshiswari by which he appointed her Manager of his estate and an *anumatipatra* (Ex. 46) in favour of his wives Khudumoni and Bhubaneswari. Shortly after his death, namely, on the 17th of Sravan 1213, his two wives executed an *ekrar-patra* (Ex. 47) in favour of their mother-in-law Lakshiswari, by which they acknowledged and confirmed her appointment as Manager and Karta of the estate left by their husband, and agreed that she was to get her name registered in the Collectorate, and also stipulated that in the event of their adopting a son, he would in his turn be registered as proprietor. Lakshiswari thus took possession of the estate and got her name registered in the Collectorate Records. It appears that Lakshiswari had some litigation with Gobind Deb, but they settled their dis-

(12) I. L. R. 19 Cal. 513, 536 (1892).
(13) I. L. R. 2 Bom. 67 (1877).

pute by a Deed of Compromise dated the 18th Assar 1220 (Ex. 15) which recited amongst other things that Gobind Deb had separated from Lakshiswari and Badan in 1204. Lakshiswari continued in possession of the estate until the 26th Joista 1230 when she withdrew from the management and executed a Deed of Relinquishment (Ex. 48) in favour of her surviving daughter-in-law Bhubaneswari, empowering her to get her name registered and to manage the estate until she adopted a son, and pending his [illegible] Lakshiswari also executed about two *debutter patras*, V1 and V2 of her widowed daughter B[illegible] *shebait*, namely, on the 26th and 30th Joista 1320, respectively. She died on the 11th Assar 1230. Bhubaneswari adopted a son named Krishna Kinkar, who married three wives, Kristapriya, Monmohini and Kristamoni, by whom he had three daughters but no son. He accordingly executed an *anumatipatra* dated the 14th Kartik 1251 (29th October 1844) in favour of two of his surviving wives, namely, Kristapriya and Kristamoni, giving them permission to adopt, but provided that his mother Bhubaneswari was to continue as the Manager of the estate during her lifetime and after her death the widows were to be the Managers, until the adopted son came of age. They adopted a son named Radha Mohon and on the 29th Sravan 1272 (12th August 1865) executed an *ekrar-patra* (Ex. 45) in favour of Bhubaneswari and Radha Mohon, leaving the management in Bhubaneswari's hands, and giving up their rights in the estate in consideration of some properties given to them by way of maintenance. This deed also provided that the estate was to vest in Bhubaneswari after their death and in Radha Mohon after Bhubaneswari's death. On the 6th Pous 1286 (20th December 1879) Bhubaneswari executed a "Deed of Gift and Relinquishment" (Ex. T) in favour of Radha Mohon "as he was at that time fit to manage the estate and to take it out of the hands of the Court of Wards," which had in the meantime taken possession, owing to the incompetency of the proprietor. Radha Mohon thereafter took possession of the estate from the Court of Wards and the contest is now between the sons of his adopted son Sailendra, and [illegible] Mohon his afterborn natural son.

The *debutter* properties in suit are said to belong to two deities, namely, Radhakant Jiu and Joy Shiva Durga. So far as the latter is concerned, there is no physical image, but poojas of both have been carried on in the family for a considerable time, the poojah of the latter being held annually at Durga Poojah time.

Of the *debutter* properties Taraf Harishpur alone is said to have been dedicated to Joy Shiva Durga and the rest are claimed on behalf of Radhakant Jiu. We intend to deal with individual items of the property in the order in which we have summarised the findings of the learned Subordinate Judge.

(1) *Kismat Binderpur*—The learned Subordinate Judge had held that this property is not *debutter* and was never treated as such.

It is said to have been endowed by Lakshiswari by a Deed of Gift—Ex. M, dated the 8th Bysakh 1226 in favour of Radhakant Jiu.

Asita Mohon is the only witness who speaks of the production of Ex. M from proper custody. He did not search for it, he had never seen it before he got it from one Gobind Adhikari who was in charge of the estate *dagtarkhana*. Gobind Adhikari did not tell him where he had

got it from. Gobind is still in his service but has not been called. We hold with the learned Subordinate Judge that the production of Ex. M from proper custody has not been proved.

It is a document written on plain paper and is not registered. A large number of other documents executed during the time of Lakshiswari's management, both before and after the date of Ex. M, appears, all of them, to have been registered. Its non-registration is a circumstance which has to be remembered in considering the question of its genuineness.

Ex. 36 (2) which is a certified copy of her the Decennial Settlement shows that Kismat Binderpur was settled by the Government with Gobind Deb for the years 1197 to 1206 B. S.

Ex. 40 (2) dated 28th Choitra 1212 (9th April 1806) is Badan's application for registration of his name as proprietor in which he alleged that Gobind Deb was the *benamdar*.

Lakshiswari is said to have dedicated this property by Ex. M in 1226. She was at that time managing the estate of Badan under the *muktaripatra*. She had no right to dedicate any property either as Mukhtear, or as executor if the *muktaripatra* be held to operate as Badan's Will. She gave up her management in favour of Bhubaneswari in 1230 by Ex. 48. In that document Binderpur is one of the properties mentioned by name as belonging to the estate. There is a clause in that document which runs thus—"That you (Bhubaneswari) shall maintain the service and worship of the deities established by your husband according to custom, preside over your husband's house, etc." This is a general direction to the lady to manage the estate and keep up the *shevas*. It does not support the contention that Binderpur was treated as *debutter* property at that time. The document taken as a whole rather goes against such a contention, as Binderpur appears in the schedule of properties therein set out as belonging to the estate of Badan. It directs Bhubaneswari to get her name registered in respect of such properties in her place.

Ex. 42 (2) dated Aswin 1230 (17th September 1823) shows that Bhubaneswari got her name so registered.

Ex. 12 dated 18th Sravan 1275 (1st August 1868) is an *ijara* lease granted by Bhubaneswari of the *mal* and *kharidji* alti[illegible] of five Mouzas including Binderpur. In[illegible] has not clear from it what property is (Ex.[illegible] to as "dedicated to the service of the deities," but it is clearly not a lease granted as *shebait* and the bulk of the lands leased seems to be *mal* lands.

Bhubaneswari relinquished her management in favour of Radha Mohon by Ex. T, dated 6th Pous 1286 (20th December 1879). This deed recites that "Radha Mohon is the sole reversionary heir to the properties," that he is "entitled to exercise the right of sale and gift in those properties and to remain in possession of them from generation to generation in succession in any way he pleased." In the list of properties Binderpur is not specifically mentioned as *debutter*. This document purports to transfer the zemindaris, *mal*, *debutter*, etc., to Radha Mohon and contains a general direction that he should perform the service of the deities, etc.

We have from the Mutation decree, Ex. 50 (11), date illegible, that Nabin Krishna Banerjee as Manager for Bhubaneswari was registered for Binderpur and from Ex. 50 (10), dated 15th January 1881, that Radha Mohon was registered as proprietor of that Mouza, neither of them as *shebaits* for the Thakur. From 1201, as shown from Ex. 51 (2) up to 1861 in the Collec-

torate Records the zemindars are recorded as proprietors, not as *shebaits*.

In Ex. 24, dated 3rd Vadra 1308 (19th August 1901) which is a *kabuliyat* by a tenant in favour of Radha Mohon in respect of certain Chowkidari Chakran lands, Kismat Binderpur is referred to as appertaining to his zemindari. From Ex. 58 a Hastabad and Terij prepared in 1288, Binderpur appears to have been treated as part of the zemindari estate. *Dakhilas* for a great number of years, Ex. 25, series, and Ex. 26, are in the name of the zemindars as owners.

The receipts from the property and payments of its Government revenue are entered in the *mal* accounts of the family. Although payments for land revenue of the other *debutter* properties are shown in the *debutter* accounts, such payment for Binderpur is not there shown.

The above facts show that the learned Subordinate Judge was quite right in holding that Binderpur was not *debutter* property and has not been treated as such.

The mere reference to the properties in Ex. 12 " dedicated to the service of the deities " even taking that reference as relating to Binderpur cannot lead one to conclude that Binderpur was really *debutter* property.

Exs. V1 and V2 both of June 1823 and which are registered *debutter* deeds executed by Lakshiswari in favour of the deity Radha Gobind Jiu, appointing her widowed daughter Brojomoni as *shebait* make no reference to Ex. M, or to Binderpur as having been previously dedicated. Ex. M has, however, been sought to be supported by another unregistered document (Ex. C) which is an *arpannama* said to have been executed by Bhubaneswari on the 4th Bysakh 1253. The date on this document appears to have been altered and some other documents such as the Collector's *rubokari* (Ex. A2) for registration of Bhubaneswari's name as *shebait*, dated 18th Baisakh 1273, which makes no mention of Ex. C, throw doubt on its genuineness.

It is pointed out that both Ex. M and Ex. C bear a note that they were filed in a case before the Deputy Collector. There is no evidence, however, that they were actually so filed.

To sum up, having regard to the registration of the names of the zemindars, as proprietors, not as *shebaits*, to the *dakhilas* in their names as zemindars, to the absence of entries relating to the properties in the *debutter* accounts as above mentioned, to the payment of Government revenue from the *mal* accounts, and the non-registration of the Deeds of Endowment, Ex. M, when the bulk of the documents of transfer executed by members of the family are bound to have been registered, and the want of proof that Ex. M was produced from proper custody, support the finding of the Subordinate Judge, which we uphold.

The trial Court has also found that Harishchandrapur is not *debutter* property and we agree with that finding, and as there is no appeal from it by Asita Mohon, we need not deal with it any further.

As to the properties found to be *debutter* by the trial Court we shall deal with them in the order in which they appear in his judgment.

Harishpur.

This property is shown to have been purchased in 1192 B. S. by Nrishingha Deb Ghosh Moulik as *shebait* in the name of the deity *Joy Shiva Durga*. See Exs. S3 and S2 (where his name appears as Nursing Ghosh, dated 1st Chait 1192 B. S. and 21st Chait 1192 respectively). The *kabuliyat* for the Decennial Settlement for

this estate from 1197 to 1206 B. S. was executed by Nrisingha Deb as such *shebait*. See Ex. S1. We find from Ex. W2 dated 13th July 1807, that Government revenue was paid for it by Lakshiswari as *shebait* and Ex. E4, dated 1st Aghran 1287, that Radha Mohon applied for registration of his name as *shebait*. This exhibit also shows that before him Bhubaneswari was recorded in the register as *shebait*, although the *rubokari*, Ex. 42 (2), dated 17th September 1823 in respect of Bhubanewari's application for registration does not specifically show that she applied to have her name registered as such *shebait*.

It is clear from the evidence that there has been an annual pujah held in the family in the name of Joy Shiva Durga. No doubt the mere purchase of an estate in the name of a Thakur does not prove a dedication [see *Raj Mohan Gossain* v. *Gour Mohan Gossain* (14) and *Moharani Brojo Soondery* v. *Ranee Luchmee Koonwaree* (15)], but we think that the documents above referred to and the way in which the proprietors of the estate dealt with the property, show that Harishpur was validly endowed to the deity. No adverse inference can legitimately be drawn against the *debutter* character of the property from the fact that its income is entered in a separate account, nor in the books of account of the deity Radha Gobind Jiu. That her pujah expenses appear in the secular account is probably due to the fact that the income of the dedicated property was insufficient and had to be supplemented from the income of the secular estate. It is a small property and is shown to have been treated as *debutter* by successive holders of the estate and held by them as *shebaits*.

We have been asked to hold by the sons of Sailendra Mohon on the strength of Ex. 15 which is a deed of compromise, executed in Assar 1220 by Gobind Deb in favour of Lakshiswari settling the litigation above referred to, that inasmuch as Mouza Harishpur is there recited as belonging to Lakshiswari in her own right as her *nij taluk*, there is ample ground for holding that Nrishingha Deb Ghosh Moulik acquired it in the *benami* name of the Thakur to deprive his brother Gobind Deb, that it was put in the name of the Thakur although it was really secular property. In support of this contention reference has also been made to the *muktaripatra* (Ex. 14) in favour of Lakshiswari and the *ekrar* of Lakshiswari (Ex. 48) in favour of Bhubaneswari, where there is no specific mention of this property being *debutter*. We are unable to accede to this contention.

The absence of a permanent image has also been commented upon. Such an image is not absolutely essential for dedication to a Thakur. The Durga Pujah is a periodical festival in Bengal and clay images of the Thakur are built every year and thrown into a river after the pujah is over. Such pujah of Shiva Durga has been held every year for a long period in this family. We agree with the trial Court that Harishpur is *debutter* property.

Huda Kutubpore (Fatehour) Dayanagar and Hasnabad.

Exs. V1 and V2 and Ex. 104 govern the above.

V1 deals with Kutubpore and portion of Dayanagar, Ex. 104 with Dayanagar and V2 with Hasnabad.

V1 and V2 are taken together, as Lakshiswari purported to create these endowments appointing Brojomoni *shebait*. They were executed about the same time, namely, V1 on the 26th Jaista 1230 and V2 on the 30th Jaista 1230. The en-

(14) 4 W. R. 46 (P. C.) (1859).
(15) 20 W. R. 95 (P. C.) (1873).

dowment is in favour of the deity Radha Gobinda which also appears to have been established about the same time. The Thakur is in existence and has been located in a large *thakurbari* and its daily and periodical festivals have been conducted ever since. Separate accounts are kept in the name of the Thakur and the *sheva* has been carried on by successive holders of the estate. Brojomoni got her name registered as *shebait*, see Exs. E, E2 and U8. Brojomoni acquired other properties out of the income of the endowed properties in the name of the Thakur and got her name registered in respect of them as *shebait*. She paid revenue as *shebait* and remained in possession as such up to her death which occurred in 1285 B. S. After her death Badan's heirs kept those properties separate and treated them as validly endowed, as also the properties acquired out of their income.

The originals of V1 and V2 have not been produced. Asita Mohon was called upon to produce the original of one of them, but did not, and certified copies produced by him were admitted. The sons of Sailendra Mohon had in fact called upon Asita Mohon to produce V1 and V2 and were ready to file certified copies upon non-production of the originals. We hold that V1 and V2 have been properly admitted and that they are genuine documents.

It is to be noticed that Lakshiswari relinquished her management in favour of Bhubaneswari by Ex. 48 on the 26th Joista 1230, the same day she executed V1 in favour of Brojomoni, and four days later, namely, on the 30th Joista 1230, she dedicated further properties by V2 in Brojomoni's favour as *shebait*. It is quite clear she as Manager or executor, had no authority to create such *debutters*. It has been argued that these dedications were apparent and that in substance they were by way of provision for Brojomoni, specially as the deeds provided that after Brojomoni's death Bhubaneswari was to succeed as *shebait* and after her the adopted son of Badan. It is no doubt capable of that inference, but it is quite possible also that Brojomoni was pious-minded and Lakshiswari thought her a fit and proper person to act as *shebait*. Nothing has been placed before us to show that any fraud was contemplated. This has not even been suggested.

It is quite correct that Lakshiswari had no legal power to create such endowments, but the subsequent successors to the inheritance did not question their validity prior to this suit. No doubt in the list of properties made by the Court of Wards during its management, these properties were included in a general list of properties belonging to the estate, as also in the schedule to Ex. T, but we find from Exs. BB1 and EE3, Radha Mohon applied as *shebait* in 1881 to have the name of the Thakur registered in respect of Dayanagar, Kutubpur and Fatehpur and it was so ordered.

Having regard to all the circumstances we hold that the above properties were *debutter*. We do not think we ought to, after this lapse of time, hold the endowments void.

Sreedhurpur, Paharpur and portion of Kutubpur.

These were purchased from the income of the other three.

Ex. N1 is the conveyance of Sreedhurpur in favour of the idol represented by Brojomoni as *shebait* dated 6th Falgoon 1237.

Exs. O and P (dated 3rd Joista 1238 and 28th Joista 1239) are similar conveyances of Paharpur and Ex. Q dated 27th Choitra

1237 is a similar conveyance in respect of 7½ annas of Kutubpur.

It is conceded by the Appellants that our decision in respect of the other three will also govern these properties. We hold that they are *debutter*.

The last one of the properties we have to deal with is *Mohonpur*.

Lakshiswari obtained this property as a gift from her father. See Ex. Y, dated 25th Agran 1298. Ex. R, dated 14th Kartick 1251, is the *anumatipatra* in favour of his widows executed by Kristo Kinkor. It also purports to assign Mohonpur additional estate for the Thakur Radha Gobind. The *ekrar*, Ex. 45, of 1272 executed by the widows in favour of Bhubaneswari and Radha Mohon contains a recital that Mohonpur is dedicated to the Thakur and we find from Ex. AA1 that in 1287 Radha Mohon got the Thakur registered in the Collectorate as proprietor represented by him as *shebait*.

We hold that Mohonpur is *debutter*. In fact it has not been seriously contested that it is not.

The sons of Sailendra Mohon have, however, submitted that as the income of the *debutter* properties exceeds the expenditure for *deva sheva* and inasmuch as large sums of money from the *deva sheva* fund have been shown to have been spent in Radha Mohon's time in payment of his personal debts and expenses, as also for the maintenance of the daughters of Kristo Kinkar, we should hold that the above properties were only charged to the extent of the amount necessary for the *sheva* and the balance of the income should be declared divisible as secular property. The learned Subordinate Judge has found that the income of the *debutter* properties is roughly between Rs. 6,000 and Rs. 8,000 and the expenses have been variously estimated between Rs. 3,000 and Rs. 5,000. It may be that there is a small margin left over, but as we find that there was a clear intention of creating the properties *debutter* and they were treated as such by the subsequent holders of the estate, although Radha Mohon appears to have spent some of the income on his personal account and also to have mortgaged Paharpur without mentioning that it was *debutter* property, we do not think it would be right to hold on the materials before us that the properties were not absolutely dedicated, but are merely charged with *deva sheva* expenses. All the circumstances show that these were genuine endowments, and intended to be absolute.

The next question is as to the right of Asita Mohon and Sailendra's sons to be treated as co-sharers. The learned Subordinate Judge has held against the latter basing his judgment mainly on the *ekrar* executed by Radha Mohon, Ex. 13. He rightly holds that *shebaitship* can be held in shares and separate *palas* may be directed. Ordinarily the right to *shebaitship* of family deities goes by inheritance unless otherwise provided by the deed of endowment. The learned Subordinate Judge, however, seems to think that inasmuch as in the presence of the natural-born son, the adopted son is not competent to perform the *krityadis* and no specific mention is made in the *ekrar* in this case relating to the adopted son's right to the *shebaitship*, Sailendra had no right to it, and so Sailendra's sons have no such right. When he is speaking of *krityadis*, he is referring collectively to *deva krityas* and *pitri-matri krityas*, namely, the *shevas* and *shrads*. It is now settled law that as regards inheritance the adopted son holds in all respects the same position as an *aurasa* son except in some special matters. Let us see if there are any specific rules exclud-

ing him from *shebaitship* in the presence of the *aurasa* son. We find that in the presence of the *aurasa* son, the adopted son's right to perform certain *shrads* is cut down. If after adoption a natural son is born to the adopter, then the adopted son cannot perform the *adya* or first *shrad*, the twelve monthly *shrads* which follow, the six-monthly and the anniversary *shrad* and the *sapindi-karan* (see Sirkar on Adoption—Tagore Law Lectures, 2nd Ed., p. 388). Subject to this restriction, however, he can perform all the other *shrads* like the *aurasa* son, with this variation that the anniversary *shrads* have to be performed by him in the *ekoddista* form in honour of the deceased only and by the *aurasa* son in the *parvana* mode, in which a double set of three oblations are presented. So the *aurasa* son has a superior right in respect of *pitri-matri krityas*, but there is no such preference in respect of *shevas* or *deva krityas*.

The learned Subordinate Judge has drawn an adverse inference against the adopted son inasmuch as no reference is made in the *ekrar*, Ex. 13, to his having equal rights in the *debutter* properties, while there is such a reference to his succeeding to the secular properties.

The passage in the *ekrar* runs thus :—

"From this day the aforesaid adopted son has become entitled to all my properties, moveable and immoveable, and to perform the services of the idols and all rites and ceremonies in connection with maternal and paternal ancestors. After my death, he shall perform the services of the deities and live in my ancestral residence at Panchthopi, and being vested in all my rights, and entitled to the ownership of these properties, he shall protect, enjoy and possess them by exercising the rights of sale and gift, and shall maintain all my rites and ceremonies. If by the blessing of God a son of my loins is born, both of them shall be equally entitled to all the aforesaid moveable and immoveable properties which may be left by me, and the son born of my loins shall not be entitled to claim a larger share in them, and if he does so, it shall be rejected."

In the second portion there is no reference to the right to perform the service of the idols, but we are unable to agree with him in construing the silence into a denial of the right. The right has not been expressly taken away, nor can it be said to have been taken away by implication. It is difficult to draw such an inference on the supposition that the adoptive father must be taken to have known, that the natural son has some superiority over the adopted son in respect of *shrads*, and his intention was accordingly to disqualify him from sharing the *sheras*. Such a conclusion is far-fetched. The learned Subordinate Judge also supports his decision on the ground that it appears from Narendra's evidence that the question of *debutter* properties was discussed at the time of the adoption, and he says that because nothing is mentioned in the *ekrar* about them, it must be taken that Radha Mohon intended to exclude the adoption in case of the birth of an *aurasa* son. This is based on the following passages in Narendra's evidence which appears in his cross-examination :—

"*Q.*—Was there any talk about the *debutter* properties at the time of the *ekrar* ?

A.—Not at the time of the *ekrar*, but when the draft was being made.

Q.—What was it?

A.—Radha Mohon Babu proposed that in case he gets a natural-born son, he would have the right to perform the *deva kirti* and *pitra kirti*, that is, he did propose

but not accepted, neither inserted in the deeds.

Q.—Again I ask, was there any talk regarding *debutter* properties? (Objected t.).

A.—Radha Mohon Babu said he got the *debutter* properties and in case he gets a natural-born child, he would have control over the *debutter* properties, but it was not accepted, but as it tantamounted to carving of the property, for good or bad reasons, I did not agree, and hence it was not inserted in the deed.

It is quite possible that if there was a discussion at the time, and Narendra did not agree to Radha Mohon's suggestion about the *debutter* properties, the matter was dropped and the law was left to take its own course. If it was settled that the adopted son was not to get it at all, Radha Mohon could have easily inserted in the deed that the adopted son would have no such right in the presence of the *aurasa* son. Neither of them has any interest in the *debutter* properties except as *shebait*, and it is quite conceivable that the adopter did not think it necessary expressly to provide for the contingency.

We hold therefore that Sailendra's sons are entitled to take eight annas in the properties found by the Subordinate Judge and ourselves not to be *debutter* and that that they are jointly entitled to rank as *shebaits* equally with Asita Mohon in respect of the properties found by both Courts as *debutter*. For convenience of the *sheras* the properties are to be held under joint management, but the periods of the *sheva* may be divided into six-monthly *palas* or annual *palas* in alternate years, as they may arrange between themselves, failing which liberty is given to them to take the direction of the Court.

During the progress of the appeal we were informed that the parties had settled their disputes amicably and the matter was allowed to stand over for recording the settlement, subject to our sanction, as infants were involved. We regret that in spite of the advice of the learned Vakils the settlement has fallen through. The estate is not a large one and may be lost in this somewhat expensive litigation.

Asita Mohon's appeal fails in every respect and is dismissed with costs.

The appeal of Nirode Mohon and others succeeds as regards their right to *shebaitship* and we allow their appeal with half costs.

N. G.

PATNA HIGH COURT.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 102 OF 1916

ROE, J. JWALA PRASAD, J. 1916, 18, May.		MUSSAMMAT SUNDER KUER, Petitioner, *v.* KING-EMPEROR.

Amaldustak, *whether it requires stamp—Indian Stamp Act (II of 1899), sch. I, Art. 35—Conviction under sec. 62 (b), if maintainable—Schedule of Stamp Act, if exhaustive.*

The schedule attached to the Stamp Act must be treated as exhaustive.

An agreement for a lease whereby no rent is reserved, and no premium paid or money advanced is not included in the schedule and does not require a stamp.

Held, *on a construction of* amaldustak *which was for a term of seven years but wherein no rent was fixed, that the document did not require stamp and so the conviction of the executant of the document under sec. 62 (b) of the Stamp Act was set aside.*

This is a revision case against the judgment and order of R. Sheepshanks, Esq., Sessions Judge of Mozufferpur, dated 23rd February 1916, confirming the sentence and order passed by Mr. E. Beal, Sub-

divisional Officer of Mozufferpur, dated 24th January 1916.

The facts out of which the case arises are shortly as follows :—The Petitioner is the proprietor of 15 gundas share of Mauza Megna, Tuppa Bhatsala, Perganna Bisara, within the District of Mozufferpur. She agreed to give a lease of the said property to Mr. A. B. Fraser, Proprietor and Manager of the Motipur Factory, but as it was necessary that the lessee would take possession of the property immediately, she gave an *amaldustak* (fully set out in the judgment) on the 17th October 1911 to the said Mr. Fraser to enable him to take possession of the said share which included 24 bighas of zerait lands. One Beehu Gope, a servant of the Motipur Factory, instituted a criminal case against one Seonandan Singh, a servant of the Petitioner, and in that criminal case the complainant filed the said *amaldustak*. Thereupon the document was impounded and submitted to the Collector for orders by the trying Deputy Magistrate by his order dated 1st September 1915. On 18th September 1915 the Collector Mr. D. Weston passed the following order : " Call in the executant of the *amaldustak* to shew cause personally or by pleader on the 1st October why she should not be prosecuted under sec. 62 (*b*) Stamp Act for executing the instrument, which appears to be an agreement to lease, or lease, without the same being duly stamped." Subsequently on 13th October 1915, the following order was passed by the Collector : " The cause shewn is in my opinion inadequate. Prosecution sanctioned under sec. 62 (*b*), Stamp Act, case to Joint Magistrate for disposal." The case having come up for hearing before the Sub-divisional Officer of Mozufferpur, he by his judgment and order dated 24th January 1916 found the Petitioner guilty of executing a lease without the same being duly stamped and sentenced her to pay a fine of rupees five hundred under sec. 62 (*b*), Act II of 1899 or in default to undergo three months' simple imprisonment. He imposed the maximum penalty because the document retrains from stating the amount of rent payable, so that it is impossible to estimate the amount of duty which ought to have been paid. Against the said conviction and order the Petitioner preferred an appeal to the Sessions Judge of Mozufferpur, who by his judgment dated 23rd February 1916 confirmed the sentence and order of the first Court.

The Petitioner thereupon moved the High Court and obtained this rule.

Mr. Shoroshi Charan Mitter for the Petitioner.

Mr. Sultan Ahmed for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The short point for decision in this matter is whether a document in the following terms is required to be stamped.

" *Amaldustak*, dated the 17th October 1911.

Amaldustak on behalf of Mussammat Sunder Kuer, widow of Tulsi Ram Thakur, deceased, resident of Mauza Donwara, Chakla Nai, Perganah Bisara.

Whereas I having made proposal for letting out in *thicca patta* the shares in the following Mauzahs, my milkiat right, to Mr. A. B. Fraser, the Proprietor, Manager and *Am-muktear* of the Motipur Concern for seven years, from 1319 to 1325 F. S., delivered possession and put him in possession thereof. It is desired that the said *thikadar* as *kashtkar* shall enter upon possession of the shares mentioned below and shall remain so, till the term, and whereas the considerable portions in the

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Constitution of Benches.

The constitution of the Courts and distribution of business amongst them which have taken effect from Thursday, the 15th of June, are as follows :—

CRIMINAL BUSINESS AND THE PRIVY COUNCIL DEPARTMENT.—The Hon'ble the Chief Justice and the Hon'ble Mr. Justice Walmsley.

GROUP I and all appeals under Or. 41, r. 11 (except appeals from orders of the Hon'ble Mr. Justice Cuming).—The Hon'ble Mr. Justice Mookerjee and the Hon'ble Mr. Justice Cuming.

GROUP II and appeals from orders of the Hon'ble Mr. Justice Cuming under Or. 41, r. 11.—The Hon'ble Mr. Justice Fletcher and the Hon'ble Mr. Justice Teunon.

GROUP III.—The Hon'ble Mr. Justice N. R. Chatterjea and the Hon'ble Mr. Justice Sheepshanks.

GROUP IV.—The Hon'ble Mr. Justice D. Chatterjee and the Hon'ble Mr. Justice Newbould.

REGULAR APPEALS OF ALL GROUPS.—The Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice Richardson.

ORIGINAL SIDE.—The Hon'ble Mr. Justice Chaudhuri and the Hon'ble Mr. Justice Greaves sitting singly.

Royal Prerogative of making Rules and its limitations—" Zamora " case.

The decision of the Judicial Committee of the Privy Council in the case of the steamship " *Zamora* " is undoubtedly of great importance as a Prize Court decision but is of even greater importance as imposing limitations on the highest executive in the Empire, *viz.*, the King in Council, in regard to the rule-making power by exercise of Royal Prerogative. Their Lordships (Lord Parker of Waddington, Lord Sumner, Lord Parmoor, Lord Wrenbury and Sir Arthur Channel) maintain that it is competent for His Majesty's Judges to question the validity of the Prize Court Rules made by His Majesty in Council for the guidance of the Prize Court. This they say not simply because Or. 29, r. 1 of the Prize Courts' Rules seemed to them to confer rights on the Crown of England contrary to the well-recognised doctrines of international law but also on the general grounds that the Crown has no prerogative to make, alter or vary the substantive law. The rule in question was framed by His Majesty in Council " under powers vested in His Majesty by virtue of the Prize Court Act, 1894, *or otherwise.*" Their Lordships did not question that the King in Council had powers to frame rules under the statute of 1894 but they would not recognise that the Crown had any powers to go beyond and make any rules *otherwise, i.e.*, in exercise of the Royal Prerogative. Further their Lordships are of opinion that the rules so framed by His Majesty in Council may lay down rules of procedure and practice which would be binding on the Courts, but not so, if they sought to prescribe or alter any rule of substantive law.

Their Lordships say " so far, therefore, as the Prize Court Rules relate to procedure and practice they have statutory force and are, undoubtedly, binding. But Or. 29, r. 1, construed as an imperative direction to the Judge is not merely a rule of procedure or practice." In their Lordships' opinion it went further inasmuch as it directed the Court to recognise the right of the Crown " to requisition the vessel or goods in question " of the subject of a neutral Power. This right, if it did not exist

independently, *i.e.*, by virtue of any statute or under the accepted doctrine of the international law, it could not be conferred on the Crown by any rules framed by His Majesty in Council. Regarding the claim that it could be so conferred by virtue of the Royal Prerogative, their Lordships said, "The idea that the King in Council or indeed any branch of the executive, has power to prescribe or alter the law to be administered by the Courts of Law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the executive have power to make rules having the force of statute, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the Prerogative involves any power to prescribe or alter the law administered in Courts of common law or equity." Their Lordships eventually came to the conclusion that the rule in question, in so far as it contravenes the well-recognised doctrines of international law, was not binding on the Judges.

The portion of the judgment dealing with the functions of the Prize Court and duties of the Judges is no less instructive. Their Lordships cite the opinion of Lord Mansfield from the Report of a Royal Commission appointed in 1753, to show that a Prize Court is no more bound to follow any executive orders of the Crown than any other of His Majesty's Courts of Law and draw pointed attention to the fact recited in the Report that "the Crown never interferes with the course of justice. No order or intimation is given to any Judge." Apart from the questions of international law of great importance decided in this appeal, their Lordships' pronouncements on the functions and duties of His Majesty's Judges are of supreme importance to the Constitution, which is at once a matter of great pride and of no less security to all British subjects. We know of no institution in any other constitutional country, where a branch of the Supreme Executive, for the Judicial Committee of His Majesty in Council is but a limb of the King in Council, sitting as a Prerogative Court of the Crown for the discharge of judicial duties, would ignore even the Royal Prerogative and administer justice, interpret laws, protect private and public rights even against the claims of the Crown, with an amount of independence and a degree of detachment hardly to be met with even in the highest statutory Courts of Law in any other part of the civilized world.

A no less remarkable feature of the decision is that their Lordships of the Privy Council not only reversed the judgment of the President of the Prize Court, declaring the Rule of the Prize Court on which he relied as of no binding effect, but also awarded damages and costs against the Crown, although the Prize Court Rules contained no express provisions for the awarding of such damages and costs. As regards costs their Lordships followed the dictum of Lord Macnaghten in *Johnson* v. *The King* (1904, A. C. 817) that the common law rule that the Crown neither paid nor received costs is subject to exception. As regards damages, it was contended that the proper procedure would be for the claimant to institute proceedings as plaintiff against the actual captors of the vessel and that he had no direct remedy against the Crown. Their Lordships regarded this as highly inconvenient and as a source of great hardship to an aggrieved party and after a careful analysis of the Rules came to the conclusion that they were framed on a footing that where the Crown by its proper officer is a party to the proceedings, it takes upon itself the liability as to damages and costs. This decision will surely enhance the international reputation of the Judicial Committee of the Privy Council as an impartial tribunal and will certainly go to promote friendly feelings between England and the neutral nations in the present critical times.

GOVERNMENT OF INDIA (CONSOLIDATION) ACT AMENDMENT BILL.

I

A communique from Simla dated the 9th June offers what must now be taken to be *the* "official" explanation of the several clauses of the Government of India Act Amendment Bill. So far as cl. 2 (2) (d) of the Bill is concerned, the "explanatory remarks" now put forward, are in some respects an echo of the "explanation" from Simla which was dealt with by the writer in the issue of the 5th June. Very wisely, however, this revised explanation drops all references to the Registration Act and does not also asseverate that the object of the amendment is to restore the law as it was before *Moment's* case. The object of the measure is thus expressed in this later document.

"The several legislatures in British India constituted under the Indian Councils Act, 1861, have *long* acted upon the assumption that the

Government of India Act, 1858, sec. 65, refers only to the *nature* of the remedies possessed by the public against the Secretary of State in Council and does not fix the *extent* of those remedies; and they have accordingly enacted *various* provisions directly barring the right to sue him in the Civil Courts in particular cases or classes of cases, and various provisions conferring jurisdiction on the revenue authorities in specified matters to the exclusion of the Civil Courts, one of the results of the latter class of provisions being to bar suits in the Civil Courts against the Government. In those matters the effect of the decision of the Privy Council is that all or many provisions which bar or whose effect is to bar suits in the Civil Courts against the Government are void and similar provisions cannot be enacted in the future. . . . *It is essential* that these legislatures should have power, and be declared to have always had power, to enact provisions of this kind in suitable cases and it is proposed to amend the law accordingly.

To enable the reader to grasp the sense of the above "explanation" more clearly, I have italicised a few words. But even with this adventitious aid, it does not seem easy to appreciate the distinction between the *nature* and the *extent* of the remedies (referred to in sec. 65 of the Government of India Act of 1858) upon which the Government's present desire to have that section amended in the manner proposed is stated to be founded. If I may venture an "explanation" of my own, the "assumption" of Government which is said to lie at the basis of Acts like the Burma Act IV of 1898 and of the proposed amendment was that sec. 65 of the Government of India Act of 1858 was intended to make the Government of India liable to action at the instance of a private individual *in every matter except* where it pleased that Government to declare through its legislatures that no suit was to lie against it. We are told in other words (if our interpretation of the opening sentence is correct) that the Government of India and the Local Governments had always understood that it was open to them through their Legislatures to restrict the area of the Government's liability to be sued to any extent they desired, short only of abolishing it altogether, either by taking away the subject's right to sue Government in any Court in regard to particular matters, or by transferring jurisdiction to try such suits to Revenue Courts.

Granted that the "assumption" is not an afterthought but is really the assumption upon which the several Legislatures in India have *long* acted: granted too, that there are other enactments besides sec. 41 of Burma Act IV of 1898, which on the authority of *Moment's* case must now be held to be *ultra vires*, how and why should it be "essential" not only to maintain all these on the statute book but also to declare that the Legislatures *have and have always had* power to enact such statutes? Essential to what? Essential for whom?

Paraphrased into plain English the explanation comes to this: "Government had, upon an erroneous assumption as to its legislative powers, got passed various statutes which the Privy Council have pronounced to be *ultra vires*. Government wants these statutes to remain operative in spite of the decision of the Privy Council and pass similar statutes in future whenever it will suit Government to do so. So let us repeal the decision and repeal the section of the Government of India Act, 1858, and keep these statutes."

The explanation proceeds "The question whether such a provision (*i.e.*, a provision depriving the subject's right to sue Government) is suitable in a particular case is one for consideration on the merits of that case. The section of the Burma Act above referred to is the only case in which *it is suggested* that the power has been unduly exercised and the Government of India are willing to reconsider this case in the light of recent criticisms."

So the *onus* is complacently thrown upon the opponents of the Bill to prove not only that the power has been exercised in contravention of the constitutional settlement embodied in the Government of India Act of 1858 but to show further that it has been improperly exercised and that, not once only, but many times. The opponents of the Bill decline to accept this challenge because it is no part of their case that Governments and Legislatures in this country (or, indeed, in any civilised country) will systematically "exercise this power," if given to them, "unduly." It is enough for them to show (if it really needs showing) that Governments and Legislatures here are not infallible and may sometimes err, and even gravely. In the first "explanation" from Simla, it was in fact conceded that sec. 41 of the Burma Act IV of 1898 was an ill-considered measure: but if this conviction could not be brought home to Government until after trial in three Courts, the last of them in the full light of a hearing before the Judicial Committee of the Privy Council, and that too, as appears from the present explanation, not until the matter had been fully ventilated by "recent criticisms" in connection with the present Bill, what stronger case is needed to be made out for the preservation intact of the jurisdiction of the Civil Courts?

The sum and substance of the argument paraphrased into plain English appears to be this: "We have exercised this power, which by law we did not have, so long and with so few demonstrable errors of judgment that nobody should object to our having this power by law. We are prepared to consider all objections that may be urged against the exercise of this power on future occasions on their merits. We are prepared even to reconsider the Burma Act round which public criticism seems to centre. But the power we ask for we must have, and you may rely on our good sense always that it will be properly exercised."

11

There is only one matter alluded to in the "explanation" upon which might be based an argument needing consideration. The Legislatures in India have at times transferred jurisdiction in certain matters from Civil to Revenue Courts including certain suits by private individuals against Government. Has *Moment's* case struck at this power? So far as they are regularly constituted judicial tribunals acting according to judicial procedure, Revenue Courts may be considered to be "Civil Courts" within the meaning of the Government of India Act of 1858 and none the less so because the statutes establishing them may designate them "Revenue Courts." For, as Lord Moulton said in the course of the argument in *Moment's* case (17 C. W. N. p. 199) "they (*i.e.*, The Indian Legislatures) may vary the Courts in which they (*i.e.*, suits against Government) are contested, but to shut out from the Civil Courts is to take away a right." The Lord Chancellor, too, in the course of his judgment said: "It may well be that the Indian Government can legislate validly about the formalities of procedure so long as they preserve the substantial right of the subject to sue in the Civil Courts like any other defendant, and do not violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old East India Company, but the question before their Lordships is not one of procedure (pp. 203, 204)."

Revenue Courts are, it is true, not placed under the superintendence of the High Courts but are subject to the control of Boards of Revenue or other similar executive bodies, but even these when they hear appeals from such Courts are expected to act judicially (see in this connection the judgment of Lord Halsbury in *Sri Vikrama Deo* v. *Gunapuram*, 9 C. W. N. 257): Most people would no doubt prefer to see them constituted into regular Civil Courts by being placed under the High Courts. But still they are "Courts" and the transfer of jurisdiction from the Civil Courts to such Courts is surely preferable to being deprived of the right to sue in *any* Court. Assume however that they are not Civil Courts, and their jurisdiction to entertain suits against Government which is said to be jeopardised by the decision in *Moment's* case must be preserved, the amending clause might easily have been so framed as to validate such transfers only. It is by no means necessary to arm the Legislatures here with powers, if they so choose, to deprive the subject altogether of his right to sue in any matter in order that it may be enabled to transfer the jurisdiction to Revenue Courts.

We confess that the prospect of having a or any class of actions against Government tried only by Revenue Courts to the exclusion of the jurisdiction of Civil Courts is, not an alluring one. Such Courts would really be "Administrative Courts" in the Continental sense and would be wholly alien to the spirit of English constitutional law and practice. But even such Courts would be better than no Courts.* What the taking away of the right of action altogether

* "The administrative Courts in Prussia are more independent of the Government, and hence in a better position to control the officials than in France; for in the lower ones a majority of the members are private citizens chosen by the local representative assemblies and serving without pay, whilst the highest is composed of men appointed by the King for life and protected like ordinary Judges, so that they can neither be removed, suspended, nor transferred without the approval of a judicial tribunal."—Lowell's Government and Parties in Continental Europe. Vol. 1, pp. 295-298. In France which is the original home of the *droit administratif*, there is, according to the same acute observer, (*ibid*) pp. 58-59) one law for the citizen and another for the public official, and the executive is really independent of the judiciary, for the Government has always a free hand, and can violate the law if it wants to do so, without having anything to fear from the ordinary Courts. There are no doubt the administrative tribunals but the danger of interference on their part is not as great as it would be in the case of the ordinary Judges; for whilst the ordinary Judges cannot under the law be removed or transferred to another Court without the approval of the Court of Cassation (the final Court of error) the Judges of the administrative Courts enjoy no such protection, and can be removed by the President at any time. Hence (the author concludes) these Courts cannot be considered entirely judicial bodies and are far from providing the rights of the citizens a complete guarantee, at least where political questions are involved. In Italy (*Ibid* pp. 173-174) at the Union (1860) such administrative Courts as then existed were abolished, and the ordinary tribunals (which, by the way, are even to-day less strongly constituted than in any other country in the Continent) were vested with exclusive jurisdiction in all criminal prosecutions and all civil cases in which

means to an English lawyer will appear from the following colloquy which passed between Sir John Edge (formerly Chief Justice at Allahabad) and Mr. Dunne, Counsel for the Secretary of State in *Moment's* case (see 17 C. W. N. p. 196).

Sir John Edge.—What remedy has this man now?

Mr. Dunne.—He can get what he claims by application to the Government.

Sir John Edge.—Then he has got no rights.

To conclude, it would be in the highest degree lamentable that starting, so far back as the commencement of British Rule, with constitutional privileges, (in regard to right of action against the Crown) far exceeding those enjoyed by British subjects in the United Kingdom itself, His Majesty's British Indian subjects should be brought down to-day to a position inferior not merely to their fellow-subjects in the United Kingdom and the Colonies, but inferior even to that of German and French subjects (we might add Italian also) under their respective Governments. It would be still more lamentable if this change for the worse should be brought about merely for the purpose of demonstrating what needs no demonstration that Indian Legislatures, or in other words, Indian Governments, do not "exercise their powers," as a rule, "unduly" and may be trusted not to do so in future. But the Governments of the United Kingdom or of the Colonies are not differentiable from the Indian Government in this respect. Yet if these Governments are not considered fit in normal times to be trusted with powers, not subject to review by the Civil Courts, in matters affecting the private rights of individuals, why should such powers be conferred exclusively on the Governments in India? Let the Governments in India by all means have all powers to make laws directly affecting individual's rights, whether personal or proprietory, if they have not plenary power in that behalf already. But preserve his right to have the Executive acts of Government reviewed by the Civil Court even in the light of the laws so made however stringently these may be framed, for at present it is the only constitutional right which the British Indian subjects of His Majesty have, and which alone is what secures in India as effectively as in England the "reign of law"—the one distinctive characteristic of the English constitution of which English constitutional writers are so justly proud. Take it away and the position of His Majesty's British Indian subjects will be constitutionally lower, in this respect, than that of German and French and Italian subjects.

Yours etc.,
LEX.

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a civil or political right was involved, but the Council of State (an executive body) was empowered to decide finally whether such a right was involved or not—a provision which made the position of private individuals in a conflict with officials worse in Italy than even in France. Later on, in 1877, the jurisdiction was transferred to the Court of Cassation at Rome,—a judicial body. In 1889-1890, administrative Courts were constituted to deal with the acts of officials affecting not private *rights*, but private *interests*, the object being to prevent abuses of official power for party purposes.

CURRENT INDIAN CASES.

(CRIMINAL.)

Criminal Procedure Code—Complaint.

EMPEROR *v.* BHOLE SINGH, I. L. R. 38 All. 32.

A village headman filed a petition before the District Magistrate expressing his desire to resign his post. In reply to questions put by the Magistrate he stated that the police were making people pay money to them in connection with an investigation into a dacoity and he apprehended trouble. This statement was reduced to writing and the Magistrate put the deponent on oath and examined him again and ultimately made an order under sec. 476, Cr. P. C., directing prosecution under sec. 211, I. P. C.

Held—That there was no complaint and the order under sec. 476, Cr. P. C., was *ultra vires*.

Criminal Procedure Code, sec. 222 (2)—Sec. 477A, I. P. C.

EMPEROR *v.* KALKAPROSAD, I. L. R. 38 All. 42.

While having regard to the provisions of sec. 222, cl. (2), Cr. P. C., it is allowable in the charge to state the gross sum which has been misappropriated, there is no similar provision which permits more than three charges under sec. 477A to be joined together.

Where there was such an irregularity in a charge under sec. 477A, the High Court set aside the conviction on the ground that the irregularity vitiated the trial although the accused was not prejudiced by the way in which the charges were framed.

Public Gambling Act (III of 1867), secs. 1 and 3.

Emperor *v.* Mian Din, I. L. R. 38 All. 47.

In this case the spot where gambling was said to have taken place, was the lower end of a bullock run of a disused wall on a bit of open land where there were some trees and a small hut. Round the sides of the bullock run in the shape of a semicircle was raised a low wall of loose bricks and it was within the shelter of this low brick wall that the gambling was said to have taken place.

Held—That the spot where the gambling took place was a " place " within the meaning of the section.

Review.

The Code of Criminal Procedure (Act V of 1898). *By Bijoy Krishna Bose, B.L., Vakil, High Court, Calcutta. Second Edition, 1916. Published by Rai M. C. Sarkar Bahadur & Sons. 75-1-1, Harrison Road, Calcutta. Price Rs. 6.*

We are glad to welcome a new edition of this handy commentary on the Code of Criminal Procedure. The fact that a new edition has been called for within five years of its publication shows that it has been found useful by the profession. There are no doubt many elaborately annotated editions of the Code and it is not the object of the author to replace them but to supply a handy edition which would enable a practitioner to make ready reference to the leading and the most recent decisions on the material points of law involved in the sections. The author in bringing out the second edition has done well in not losing sight of the scope of his work and increasing its bulk, although he has taken care to embody in his notes references to decisions up to April last. Although we cannot say that there have been no omissions in noting the latest decisions yet we are satisfied that as a rule they have been well digested under the appropriate sections. Since the late Babu Harendra Narayan Mitra's Code of Criminal Procedure went out of print, there has been good scope for a handy reliable edition of the Code and the work under review would seem to supply that want.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before Lords Justices Swinfen Eady, Pickford and Banks. *Becker Gray & Co.* v. *London Assurance Corporation.* 12th May 1916.

Marine Insurance—Loss caused by Man-of-War, or restraint of Princes, proximate cause of abandonment of voyage.

This was an appeal from a decision of Bailhache, J., which is shortly noted in 19 C. W. N. (notes p. 242). The learned Judges agreed with the Court below in holding that the abandonment of the voyage was not caused by Man-of-War, nor by restraint of Princes. Lord Justice Swinfen Eady, in the course of his judgment, said :—

On behalf of the Plaintiffs it is first contended that the venture of the carriage of the goods to Hamburg was lost by one of the perils insured against, namely, men-of-war; that it was solely owing to the presence of hostile men-of-war in the Mediterranean that the ship was unable to continue her voyage; that actual capture or seizure was not necessary, as appears from the case of the Spanish Dollars (*Butler* v. *Wildman*, 3 B. and Ald. 398).

It is well established in the English law of marine insurance that in many cases the loss of an adventure by a resolution not to incur a particular peril is not the same as, and does not occasion, a loss by the peril itself. (*Hadkinson* v. *Robinson*, 3 Bos. and P. 388; *Nickels and Co.* v. *London and Provincial Marine and General Insurance Company*, 6 Com. Cas. 15; *Lubbock* v. *Raycroft*, 5 Esp. 50; and the recent case of *Kacianoff* v. *China Traders Insurance Company* [1914] 3 K. B. 1, 121). In *Lubbock* v. *Raycroft* (*supra*), Lord Ellenborough said that the abandonment was from an apprehension of an enemy's capture, and not from any loss within the terms of the policy; and that if such was allowed, every ship about to sail from the Port of London for a port which had fallen into the hands of the French might be abandoned . . . .

It was contended that if the Kattenturm had attempted to proceed through the Straits of Gibraltar to Hamburg there was a practical certainty that she would have been captured, and that as the subject-matter insured was reasonably abandoned, because its actual total loss appeared to be unavoidable, there was a constructive total loss within sec. 60 of the Marine Insurance Act. In the recent case of *British and Foreign Marine Insurance Company (Limited)* v. *Samuel Sanday and Co.*, [(1916) A. C. 650], the House of Lords referred to *Hadkinson* v. *Robinson* (*supra*) and *Lubbock* v. *Raycroft* (*supra*) without disapproval and as existing authorities. Lord Atkinson pointed out that in each of those cases the

deterrent was the risk of ultimate capture if the ships proceeded to their destination, and that the vessels prudently resolved not to incur that risk. It is not difficult to draw a line between vessels which determine not to run a particular risk and vessels which persevere in their voyage and enter a zone in which they are in peril, persisting until it becomes clear that in the existing circumstances they cannot complete the voyage and escape from the peril, and that the only course is either to desist and abandon the voyage, or inevitably incur a loss by the particular peril. There may be difficulty in applying the distinction to the facts of each case where the case is brought near the dividing line.

In my opinion the Kattenturm was never in peril of capture by men-of-war. Her commander prudently resolved not to incur that risk. There appears to be some ground for believing that she arrived at Messina earlier than August 5th, but taking the 5th as the accurate date only one hour would elapse between a state of war at 11 P.M. on August 4th and the early morning of the 5th, and the time of her arrival on the 5th, or the period during which she had been in neutral Italian waters off the Sicilian coast, does not appear. Indeed it does not appear that she was at any time outside neutral territorial waters after a state of war had arisen. She left Malta not later than August 3rd, and the distance to Sicily is only about 50 miles. In these circumstances I am of opinion that no loss by men-of-war was incurred.

It was urged, nevertheless, that, having regard to the construction placed by the House of Lords on the Marine Insurance Act, 1906, the Plaintiffs were entitled to succeed; that the subject-matter insured included the adventure, and not merely the goods, and that the party assured was irretrievably deprived of it, because all prospect of safe arrival on the voyage to Germany was hopelessly frustrated when the Kattenturm desisted from her voyage and sought refuge in Sicily. It was said that the case came directly within sec. 60 of the Act, as interpreted in *British Marine, &c.* v. *Sanday*, and that the subject-matter insured (*i.e.*, the adventure) was reasonably abandoned because its actual total loss from capture or men-of-war appeared to be unavoidable. But to entitle the assured to recover under sec. 60 the actual total loss must appear to be unavoidable from the peril insured against, and, to use the language of Lord Atkinson in *British and Foreign Marine Insurance Co.* v. *Sanday* at page 665, "Actual capture was . . . . . the peril insured against. The apprehension of capture is an entirely different thing and was not insured against."

The next question is, was there a loss by restraint of Princes? It is said that immediately on the outbreak of war it became unlawful for the Plaintiffs, as British subjects, to trade with the enemy by sending goods to Hamburg; the sale made by the Plaintiffs was to a German firm, on terms of cash in London against documents, within 24 hours of the official arrival of the steamer at port of destination; final settlement on average landed weights, at port of discharge, expenses of weighing to be paid by seller. The contention of the Plaintiffs is that on the outbreak of war the further prosecution of their venture became illegal; that the Declaration by His Majesty that a state of war existed was an act of State, making it thenceforward illegal for British subjects to trade with Germany; and that in this case the venture was rendered illegal and was destroyed by restraint falling within the words "restraint of Kings, Princes, and People's."

In support of this argument the case of *British and Foreign Marine Insurance Company* v. *Sanday & Co.* (*supra*) was relied on; it was urged that the effect of that decision was to render every British venture on the high seas, which involved trading with the enemy, a constructive total loss by the peril of a "restraint of Kings, Princes," &c., whether such peril in fact occasioned the loss or not. It is true that in that case the owners of the goods took no steps to countermand the venture, but after the cargoes had been landed by the shipowners at British ports the owners of the goods gave notice of abandonment to the underwriters. After the goods had been landed and warehoused at the instance of the shipowners, and after the owners of the goods had subsequently established to the satisfaction of the Customs authorities that the goods were not enemy goods, they were dealt with for the benefit of whomsoever it might concern. But it was the action of the shipowners in diverting their ships, and landing the cargoes, that prevented the voyage to Hamburg from being continued. This clearly appears from the agreed statement of facts upon which the case proceeded and was decided.

There is a close resemblance between the present case and Sanday's case, looked at from

this point of view. But, on the other hand, it has never yet been held in England that by the mere force of the existence of a state of war all goods owned by British subjects on their way to ports which during the voyage have become enemy ports, even though in neutral ships, or enemy ships, become constructive total losses on the ground that trading with the enemy is restrained by what is to be deemed to be a "restraint of Princes." Now, the maxim *causa proxima non remota spectatur* has been strictly applied in marine insurance cases. Is it true to say that in point of fact what frustrated the adventure in the present case, and prevented the goods from being carried to Hamburg, was the fact that trading with the German enemy had become unlawful for British subjects? Certainly not. In my judgment, the fact that the adventure had become illegal by the English common law had no weight whatever with the German master of the Kattenturm.

The inference which I should draw from the facts proved in this case, including the letter of September 4th, 1914, written by this German master to Baylis Haynes, Lloyd's agent at Messina, is that if he could have been sure of evading all hostile cruisers, and of arriving safely at Hamburg with the goods, he would certainly have proceeded on the voyage, and given himself the pleasure of taking to Hamburg and landing safely there all British goods.

Again, the possibility of forwarding the goods from Italy by some other vessel was effectually prevented by the Italian Decree prohibiting jute from being exported from the country, even if such a course had previously been practicable, of which there is no evidence. The Plaintiffs as owners of the jute did not, and could not, take any steps to prevent the voyage from being continued if the master of the ship decided to continue it. The master of the vessel acted as to him seemed best, both with regard to the ship and the goods on board: if the jute had belonged to a neutral owner not affected by the consideration of trading with an enemy the position would have been the same: the voyage in the Kattenturm would not have been continued, and transhipment and forwarding by another vessel, even if otherwise practicable in fact, was prevented by the law against the re-exportation of jute.

The ground of the decision in Sanday's case is thus stated by Lord Loreburn at p. 658:—

> Among other things, trading to German ports became unlawful, and an instant duty arose for these two ships to discontinue their voyage to Hamburg. The adventure of carrying this merchandise to its destination became in law a serious offence, and, in fact, impracticable. . . . The destruction of that adventure was directly caused by His Majesty's declaration.

That language has no application to the present case. The British shipowners was bound to obey the British law, and he did so. The German captain was not so bound. The continuance of the voyage was illegal for the British captain; perfectly legal for the German captain. The illegality, in fact, prevented the British captain from proceeding with his voyage to Hamburg; it did not prevent the German captain, or indeed influence him in the very slighest. Except for the risk from a different peril, the German ship might, and probably would, have proceeded on her voyage and arrived safely at Hamburg, and the goods would have been landed from the ship and safely warehoused. Restraint of Princes operating to frustrate an adventure, by rendering it illegal, had no operation in the present case, and, in my opinion, the Plaintiffs cannot succeed on that ground. The mercantile venture of the Plaintiffs was frustrated by the detention of the goods for an indefinite time in Italy, but such detention was not occasioned by any peril insured against—not by a restraint of Princes rendering illegal the further prosecution of the voyage.

Sir John Simon, K. C., Messrs. Aspinall, K. C., Leck, K. C. and *Wright* for the Appellants.

Sir Robert Finlay, K. C., Messrs. Leslie Scott, K. C., Roche, K. C. and *Mather* for the Respondents.

B. D.

shares of the Mauzahs form the zerait land, some of which have been entered in the Survey *khatian* and some of which have not been entered therein, and I have also to point out to him the *asamiwar jama* and land but it will take time, and the time for taking possession is approaching. At present there will be delay in granting the *thica patta* and getting a *kabuliyat* executed. For this reason at present a *thica patta* could not be executed. Therefore by virtue of this *amaldustak* I have put the said *thicadar* in possession of the zerait land and the *asamiwar* shares aforesaid. I, having made correct test of the zerait and *asamiwar jama* in the month of January 1912, shall execute a *thica patta* on the same *jama* and get a *kabuliyat* executed therefor, and the *patta* and *kabuliyat* will be registered together. Therefore I have executed this *amaldustak* for a term of seven years, so that it may be of use when required.

Details of Mauzas.

Tauzi No.		Extent of shares.
1617	...	1 anna 7 gandas.
1620	...	4 gandas.
1619	...	2 as. 13 gs. 1 kour 1 karat.

Situate in Mauzah Bhagwa, Tappa Bhatsala, Perganna Bisara."

It will be observed that in this document no rent is fixed. Art. 35, Sch. I of the Stamp Act sets forth the classes of leases upon which a stamp is required; "a lease including an under-lease or sub-lease and any agreement to let or sub-let—(*a*) where, by such a lease, rent is fixed and no premium is paid or delivered; (*b*) where the lease is granted for a fine or premium or money advanced and where no rent is reserved; (*c*) where the lease is granted for a fine or premium of for money advanced in addition to rent reserved."

The Schedule attached to the Stamp Act must be treated as exhaustive. An agreement for a lease whereby no rent is reserved, and no premium paid or money advanced is not included in the Schedule and does not therefore require a stamp.

The conviction, therefore, of the executant of the document, which we have quoted, under sec. 62 (*b*) of the Stamp Act must be set aside. We accordingly set it aside and direct that the fine, if paid, be refunded.

A. K. R. *Conviction set aside.*

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD SHAW.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.
1916,
Heard, 20 and 21, March.
Judgment, 21, March.

PRANJIVANDAS JAGJIVANDAS MEHTA, Appellant,
v.
CHAN MAH PHEE, Respondent.

Equitable mortgage by deposit of title-deeds—All the properties referred to in document of title if subject to mortgage—Bargain restricting scope of security—Written bargain.

Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title.

Where, however, titles are handed over accompanied by a bargain, that bargain must rule.

Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security.

SHAW *v.* FOSTER (1) *referred to.*

This was an appeal from a decree, dated 6th May 1914, of the Chief Court of Lower Burma, Appellate Side, varying

(1) L. R. 5 Eng. & Ir. App. 321 at p. 340 (1872).

a decree of the same Court in its original jurisdiction. The Appellant sued to recover money from the Defendants and stated as follows in his plaint :—

" That on the 1st of June 1906 the 1st and 2nd Defendants by their promissory note hereto annexed and marked A promised to pay to Ravashanker Jagjivan and Company the sum of Rs. 13,000 together with interest at the rate of Rs. 1-2-0 per cent. per mensem.

That the said 1st and 2nd Defendants at the same and on the same day as collateral security for the repayment of the said sum of Rs. 13,000 and interest and by way of equitable mortgage, deposited with the said Ravashanker Jagjivan and Company the title-deeds of the pieces or parcels of leasehold land situate in the Lanmadaw Quarter in Rangoon Town District now known as 5th Class Lots Nos. 65, 66, 66A and 67 in Block Z-1, together with all the buildings standing thereon.

That the said Ravashanker Jagjivan and Company have endorsed the said promissory note to the Plaintiff for valuable consideration and also delivered to the Plaintiff the title-deeds of the property above referred to intending thereby to create an equitable mortgage in favour of the Plaintiff and to assign to the Plaintiff all their right, title and interest to, in and upon the said premises.

That the said 1st and 2nd Defendants have not paid the principal and have not paid anything towards interest except Rs. 4,095."

The Defendants denied the claim and put Plaintiff to proof of his equitable mortgage. Robinson, J., held in favour of the Plaintiff and decreed the claim. His judgment was as follows :—

" Plaintiff's agent has deposed in detail to the various loans made to Defendant No. 1 and her deceased husband and to their having finally on a settlement of account executed the promissory note for Rs. 13,000. He has proved payments of interest and has satisfied me that the claim he made in para. 6 of the plaint is a just claim. Plaintiff further proves that at the time of the execution of this promissory note the title-deeds of the property in suit consisting of two leases and two sale-deeds were deposited with him as security for the repayment of prior loans and that there was an agreement that these title-deeds should be deposited as security for the repayment of the promissory note. It has also been proved that Plaintiff at the request of Defendant No. 1 paid the sum of Rs. 1,023 under the following circumstances. The leases of the sites had expired and some years afterwards the persons who occupied the lands were called upon by Government to take out fresh leases for which premia had to be paid. These premia were payable by instalments and Defendant No. 1 having got into arrears in respect of these payments notices were served on her in respect to two sites threatening that if she did not pay the premia due the property would be brought to sale. She approached the Plaintiff and in order to save his security he paid Rs. 1,023 for her at her request. I must hold that he has a lien for this amount on the properties."

On appeal, that judgment was partly reversed. Twomey, J., in whose judgment Hartnoll, O. C. J., concurred, observed as follows :—

" It is clear that the two areas known as No. 87, 14th Street and No. 92, Strand Road, have all along been held under separate title-deeds. The Plaintiff claims an equitable mortgage over both of them. They were both sold in the execution proceedings of July 1909 and the Plaintiff himself bought the smaller property

No. 87, 14th Street, for Rs. 4,000 odd while Chan Ma Phee the Appellant bought the larger property No. 92, Strand Road, for Rs. 20,000. The Plaintiff's case is that the two leases (or agreements to lease) Exs. B and C and the two sale-deeds, Exs. D and E, were given over as security when Ma Saw's predecessor in title, Maung Tha Gywe, first borrowed Rs. 5,000 on 10th October 1902 from the firm R. Jagjivan and Company. His claim rests however on the pro-note of 1st June 1906, for Rs. 13,000 signed by Ma Saw and endorsed by her with the note :—

" As security—Grant of a house in 14th Street."

The words " Strand Road and " were afterwards written making the note appear as follows :—

Strand Road and

" As security —Grant of a house in 14th Street."

This addition was admittedly made several months after Ma Saw had signed the note.

The entries in the books of account produced by the Plaintiff to prove the various transactions with Ma Saw refer only to the mortgage of ' the house,' always in the singular.

On the evidence produced by the Plaintiff it cannot in my opinion be held that the title-deeds of the Strand Road house were delivered to the lenders by way of security. The endorsement signed by Ma Saw at the time related only to the 14th Street house, and the entries in the Plaintiff's books support the view that only one house and site was given as security."

Hence this appeal.

Messrs. L. DeGruyther, K.C., and *J. M. Parikh* for the Appellant submitted that the Appellate Court was in error in holding that the equitable mortgage did not cover *all* the properties in suit. All the plots in suit really constituted only one property, and no distinction was drawn by the parties. The defence did not specifically plead that there was an equitable mortgage with reference to a house in 14th Street, Rangoon, alone, and that the mortgage did not cover the remaining parcels of land. The sole question was whether or not, the plots of land were covered by an equitable mortgage alleged by the Plaintiff. A new case was made on behalf of the Defendants in the Court of Appeal. It was not questioned that title-deeds relating to all the plots in dispute were deposited with the Plaintiff. They must be deemed to have been deposited as found by the trial Judge by way of security.

The deposit in law constituted an equitable mortgage. The memorandum made on the promissory note was not the real contract. The object of the endorsement was to fix the lady with a further acknowledgment of liability. Reference was made to *Ashton* v. *Dalton* (2) and *Ex parte Kensington* (3). In any case, the words "a house in 14th Street, Rangoon" included all the plots of land in suit, and that was certainly in the contemplation of both parties at the time of the deposit of the title-deeds. At the time of the execution of the promissory note, the buildings standing on the whole of the leasehold land constituted a house, and stables, which had subsequently come to be known as house No. 92, Strand Road, and house No. 87, 14th Street.

Sir Erle Richards, K.C., and *Mr. F. J. Coltman*, for the Respondent were not heard.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—Their Lordships think it

(2) 2 Collyer 565 (1846).
(3) 2 Ves. & B. 79 (1809).

unnecessary in this case to call upon learned Counsel for the Respondent. They are of opinion that the judgment of the Chief Court of Lower Burma appealed from is correct.

The rights of the parties have to be determined, in their Lordships' opinion, by a written agreement, which is, in their Lordships' view, the limit and standard fully measuring the obligations of Mah Saw, who obtained an advance of Rs. 13,000 from the Respondent on the 1st June 1906.

On that date there was a notandum put upon the back of a promissory note then granted, and the notandum is to this effect: "As security, grant of a house in 14th Street, Rangoon." Their Lordships take no stock of an alternation made after that notandum was signed, by which there was an interpolation of the words "Strand Road and," which words would have, in appearance at least, extended the scope of the security from "a house in 14th Street, Rangoon," to "a house in Strand Road and 14th Street, Rangoon." Had an argument been raised as to whether this alteration having been made, any rights in law could now be founded upon this document, that argument would have been considered: but it is unnecessary to make any pronouncement upon this topic, and accordingly their Lordships deal with the document signed by Mah Saw on the 1st June 1906, as definitely limiting and describing the scope of the security. It was a "grant," in the singular, "of a house," in the singular, "in 14th Street, Rangoon."

The law upon this subject is beyond any doubt. (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. In the words of Lord Cairns in the leading case of *Shaw* v. *Foster* (1):—

"Although it is a well-established rule of equity that a deposit of a document of title, without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

Their Lordships accordingly have admitted in argument the only possible question which remains (standing the document specifying the security and signed by Mah Saw), namely, the question of identification of the term "grant of a house in 14th Street, Rangoon." To identify this grant, a reference has been made by learned Counsel for the appellant, to the various title-deeds of the properties called Plots 65, 66, 66A, and 67. These deeds are are follows: With reference to Plot 65, there is a lease of land in favour of a person named Ma Thit, who was the mother of Mah Saw. With reference to Plot 66, and apparently also to 66A, there is a document for sale of a house and of land in favour of Ma Thit. But then, with reference to the last document, namely, as to Plot 67, there is a "grant of a house," a conveyance of a house on the 3rd January 1901, in favour of Ko Tha Gywe. Ko Tha Gywe was the husband of the

(1) L. R. 5 Eng. & Ir. App. 321 at p. 340 (1872).

grantee, or lessee, of the other plots of ground covered by the other documents. He was the father of Mha Saw, and it does occur as a matter of interest that this person, the father of Mah Saw, who had a conveyance of a house, that on Plot 67, was himself a borrower from the persons who are interested in this suit, who were bankers and money-lenders in the district. On the 10th October 1902, he borrowed a sum of 5,000 rupees from them; and a somewhat curious transaction took place, namely, that he deposited with the money-lenders, not only the title of the property belonging to himself, namely, the grant of the house, but also the title-deeds of the other three properties which belonged not to himself, but to his wife. It was on this occasion that all these titles found their way into the hands of the lenders. Mah Saw succeeded to Ko Tha Gywe in the ownership of the house on Plot 67.

Their Lordships have, in these circumstances, no doubt whatsoever that the identification of the "grant of a house in 14th Street, Rangoon," by her is accomplished by a reference to the conveyance of the house in favour of Ko Tha Gywe, which house had been his property when the original advance of 5,000 rupees, some years before, was obtained by him.

Their Lordships finally remark that, as against this identification of the house in 14th Street, there is no evidence at all satisfactory in this case, and it was for the persons holding this security clearly to satisfy the Court of the scope thereof. They have not done so. There is nothing in the case which confirms the view that, under the term "grant of a house," which would be a singular term applicable to a singular title, there was included the subject of three other plots of land under leases. Their Lordships cannot assent to such a construction. They think the security is distinctly and by contract limited, and they cannot extend it as desired. They have no doubt that the Chief Court of Lower Burma has reached a proper conclusion.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors: *Messrs. Edward* and *Dalgado* for the Appellant.

Solicitors: *Messrs. Arnold & Son* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 52 OF 1915.

SANDERSON, C. J. WOODROFFE, J. MOOKERJEE, J. 1916, Heard, 3, 4 and 5, April. Judgment, 6, April.	SREEMATI KALIDASI DASSEE and others, Plaintiffs, Appellants, *v.* SREEMATI NOBO KUMARI DASSEE and others, Defendants, Respondents.

Specific performance of a contract of sale—Sec. 27 (6), Specific Relief Act (I of 1877)—Contract varied—Vendors asked to take out letters of administration and leave to sell—Effect of variation—Contingent contract—Order for sale—Title of purchasers under order of Court—Whether such purchasers are affected with notice of previous agreement—Dealings with purdanashin ***ladies—Independent legal advice—Costs—Discretion of the appeal Court in modifying order for costs made by the Court of first instance.***

Two widows Defendants Nos. 1 and 2 entered into an agreement on the 23rd January 1910 for sale of certain properties for legal necessity with the Plaintiffs at Rs. 8,000 per cottah. The agreement contained the following covenant on the part of the vendors—" We shall at our own expenses do everything which your attorney shall consider necessary for

rectifying and clearing the title-deeds." The idea of applying for Letters of Administration was not present in the mind of any of the parties at the time of the agreement. Subsequently in order to obviate any objection of the reversioner on the score of legal necessity the Plaintiffs asked the widows to apply for Letters of Administration with leave to sell to the Plaintiffs. The widows obtained Letters of Administration and one of them actually obtained leave to sell to the Plaintiffs. Subsequently the widows applied and obtained leave for sale to the Defendants Nos. 3, 4 and 5 (described as the Nandi Defendants) who offered a higher price and the property was conveyed to them. The Nandi Defendants had notice of the agreement for sale to the Plaintiffs at the time when they took the conveyance. In a suit by the Plaintiffs for specific performance of the agreement of sale against all the Defendants and in the alternative for damages against Defendants Nos. 1 and 2 for breach of contract,

Held—*That the contract as varied by mutual consent became a contingent one, and as the contingency had not happened* (i.e., *leave of the Court had not been obtained in their favour) the Plaintiffs were not entitled to claim performance of the contract.*

NARAIN PATTRO *v.* AUKHOY NARAIN MANNA (1) *and* SARDESH CHUNDER *v.* KHETRAPAL (3) *followed.*

Held also, *that the Plaintiffs were not entitled to claim damage as their action was based on the original contract and not on the contract as modified and as there was no breach of the modified contract.*

This was an appeal preferred on the 29th June 1915 against the judgment of Mr. Justice Imam, dated 31st March 1915, passed in the Ordinary Original Civil Jurisdiction.

Mr. B. C. Mitter (with him *Messrs. A. N. Chaudhuri* and *M. N. Kanjilal*) for the Plaintiffs-Appellants. This was a suit for specific performance of an agreement to sell executed by two widows Defendants Nos. 1 and 2 on the 23rd January 1910 and also against Defendants Nos. 3, 4 and 5 (who are described as Nandi Defendants) purchasers from the widows with notice of the agreement and in the alternative for damage against Defendants Nos. 1 and 2. The widows' case was that they did not execute the agreement, they had no independent legal advice, that they signed the document which they were told was necessary for the management of their property and that the whole thing was done in collusion with Gajendra. Their story was disbelieved by the lower Court and the Plaintiff's witnesses were described as witnesses of truth. We asked the ladies to take out Letters of Administration for greater safety and not by way of novation. The widows took out Letters of Administration at their own costs; applied to the Hooghly Court for leave to sell and one of them actually got the leave in our favour. But subsequently at the instance of the Nandies the widows applied for sale to the Nandies at Rs. 10,000 a cottah (our offer being Rs. 8,000) suppressing from the Court the fact that there was a binding agreement with us. The Nandies are *mala fide* purchasers as they had knowledge of our agreement and the lower Court has held that they had such notice. But the lower Court has held that in making the Defendants Nos. 1 and 2 apply for Letters of Administration the object of the Plaintiffs was to obviate all objections of the reversioners on the score of legal necessity and to get the property from the ladies not as widows but as administra-

(1) I. L. R. 12 Cal. 152 (1885).
(3) 14 C. W. N. 451 : s. c. 11 C. L. J. 346 (1910).

trixes; and as the Nandies purchased under the order of the Court their title cannot be impeached. The agreement with the Plaintiffs could not be performed, as the Judge of the Hooghly did not give his permission. But I submit that there was no novation, the original contract was still subsisting and the change in the character of the widows does not affect our rights under the contract.

Mr. Kanjilal followed. An obligation incurred by a Hindu widow for legal necessity is binding on the whole estate, and any person representing the estate takes it subject to that obligation. No authority is required for this proposition.

In the case of a Hindu or a Mahomedan administrator, the estate vests in him immediately on the death of the intestate and Letters of Administration are not necessary for the purpose of acquiring title. Sec. 4 of the Probate and Administration Act and secs. 187 and 190 of the Indian Succession Act. *Krishna Kinkur* v. *Rai Mohun* (5), *Krishna Kinkur* v. *Panchuram* (6) and *Ganapathi* v. *Sivamalai* (7). If a property is contracted to be sold by the heir and then Letters of Administration are taken out by the heir, the Letters of Administration gives the heir full title but subject to his previous obligation. *Gowzolves* v. *Makis Boopalrayan* (8). Once a contract is validly entered into by a trustee for sale then if a higher offer is forthcoming, the Court cannot ask the trustee to commit a breach of contract by ordering the sale to the person who makes a higher offer. Lewin on Trust, 12th Ed., p. 500. An order giving leave to sell in administration proceeding is not an order directing a person to sell. Leave is only the removal of a bar. The Court has no jurisdiction to enter into particular contracts. Leave confers on a Hindu administrator the same powers as under sec. 269 of the Indian Succession Act.

Corresponding English rule is to be found in the R. S. C. Or. 55, r. 3 (*f*) and Or. 51, r. 1. See also *In re Robinson* (9). A person who purchases with notice of a previous contract is a *mala fide* purchaser and the order of the Court will afford him no protection unless he shows that the facts were brought to the notice of the Court. Sec. 27 (*b*), Specific Relief Act; sec. 40, Transfer of Property Act, and sec. 91, Indian Trusts Act (Act II of 1882). *Waman Ramchandra* v. *Dhondiba* (10) *Himatlal* v. *Vasudeb* (11) and *Gaffur* v. *Bhikaji* (12). Even if it is held that the contract was novated, then on the authorities if the novated contract is itself incapable of performance, the novation comes to nothing. *Mathuramohon Saha* v. *Ram Kumar Saha* (13). The case of *Narain Pattro* v. *Aukhoy Narain Manna* (1) and similar cases are distinguishable from the present case. The position of a guardian is quite different from that of an administrator. While the former has no title the latter is the legal owner. Under sec. 90 of the Probate and Administration Act a sale by the administrator without leave of Court is not void but voidable.

Sir S. P. Sinha (with him *Messrs. N. N. Sircar* and *R. N. Mitter*) for the Nundy Defendants-Respondents Nos. 3, 4 and 5. There was clearly a novation in this case. A sale by a widow may be challenged by the reversioners at

(5) I. L. R. 14 Cal. 37 (1886).
(6) I. L. R. 17 Cal. 972 (1889).
(7) I. L. R. 36 Mad 575 (1912).
(8) I. L. R. 34 Mad. 395 (1910).
(1) I. L. R. 12 Cal. 152 (1885).
(9) L. R. 31 Ch. D. 247 (1885).
(10) I. L. R. 4 Bom. 126, 151, 153 (1879).
(11) I. L. R. 36 Bom. 446 (1912).
(12) I. L. R. 26 Bom. 159 (1901).
(13) 20 C. W. N. 870 at p. 886 (1916).

any time. And so to obviate all future litigations the Plaintiffs agreed to buy only if Letters of Administration were taken out by the ladies and leave to sell was taken in their favour. The title of a person buying under the leave of the Court cannot be impeached for want of legal necessity. The Court in granting leave would consider various things and the Court will consider the prices offered by prospective purchasers. A contract of this kind is always a contingent contract. If the widows were wanting in due diligence to get an order for sale in favour of the Plaintiffs, they may be sued for damage but no decree for specific performance could be made. Fry on Specific Performance, 5th Ed., p. 489. *Narain Pattro* v. *Aukhoy Narain Manna* (1), *Satish Chandra* v. *Jnanada Sundar* (14) and *Sarbesh Chunder* v. *Khetrapal* (3).

Mr. B. L. Mitter (with him *Mr. M. N. Mitter*) for the lady Defendants-Respondents Nos. 1 and 2. In this case the old agreement was substituted by a new contract which could only be performed if the leave of the Court was obtained. Hence no suit would lie on the old contract. The Plaintiffs are not entitled to damage either as the widows placed on the material facts before the District Judge of Hooghly who made an order in favour of the Nandies.

Mr. B. C. Mitter in reply. No order for costs ought to be made against us in favour of the widows. Their story was wholly disbelieved by the Court. There was lengthy commission for the examination of the widows which would have been absolutely unnecessary if the widows were to admit the agreement of the 23rd of January. The length of the trial which lasted for six days in the lower Court was due to the attitude taken up by the widows.

Mr. B. L. Mitter.—We ought to get our costs. The agreement was not properly explained to the widows who were illiterate *purdanâshin* ladies.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal by the Plaintiffs who are the executrix and executors of the estate of one Bhuban Chandra Bhar deceased, and the claim is in respect of an agreement for sale dated the 23rd of January 1910, which was made between the first and the second Defendants, and Bhuban Chandra Bhar, which related to the shares of those Defendants in certain premises known as Nos. 10, 12 and 13, Darmahatta Street. The Defendants, other than the first and the second, who may be called the Nandi Defendants, were the purchasers of the shares of the first and the second Defendants in the premises, under circumstances to which I will refer later in more detail.

The claim is for specific performance, and in the alternative, damages.

The first Defendant is the widow of Hari Charan Sett, and the second Defendant is the widow of Sattya Charan Sett. These two men were the owners in equal shares of premises No. 10, and between them they owned a share in Nos. 12 and 13, which is said to have been about 5/6ths. In 1907 Hari Charan Sett died intestate, and the first Defendant, his widow, is his heir. In 1908, Sattya Charan Sett died, leaving behind him his widow, the second Defendant, and his son Punchanon Sett who shortly afterwards died while an infant, and therefore

(1) I. L. R. 12 Cal. 152 (1885).
(3) 14 C. W. N. 421: s. c. 11 C. L. J. 346 (1910).
(14) 1 Ind. Cas. 364 (1909).

the mother, the second Defendant, succeeded to the estate of her late husband.

It appears that Bhuban Chandra Bhar and the Nandi Defendants were rival traders carrying on their business in different parts of the premises in question which were leased to them and it appears that when the property came into the market, Bhuban Chandra Bhar and his sons negotiated the transaction to which I shall make reference directly. Both the Plaintiffs and the Nandies were anxious to buy the premises. Bhuban Chandra Bhar got into communication with the first and the second Defendants through two men who are called Gajendra Kundu and Tulsi Charan Kundu who had been acting as agents for the first and the second Defendants for the purpose of collecting rents of their property: and, it appears that on the 11th of January 1910, the draft agreement was settled. Then arose a question about an agreement which, it was alleged, the two deceased men, Hari Charan Sett and Sattya Charan Sett, had entered into with a man called Ram Lal Pachasia, with regard to the lease of these premises, and it was stated that the ladies desired some provision being inserted in the agreement with reference to this matter. It was discussed and the decision was postponed until the date which apparently had been fixed for the completion of the contract, namely, the 23rd of January 1910. Before I deal with the agreement of the 23rd of January 1910, it is necessary for me to refer to one or two other dates: on the 15th of January, four days after the draft agreement had been settled or partially settled, a contract was made between the Nandis and a lady whose name was Barodamoyi and who owned 1/6th share of Nos. 12 and 13; and, by that agreement the Nandis agreed to buy the 1/6th share of Barodamoyi, and the price which was agreed worked out at about Rs. 9,000 per cottah. On the 23rd January, as I have already mentioned, the agreement in question was executed. I shall have to refer to the terms of it directly. On the 6th of February the conveyance of the share of Barodamoyi to the Nandis was executed. In the meantime, on the 2nd of February another contract had been entered into by the Nandis with a lady called Aghoremoni who alleged that she was the owner of 1/9th share of premises Nos. 12 and 13. It is perhaps right to remark in passing that the Plaintiffs alleged that this lady had no share in the property. But I do not think that it is material to consider whether that allegation was made out or not. On the 7th of February, the conveyance in pursuance of the contract of the 2nd of February by Aghoremoni to the Nandis was executed. On the 5th of February a suit was instituted by Ram Lal Pachasia against the first and the second Defendants claiming specific performance of his agreement with the two deceased men for a lease of the premises. On the 7th of February an event occurred which had material effect upon the subsequent history of this case. On that date a suit was brought by Norendra Nath Samanta who was the son-in-law of the first Defendant, on behalf of three infant daughters of the first Defendant against the first Defendant to restrain her from making an absolute alienation of the premises, alleging that first of all there was no legal necessity for her to sell the property, and secondly that the price which was mentioned in the contract of the 23rd of January 1910 was a gross undervalue; And, on the same date a letter was written (to be found at page 64 of the paper book) by Messrs. Fox and Mandal, Solicitors

acting on behalf of the Plaintiff in that suit to Bhuban Chandra Bhar to this effect :—

" We are instructed by Babu Norendra Nath Samanta to inform you that he has to-day filed a suit in the High Court as the next friend of Srimutty Sabitri Dassi and others infant daughters of Hari Charan Sett deceased against Srimutty Nobo Kumari Dassee, widow of the said Hari Charan Sett deceased for an injunction restraining her from making an absolute alienation of the premises Nos. 10, 12 and 13, Darmahatta Street, Calcutta, for a declaration that there being no legal necessity the Defendant Srimutty Nobo Kumari Dassee is not entitled to convey an absolute interest in the said premises and other reliefs."

" Our client is informed that you are negotiating for the purchase of a share in the said premises from the said Srimutty Nobo Kumari Dassee. We are instructed to warn you against purchasing the said share and to give you notice which we hereby do that there is no legal necessity for the said proposed sale and that our clients dispute the *bonâ fides* thereof." This suit and the notice of the suit raised a difficulty as between Bhar and the Defendants Nos. 1 and 2, the widows; and, for this reason, that, as is well known, a widow cannot alienate absolutely the property unless it can be shown that there is what is called legal necessity for the alienation, and as was pointed out by the learned Advocate-General in the course of his argument, that this question can be raised either at the time by the person who is interested in the estate, by bringing an action claiming a declaration that there is no legal necessity and getting an injunction, or it may be raised after the death of the widow by the reversioner alleging that the widow had a mere right to alienate her life estate and that there was no legal necessity which would justify her alienating the entire interest in the property. Consequently a purchaser from a widow runs a very considerable risk, and it is obvious that in some cases he may be called upon to prove the existence of legal or justified necessity at a time when it may be exceedingly difficult and perhaps impossible for the purchaser to bring forward the necessary evidence. On the other hand, if the widow could be persuaded to take out Letters of Administration and get herself appointed administratrix and obtain leave of the Court to alienate, then of course the property would vest in the administratrix, and the purchaser would get very much better title or much more reliable title than he would have if he bought from the widow under the circumstances and with the risk to which I have just referred.

In consequence of this '*golmal*,' as it was called in the evidence, which as I understand means trouble or difficulty, the sons of Bhuban Chandra Bhar who were looking after the business on behalf of their father, were advised by their attorney to ask the ladies to take out Letters of Administration, and I think it is desirable for me to refer to the evidence upon that point, which is very short and is contained in a few pages. At page 183 of the paper book one of the sons said, " He " (that is, his attorney) " said, as the *golmal* was raised, it was better to ask the ladies to take out Letters of Administration. He said nothing else. I asked the ladies to take out Letters of Administration. On Tulsi and Gajen calling at my shop, I told them to ask the ladies to take out Letters of Administration. Gajen and Tulsi said three or four days after that occasion, ' yes, the ladies are willing to take out

Letters of Administration, but they have no money,' and asked me to advance money to meet the expenses for taking out Letters of Administration, and the money so advanced would be deducted from the consideration when the purchase would be completed." At p. 189, when the same witness was being cross-examined by Mr. Sircar, a question was put as follows :—

"*Q.*—I believe it is your case that the Defendants Nos. 1 and 2, through Gajen and Tulsi, agreed that they would take out Letters of Administration and obtain leave of the District Judge to sell and convey the property to you?

A.—After the 7th February, after the letter of Norendra Samanta, these things were discussed.

Q.—Repeated.

A.—Yes.

Q.—You understood that the sanction of the District Judge would be required for sale by the ladies after Letters of Administration had been taken out?

(I think this is rather an important passage).

A.—On receipt of the letter dated 7th February 1910, I understood that.

Q.—You understood that the sale to your father by the ladies was conditional on the sanction of the District Judge?

A.—There was no such condition.

Q.—Did you understand that the ladies would convey the properties to you on taking out Letters of Administration, even if the District Judge refused sanction to sell?

A.—I did not understand that."

Then at page 190, the same witness says—"On that day my brother-in-law got all the title-deeds. There was no need for my waiting for the title-deeds. Norendra Nath Samanta took out an injunction from the High Court and I got a letter to that effect. Thereupon I told the ladies that as there was all this *golmal*, I could not take the properties unless the ladies took out Letters of Administration." And then he gave a further answer to the Court, "I said I would not take the properties unless the ladies took out Letters of Administration. I would bring a suit to enforce the agreement." I think what he meant there was that he was under the impression that the agreement of the 23rd of January 1910 gave his father a right to call upon the ladies to take out Letters of Administration. There is some evidence to which I will refer shortly that the attorney had advised him to that effect. At page 205 the other brother gives evidence : he says, "On receipt of the letter dated 7th February 1910 we were advised by our attorney to ask the ladies to take out Letters of Administration.

Q.—There was no difficulty in getting a conveyance from the ladies as widows and not as administratrixes?

A.—As Norendra obtained an injunction against them, our attorney's advice for our additional safety was to take the conveyance after Letters of Administration with leave to sell was obtained. By reason of our attorney's advice we waited for the Letters of Administration and the order to sell. It was our idea after the 7th February. I was waiting all these months, because after the 7th February I understood that the order of the Judge to sell was necessary. This was the only reason why I was waiting from the 23rd January to August." Then at page 161 is to be found the evidence of the attorney; He says, "I subsequently ascertained that they had asked the Defendants Nos. 1 and 2 to take out Letters of Administration,

They told me that the Defendants Nos. 1 and 2 were agreeable to take out Letters of Administration, but the Defendants Nos. 1 and 2 desired they, the Bhars, should furnish them with funds and deduct the same from the purchase-money to which the Plaintiff has agreed. I saw Mritunjoy and Bhola in the middle of March. They told us that Gajen and Tulsi had told them that the Nundy Defendants were trying to get hold of these properties, that Norendra Nath Samanta was instructed at the instigation of the Nundy Defendants, that the Nundy Defendants were defraying the expenses of the suit, and so I advised them to advertise the fact of the agreement and I also sent a letter from our office giving notice of the agreement to the Nundy Defendants." Then at page 167, he says " My brother Kali Mohon (that is, the attorney) suggested that Letters of Administration should be taken out by the ladies. I was then present. Before the receipt of the letters of the 7th February there was no suggestion by any body as to taking out Letters of Administration by the ladies. After the receipt of the letters of 7th February, I had a discussion with my brother. My brother (that is, the attorney) suggested that Letters of Administration should be taken for greater safety.

Q.—May I take it that you consider that the conveyance by a lady on the allegation of legal necessity was less safe?

A.—No. As all those disputes had arisen, we advised them for greater safety that the ladies should take out Letters of Administration.

Q.—What disputes?

A.—There was a suit filed by Norendra.

Q.—Because somebody was disputing the existence of legal necessity, the taking out of Letters of Administration would be safer?

A.—No, but because there would be difficulty owing to the change of circumstances of procuring witnesses.

The conveyance by an administratrix would dispense with the question of legal necessity. As a matter of fact the two ladies got Letters of Administration at the instance of my client. My clients advanced the money and my clients were aware all along what was going on in the Letters of Administration proceedings. As an attorney of the case I went through the papers in connection with the cases Nos. 15 and 16 of the Hooghly Court." There is only one other passage at page 170, to which I need refer :

"*Q.*—Was it any time agreed between Bhuban and the ladies, or any of them, that the ladies should take out Letters of Administration and then convey the property to Bhuban?

A.—I was informed to that effect by the Plaintiff.

Q.—Was the agreement between Bhuban and the ladies in writing?

A.—There was no writing to that effect.

Q.—Was it a verbal agreement?

A.—We told the Plaintiff to tell the ladies to take out Letters of Administration with leave to sell and this was in pursuance of a clause of the agreement that the ladies would conform to any requisition that may be necessary to complete the title.

Q.—It is your evidence that whatever agreement there was for taking out Letters of Administration, it was in that agreement by virtue of that clause?

A.—Yes.

Beyond that clause there was no other agreement, written or oral, for taking out Letters of Administration. But pursuant to that clause we asked the ladies, and

they agreed, to take out Letters of Administration."

This is all the evidence upon that point.

Now the learned Judge on that point has found this, (page 378) "The idea of applying for Letters of Administration was not present in the mind of any of the parties at the time of the agreement, and it did not occur to any of them till they came to know of Sabitri's suit wherein legal necessity was challenged." —There the learned Judge was perfectly justified in coming to that conclusion on the evidence—"I cannot hold that applying for Letters of Administration came within 'rectifying and clearing the title-deeds.'" The clause in the agreement to which the learned Judge was referring is to be found at page 27, and runs thus:

"The time for (your) purchasing our said share shall be a period of one month from the date of your attorney approving of the title-deeds. We shall at our own expenses do everything which your attorney shall consider necessary for rectifying and clearing the title-deeds." I agree with the learned Judge that this question of taking out Letters of Administration was never contemplated by the parties at the time they made this agreement: In my opinion, the learned Judge was also right in coming to the conclusion that taking out Letters of Administration would not come within the phrase "do everything which your attorney shall consider necessary for rectifying and clearing the title-deeds." There undoubtedly was an agreement between the parties that the ladies should apply for Letters of Administration. It was to the effect that the ladies should take out Letters of Administration and that the Plaintiff's father should supply the necessary funds for those proceedings,—an agreement which, in my judgment, was made for good consideration and which was binding on the parties. But whether this agreement was done in pursuance of the original contract as the attorney thought it was—and which I think it was not—or whether the application for administration proceedings was made in pursuance of an additional verbal contract which I think it was—in either case the agreement involved an application to the Court and the obtaining of the leave of the Court to the proposed sale. Furthermore, it was done at the instance of the Plaintiff's father and at his request, and by so doing, in my judgment, they subjected themselves to the risk that the Judge when he heard the application might not approve the sale for any good and valid reason which might be put forward:—On that application he would have to consider several matters; amongst them, first of all, whether there was necessity for sale; secondly, whether the price which was offered by the intending purchaser was a proper price. The contract, in my judgment, was to this effect, namely, that the widows were to clothe themselves with the character of administratixes; and, further, they were to obtain the leave of the Court to sell the premises in question to the Plaintiffs: In other words, the contract became a conditional one—conditional upon the performance of these two matters at all events. What happened then is as follows: On the 23rd of February 1910, both the first and the second Defendants applied for Letters of Administration. With regard to the proceedings by the first Defendant, Norendra Nath Samanta objected, and there were several applications and interlocutory orders given by the learned Judge of the District Court, and the matter came to a climax, if I may use the word, as is shown by the proceedings at pages 134 and 135.

SREEMATI KALIDASI DASSEE *v.* SREEMATI NOBO KUMARI DASSEE.

At page 135 is a petition put in on behalf of the first Defendant in which she says as follows: she first describes her share in the properties in question and says that "the price of the same has been settled with an intending purchaser at the rate of Rs. 8,000 per cottah": and, then she goes on to say, "Mohendra Nath Samanta objected at the time of obtaining certificate and he is giving out that he can secure higher offers than the price fixed by this petitioner. It is therefore prayed that permission be granted for the sale of my own share in premises Nos. 10, 12 and 13, Darmahatta Street, at such higher price as Mohendra Nath Samanta might be able to secure and failing that at the price settled by this petitioner." Then the learned Judge passed an order on the 10th of August 1910, to the effect "Let the grantee ascertain whether the persons named by the objector are willing to pay Rs. 10,000 per cottah for the property and report by the 18th instant." And, on the 18th of August he made the following order, "Considered an application of the grantee for permission to sell the properties . . . . . to Gopi Nath Nundi and brothers who offer to pay Rs. 10,000 per cottah.

The application is granted."

With regard to the proceedings by Defendant No. 2, the material passages may be found at pages 122, 125, 123 and 124. In that case in the first instance the application of Defendant No. 2 was granted, and then a rescission of that order was obtained by Defendant No. 2 on a petition which is set out at page 123. She says in her petition: "The petitioner Srimutty Nobokumari Nandini Dassi begs to submit . . . . . I applied for permission to sell an 8 annas share,"—then she describes her share, and says—"at Rs. 8,000 per cottah and your Honour's Court gave the said sanction. At present Babu Gopi Lal Nandi and brothers of Darmahatta Street, Calcutta, have made an offer for purchase at Rs. 10,000 per cottah." Then after stating that this petition was verified by an affidavit, she prays that "with a view to pay off the debts of my husband's estate, orders be passed for the sale of the said properties belonging to his estate to Gopi Lal Nandi and brothers at Rs. 10,000 per cottah instead of Rs. 8,000 per cottah." Therefore, the result was that in each case, I mean in each of the administration proceedings by Defendants Nos. 1 and 2, leave of Court was given to the proposed sale to the Nundis, and the consent of the Court to the proposed sale to Bhuban Chandra Bhar was not obtained. I am not sure that it is at all necessary to deal with the allegation which is put forward by the learned Counsel for the Appellants, that the Defendants did not really bring all the facts relating to the transaction to the notice of the Court, but if it is necessary for me to consider that, I am not satisfied that they did conceal the facts. I have gone carefully through the different orders and the statements which were made in the different applications, and I am not satisfied that the applicants to the District Court failed to disclose the material facts relating to the matter. In any event, there is no doubt that the order of that Court stands. This is not an appeal from the order of that Court, and under that order as I have already mentioned, consent of the Court was given to the sale to the Nundis and it was not obtained by the two administratixes for sale to Bhuban Chundra Bhar.

The first question I have to consider on these facts is whether the Plaintiffs can obtain a decree for specific performance of the contract against the first two Defen-

dants. In my opinion, the Plaintiffs cannot succeed in obtaining this decree.

The case which was referred to by the learned Advocate General, *Narain Pattro* v. *Aukhoy Narain Manna* (1) was to this effect: A certificated guardian of certain minors entered into an agreement with the Plaintiff to sell certain land belonging to them for a fixed price contingent upon the leave of the Court, which was necessary, being obtained to the transaction, and a portion of the purchase-money was paid by the Plaintiff. The Court sanctioned the sale but at a higher price than that agreed on between the Plaintiff and the guardian, and the latter sold to a third party. The Plaintiff, thereupon, sued the minors by their guardian as next friend and the third party for specific performance of the agreement to sell to him at the price mentioned in the agreement :— It was held that " the contract was not one which could be specifically enforced, and that sec. 26 of the Specific Relief Act did not apply. The contract as it stood was never a complete contract at any time as it was contingent upon the permission of the Court, and the permission of the Court did not extend to the whole contract as agreed upon between the parties."

Having held, as I have, that there was a verbal agreement subsequent to the execution of the agreement of the 23rd of January 1910, which constituted an agreement between the parties a conditional one, dependent upon the consent of the Court being obtained to the sale, I am of opinion that this case is governed by the principle laid down in the case to which I have just referred. Therefore, specific performance against Defendants Nos. 1 and 2 cannot be obtained.

Consequently, if the Plaintiffs are not entitled to specific performance against Defendants Nos. 1 and 2, it follows naturally and as a matter of course that they cannot obtain it against the Nundi Defendants. Therefore, the question of notice to the Nundi Defendants to the contract of the 23rd of January 1910, does not arise. As regards these Defendants, there can be no claim for damages, as they were not parties to the contract.

Therefore, as against the Nundi Defendants this appeal must be dismissed with costs.

As regards the claim for damages, which must be confined to Defendants Nos. 1 and 2, here again, having decided that the agreement was varied by the consent of the parties and became conditional on the ladies changing their character and becoming Administratrices to the Estates, and getting leave of the Court, that would bar the Plaintiffs' claim for damages, because it must be pointed out that this action is not based upon the conditional contract, but it is based upon the original contract of the 23rd of January 1910 unvaried, and the breach is specified in para. 19 of the plaint. That alone would be a sufficient answer to the Plaintiffs' claim for damages. But I would like to add that even if the administration proceedings are to be considered as taken under the clause of the contract to which I have referred— though as I have already pointed out I do not think they can have been— administration proceedings were taken at the instance of the Plaintiffs, and it was at the instance of the Plaintiffs that the matter was made subject to an application being made and the sanction of the Court to sell being obtained; and, such a condition involved the risk that a higher offer might be forthcoming, which, if made, the administratrix would be bound to bring to the notice of the Court, and which the Court in the in-

(1) I. L. R. 12 Cal. 152 (1885).

terests of all the parties concerned would have to consider as against the price which was mentioned in the original agreement of the 23rd of January. It is also to be noticed that in the Court below no attempt was made to prove the damages which were stated in the plaint to be Rs. 20,000.

For these reasons, in my judgment, the Plaintiffs are not entitled to damages against Defendants Nos. 1 and 2.

As regards the question of costs, that is a matter for the discretion of the learned Judge, I am not sure that if I had been sitting as a Judge of first instance, I should have made quite the same order as to costs as the learned Judge did. But that is not the question. Costs are in the discretion of the learned Judge, and the question I have to consider is whether I am satisfied that sufficiently good cause has been shown for me to interfere with the discretion which the learned Judge has exercised. I am not so satisfied: I bear in mind that the learned Judge must have had all the facts before him at the time he made the order. Not only that: this question of costs was expressly raised and argued before him, and especially the question of the reserved costs of the commission was strenuously argued, as I was informed, by the parties before him: and, under those circumstances I cannot go so far as to say that I am satisfied that this Court ought to interfere with the discretion which the learned Judge has exercised. I am, therefore, of opinion that this appeal ought to be dismissed with costs.

WOODROFFE, J.—I am not satisfied that the ladies understood the consequence of and were bound by the alleged agreement of the 23rd January 1910. It is to be observed that the document was said to have been explained by the attorney of the purchaser. It apparently did not occur to him in dealing with the *pardanashin* ladies who were said to be selling their property to recommend that they should be represented by a separate solicitor. There was a solicitor of the estate Mr. Srimani who had been the deceased's solicitor; and he was not consulted. It was apparently not explained to the ladies that in the event of Marwari Pachasia getting a decree for damages the ladies would in that case have been liable therefor. Nor was it explained to them that, as contended in the trial, the provision as to clearing the title might be relied upon for the purpose of showing that there was a duty upon them to get out Letters of Administration to the estate and to incur the additional costs of such administration.

But if the ladies were at one time bound by that agreement it was in my opinion superseded by another according to which the sale was to be, not by the widows but by administratrices contingent on the Court's sanction being obtained. There can be under the circumstances no decree for specific performance as claimed either against the first or second Defendant or the Nandi Defendants. Nor as against these latter Defendants any question of notice arises.

Then as regards the damages, they are claimed against the first and second Defendants only. It is sufficient to say that the claim has been made in the plaint on the basis of the agreement of the 23rd January 1910 which I hold has gone. I may further add with reference to the contention that the first and second Defendants were bound to do all they could to get sanction from the Court that the grant of Letters of Administration altered the character of the vendors; and that the case of the Plaintiffs is that

Rs. 8,000 per cottah was the proper price of the premises. So according to them there was no loss except the alleged hypothetical loss said to be due to an alleged disturbance of their business; with regard to which there is nothing on the record to show that it is not too remote if it be held to exist at all of which there is no evidence.

As regards the question of costs it is true that the Plaintiffs succeeded in certain points in the first Court. But the learned Judge though asked to take this into account in his order for costs has not done so. Apart from the findings above mentioned in my judgment I do not think that sufficient ground has been made out for interfering with the discretion of the Court in this respect.

I therefore agree with the order proposed by the learned Chief Justice.

MOOKERJEE, J.—I agree that the decree made by Mr. Justice Imam is substantially correct and should not be disturbed.

The facts material for the determination of the questions raised before us, as I gather them from the evidence, may be very briefly stated. The subject-matter of the litigation is house-property in this city which was owned at one time by Hari Charan Sett and Panchanan Sett. The share of the former devolved upon his death on his widow, the first Defendant, while the share of the latter passed on his death to his mother, the second Defendant. The proprietors died heavily indebted, and the ladies found it necessary to sell the disputed land to liquidate the debts. The Bhars, the Plaintiffs in this suit, as also the Nandis who form the last three Defendants in this litigation, were in occupation of different portions of the property as tenants. They were rival traders and carried on business in hardware on the premises; they were consequently both naturally anxious to acquire the property. As the result of negotiations, on the 23rd January 1910, the first two Defendants executed in favour of the Bhars a contract of sale and undertook to execute a conveyance on receipt of the price which was fixed at Rs. 8,000 per cottah. Immediately after this, on the 7th February 1910, a suit was instituted against the first Defendant, on behalf of her infant daughters, (who were the reversionary heirs to the estate of her husband), to restrain her from making an absolute alienation of the premises. The claim was founded on the assertion that there was no legal necessity for the alienation and that the price fixed was wholly inadequate. The Plaintiffs realised that a purchase of the premises in these circumstances was likely to involve them in serious troubles, and, with a view to fortify their position, they induced their vendors to apply for Letters of Administration in respect of the estates held by them and to obtain the sanction of the District Judge to the intended alienation under sec. 90 of the Probate and Administration Act. The object of this device was obvious. If the Plaintiffs took a conveyance from the ladies in their character as a Hindu widow and a Hindu mother, respectively, vested with qualified powers of alienation, their title would be liable to be challenged on the death of the ladies by the then actual reversioners, and the burden would be cast upon the Plaintiffs to establish the existence of justifying legal necessity. On the other hand, if the ladies were clothed with the character of administratrixes and made the alienation with the sanction of the District Judge under sec. 90 of the Probate and Administration Act, although the sale might not be operative precisely in the same way as a sale by order of the Court in adminis-

tration proceedings, yet, as pointed out by Sir Richard Garth in *Sikher Chund* v. *Dulputty Singh* (2), the burden would lie heavily upon those that might impeach the validity of the transaction. The ladies accordingly applied for Letters of Administration at the instance of the Plaintiffs, who also supplied the funds requisite for the conduct of the proceedings. But an unforeseen difficulty arose. The District Judge granted Letters of Administration, but ultimately declined to sanction the sale to the Plaintiffs on the terms arranged. That the District Judge knew all the circumstances and was competent to make this order is indisputable. The Nandi Defendants seized this opportunity, intervened, and offered Rs. 10,000 a cottah for the property, with the result that the District Judge sanctioned a sale at the higher price. Consequently, on the 15th July and 24th August 1910 the ladies executed conveyances in favour of the Nandi Defendants. On the 15th September following, the Plaintiffs instituted the present suit for specific performance of the contract of the 23rd January 1910, and, in the alternative, for damages for breach of contract. In my opinion, it is perfectly plain that the Plaintiffs are not entitled to a decree for specific performance of the contract on which they rely. That contract was substantially varied when, at the instance of the Plaintiffs, the ladies applied for Letters of Administration. Both parties to the agreement must be deemed to have implied that the transaction should not be effected until after the ladies had been clothed with the character of administratrixes and had secured the requisite permission of the District Judge. The original contract, when so varied by mutual consent, became in substance a contingent contract. The contingency has not happened, and, consequently, the Plaintiffs are not entitled to claim performance of the contract. See *Narayan* v. *Akshay* (1) and *Sarbesh Chunder* v. *Khetrapal* (3). In these circumstances, the observation of Lord Redesdale in *Harnett* v. *Yielding* (4) applies: "the Plaintiff must show that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do, for if he does, a consequence is produced that quite passes the object of the Court in exercising the jurisdiction which is to do more complete justice." On behalf of the Appellants, it has been argued, however, that this view may render possible an evasion of contractual obligation wherever an unscrupulous person enters into a contract and subsequently places himself under the jurisdiction of the Probate Court as an administrator. There is, in my opinion, no real foundation for this apprehension. For the purposes of the present case, it is only necessary for me to hold that the original contract was by implication varied by mutual consent, when, at the instance of the intending purchasers, the vendors agreed to obtain Letters of Administration. In my opinion the original contract has been varied and has been transformed into a contingent contract. In the events which have happened, the Plaintiffs cannot claim specific performance of that contingent contract. From this it further follows that as there has been no breach of the modified contract by the Defendants, the Plaintiffs are not entitled to damages. A decree has been made in their favour for refund of the earnest money and the costs of the Letters of Administration proceed-

(2) I. L. R. 5 Cal. 363 (1879).

(1) I. L. R. 12 Cal. 153 (1885).

(3) 14 C. W. N. 451; s. c. 11 C. L. J. 346 (1910).

(4) 2 Sch. & Lef 549 (1805).

ings. No question has been raised in this Court as to the propriety of this order.

Finally, we have been asked to vary the order for costs made by Mr. Justice Imam as between the Plaintiffs and the first two Defendants. I am not satisfied that the order is so manifestly erroneous or unjust as to call for our interference. The decree must consequently be affirmed and this appeal dismissed with costs.

Messrs. K. M. Rakhit & Co., Solicitors, for the Appellant.

Messrs. Fox and *Mondul* and *B. Srimany*, Solicitors, for the Respondents.

M. N. K. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 18 OF 1914.

MOOKERJEE, J.
N. R. CHATTERJEA, J.
1915,
23, August.

CHATTERJEE BRAHMIN, Plaintiff, Appellant,
v.
DURGADUTT AGARWALA and ors., Defendants, Respondents.

Suit, decision of, in the absence of Defendant—Summons against one of two Defendants residing outside British India returned unserved—Compromise of suit by the other Defendant both for himself and the absent Defendant acting on power of attorney empowering management of business and institution, conduct and defence of suits—Compromise decree if binding on absent Defendant—Decree set aside even as against Defendant present on the ground of decree being indivisible.

The Plaintiff and the four Defendants were partners. The first three Defendants brought a suit against the Plaintiff and the fourth Defendant for dissolution of partnership and other incidental reliefs. The Plaintiff was at the time admittedly residing outside British India in Rajputana and the summons which was issued against him was returned by the Political Agent at Rajputana with the remark that it was impossible to serve it upon the Defendant in time as the date fixed for the hearing of the case was too close at hand. Before the summons so returned had reached the Court the suit was compromised by the fourth Defendant both for himself and the Plaintiff. The fourth Defendant professed to represent the Plaintiff on the basis of a power of attorney in his favour which authorised him to manage the partnership business, to continue, institute, prosecute, defend or oppose all the suits that were or might be brought by or against the executant in respect of his business and property. The Plaintiff sued to have the compromise decree set aside.

Held—*That the Code contemplates service of summons upon the party sought to be made liable and the position in the present case being in substance the same as if no summons had ever been issued for service on the Defendant, the decree made against the Plaintiff could not bind him.*

A judgment made under such circumstances as happened in the present case when the summons issued against the Defendant was returned unserved may be set aside on the ground that the Defendant must in essence be a party to the suit before the Plaintiff can have judgment against him.

That the decree was also liable to be set aside on the ground that the power of attorney did not authorise the fourth Defendant to bind the Plaintiff by the compromise.

That the decree was liable to be set aside not only in so far as the Plaintiff was concerned but also with regard to the fourth Defendant because the decree on the face of it was indivisible and could not be set aside in part.

That the effect of the order of the High Court was to discharge the entire decree in the suit and to revive it for retrial.

CHATTERJEE BRAHMIN *v.* DURGADUTT AGARWALA.

This was an appeal preferred on the 23rd of January 1914 against the decree of N. E. Parry, Esq., Subordinate Judge at Lakhimpur in Assam Valley Districts, dated 24th September 1913.

The facts of the case will appear from the judgment.

Babu Bhupendra Kumar Ghosh for the Appellant.

Babu Nanda Lal Banerjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff in a suit to set aside what has been described as an *ex parte* decree. The circumstances under which the decree in question was obtained against the Plaintiff are beyond controversy. The first three Defendants had a six annas share in a partnership business under a deed dated the 21st April 1909, while the Plaintiff and the fourth Defendant who are relatives had each a five annas share. On the 24th May 1912, the first three Defendants, who were, at the time, infants, instituted a suit against the Plaintiff and the fourth Defendant for dissolution of partnership, for adjustment of accounts, for appointment of a Receiver and for other incidental reliefs. The claim was valued at Rs. 22,000. At that time the Plaintiff, who was then the second Defendant, was stated on the face of the plaint to be resident beyond the limits of British India, namely, at Somaser in Rajputana. The fourth Defendant, who was the first Defendant in that suit, was a resident of the place where the suit was instituted. On the day the plaint was filed, an application was made by the then Plaintiffs for the issue of a warrant for arrest of the then first Defendant and a warrant for attachment, before judgment, of all the partnership assets. The Subordinate Judge directed the issue of the warrants, ordered summonses to issue, and fixed the 10th June 1912, for the trial of the suit. The warrants of arrest and attachment were issued forthwith. The summons upon the second Defendant which was issued on the day following reached the Political Agent at Rajputana on or about the 1st June 1912, and was returned by him to the Court with the remark that it was impossible to serve the summons upon the Defendant in time, as the date fixed for hearing the case was too close at hand. At the same time, a request was made by him that a more distant date might be fixed; the date suggested was six weeks from the 1st June. Before the summons so returned had reached the Court of the Subordinate Judge, the proceedings had, however, been pushed on on behalf of the Plaintiffs with extreme rapidity. We find it noted in the order-sheet that on the 27th May, that is, within three days of the institution of the suit, the first Defendant had been arrested, and had received intimation from the Court that unless he furnished security for Rs. 15,000, he would be forthwith sent to the Civil Jail. On the 30th May, we find that the suit had been compromised. The first Defendant had paid to the Plaintiffs Rs. 13,000 and had agreed to pay Rs. 5,800 in specified instalments. A decree was made on these terms and the first Defendant was released from arrest. Whether a decree obtained by consent under the circumstances described would be operative against the person who had consented thereto, is a question which does not directly arise for consideration in the present appeal, but we have to determine whether such decree is binding upon the other Defendant to the suit who was absent in Rajputana.

CHATTERJEE BRAHMIN *v.* DURGADUTT AGARWALA.

It appears from the petition of compromise that the first Defendant entered into the settlement both for himself and his absent partner. He professed to represent his partner on the basis of a power of attorney to which reference will presently be made. The decree however does not mention the petition of compromise, and does not even recite that it was made by consent, but it directs both the Defendants to pay the Plaintiff the sum of Rs. 5,800 with costs by six monthly instalments on the dates specified, subject to the proviso that if default was made in the payment of a single instalment the Plaintiffs would be at liberty to enforce the entire decree by execution. The decree consequently on the face of it binds both the then Defendants. The Plaintiff was thus driven to institute this suit on the 8th October 1912, to set aside this decree. His contention is that he is not bound by this decree: *first*, because he was in essence not a party to the suit and the Court had no jurisdiction to make a decree against him; and, *secondly*, because, his partner had no authority to bind him by a compromise. In our opinion, these contentions are well-founded and must prevail.

As regards the first ground it is plain that this is in no sense a case of an *ex parte* decree. The Code contemplates service of summons upon the party sought to be made liable. That summons may be duly served or may not be duly served. But the Code does not contemplate the contingency which has happened in this case. The Plaintiffs took out summons upon the second Defendant in the suit. The summons was sent, as stated, to the Political Agent at Rajputana. No attempt was made by him, rightly or wrongly, to serve the Defendant; but the summons was returned to the Court. The position in substance is the same as if no summons had ever been issued for service on the Defendant. Under these circumstances a decree made against the Defendant cannot possibly bind him.

Or. 9, r. 5 of the Civil Procedure Code clearly contemplates that where the summons has been returned unserved, the Plaintiff must, within a year from the prescribed date, apply for the issue of a fresh summons; if he fails to do so, the suit is liable to be dismissed. The Code obviously does not contemplate the trial of a suit when the summons has been returned unserved. It is obviously just that a man should have notice of any legal proceeding that may be taken against him and a full and fair opportunity to make his defence. As has been well said, the law never acts by stealth, it condemns no one unheard, so that a personal judgment rendered against a Defendant without notice to him or an appearance, by him, is vitiated by the same infirmity as a judgment without jurisdiction. A judgment made under such circumstances may be set aside on the ground that the Defendant must in essence be a party to the suit before the Plaintiff can have judgment against him.

As regards the second ground, it is equally plain that the decree cannot be sustained. An extract from the power of attorney dated the 22nd June 1909, is on the record. Thereby the Plaintiff authorised his partner to manage the partnership business, to continue, institute, prosecute, defend or oppose, as the case might be, all the suits that were or might be, brought by or against the executant in respect of his business and property. On behalf of the Plaintiffs-Respondents, no endeavour has been made to support the view that the compromise of a suit

can by any stretch of language be included within any of the terms of the power of attorney. It is plain beyond controversy that the partner of the Plaintiff had no authority to bind him by the compromise.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed. The decree in suit No. 10 of 1912 is set aside, not only in so far as the Plaintiff is concerned but also with regard to the fourth Defendant, because the decree, on the face of it, is indivisible and cannot be set aside in part. The question arises, in these circumstances, what is the effect of our order upon the prior suit. The effect is obviously to discharge the entire decree in that suit and to revive it for retrial, *Khajoorooneesa* v. *Roushan Jehan* (1), *Gordon* v. *Lennox* (2), *Bibee Solomon* v. *Abdul Aziz* (3), *Sarat Chandra* v. *Kartik Chandra* (4), *Sarbes Chandra* v. *Khetra Pal* (5) and *Rajkumar* v. *Harekrishna* (6), though there are expressions to the contrary effect in *Bhimaji* v. *Rakmabi* (7) and *Khettra Mohon* v. *Mangobinda* (8). As the then second Defendant was not served, he will have to be served, unless he chooses to enter appearance voluntarily. The Appellant is entitled to his costs both here and in the Court below; but although the appeal is valued at Rs. 18,000 we assess the hearing fee in this Court at five gold mohurs, as the arguments for the Respondents have not been unduly protracted.

S. C. M. *Appeal allowed.*

(1) I. L. R. 2 Cal. 184 (191.: s. c. L. R. 3 I. A. 291 (1876).
(2) [1902] App. Cas. 465
(3) I. L. R. 6 Cal. 687 (1881).
(4) I. L. R. 9 Cal. 810 (1883).
(5) 14 C. W. N 451: s. c. 11 C. L. J. 346 (1910).
(6) 15 C L J. 217 (1910).
(7) I. L. R 10 Bom. 338 (1885).
(8) 14 C. W. N. 558 (1910).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2816 OF 1914.

N. R. CHATTERJEA, J. NEWBOULD, J. 1915, 17, December.	MOULVI MAHAMMAD ISMAIL, Plaintiff, Appellant, *v.* SAMAD ALI BHUIYAN and ors., Defendants, Respondents.

Agreement to compound criminal case compoundable with leave of Court only if opposed to public policy—Offence not so compoundable alleged but no summons issued—Effect.

In a Criminal case the Magistrate after examining the complainant summoned the accused under sec. 325, I. P. C., although allegations were made in the petition of complaint of an offence under sec. 147, I. P. C. also. An agreement was entered into between the parties and with the leave of the Court the case was compromised.

Held—*That a case under sec. 325, I. P. C., being compoundable with the leave of the Court and the Magistrate having given permission to compound the case, the contract was not opposed to public policy; the allegation in the petition of complaint of a noncompoundable offence under sec, 147, I. P. C., which was not accepted by the Magistrate when issuing process made no difference.*

This was an appeal preferred on the 13th November 1914 against a decree of Babu Ramesh Ch. Sen, Subordinate Judge of Noakhali, dated the 13th June 1914, affirming the decree of Babu Basanta Kumar Ray, Munsif at Feni, dated the 30th June 1910.

The material facts will appear from the judgment.

Dr. Dwarka Nath Mitter and *Babu Gour Chandra Pal* for the Appellant.

MOULVI MAHAMMAD ISMAIL *v.* SAMAD ALI BHUIYAN.

No one for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff who is the Appellant in this case sued for a declaration that certain documents executed by him in favour of the Defendants were invalid and void for want of consideration. It appears that in the Court of first instance the case was tried on the question whether the Plaintiff executed the documents under coercion. The Court of first instance found that there was no coercion exercised upon the Plaintiff and the suit was dismissed.

On appeal the finding of the Court of first instance on the point was affirmed, but then it was contended before that Court that the contracts were opposed to public policy, as they were entered into for compounding a criminal case. The learned Subordinate Judge points out that the Plaintiff had been summoned only under sec. 325 of the Indian Penal Code. An offence under sec. 325 can be compounded with the permission of the Court, and the Magistrate gave permission to compound the case. We have been referred to the case of *Majibar Rahaman* v. *Muktashad Hossein* (1) by the learned Pleader for the Appellant, but in that case the contract was entered into in order to stifle a non-compoundable criminal case, and all that that case decided was that it was contrary to public policy to compound a non-compoundable criminal case and any agreement to that end is wholly void in law.

It was contended by the learned Pleader for the Appellant that although an offence under sec. 325 of the Indian Penal Code is compoundable with the permission of the Court, the Plaintiff was also accused of having committed an offence under sec. 147 of the Code in the petition of complaint before the Magistrate and the learned Pleader relied upon the case of *Williams* v. *Bayley* (2) in support of the proposition that where a contract is entered into in order to avoid a criminal prosecution, even before the case is brought into Court, the agreement is invalid as being opposed to public policy. In that case, however, the father of the person who had been accused of having committed forgery, took upon himself the liability with the knowledge that unless he did so, his son would be exposed to a criminal prosecution with a moral certainty of conviction; and it was held that under the circumstances he was not a free and voluntary agent and the agreement he made was not enforcible in equity. In the present case the Plaintiff, it is true, was accused of having committed offences under secs. 325 and 147, I. P. C., in the petition of complaint but the Magistrate after perusing the petition of complaint and examining the complainant (as he must have done) thought fit to summon the Plaintiff only under sec. 325. Then again there is nothing to show that there was any truth whatsoever in the allegations as to rioting or that there was any apprehension in the mind of the Plaintiff that he would be convicted under that section. As we have said the only section under which he was summoned was sec. 325 and an offence under that section is compoundable with the permission of the Magistrate. The Magistrate did permit it and the parties entered into a compromise for settling their long-standing disputes. It is to be observed that the complainant in that case who is the Respondent in this appeal, was also accused under sec. 325.

(1) I. L. R. 40 Cal. 113 ; s. c. 16 C. W N, 854 (1912).

(2) L. R. 1 H. L. 200 (1866).

MOULVI MAHAMMAD ISMAIL *v.* SAMAD ALI BHUIYAN.

The parties settled their long-standing disputes by executing the documents and by payment of money in cash. We think that under the circumstances the decree of the lower Appellate Court is correct and this appeal must be dismissed but without costs as the Respondents do not appear.

S. C. M.

Appeal dismissed without costs.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2645 OF 1914.

MOOKERJEE, J.
N. R. CHATTERJEA, J.
1915,
Heard, 17 and 18, August.
Judgment, 18, August.

LANI MIA, Defendant, Appellant,
v.
MUHAMMAD EASIN MEA and others, Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 85—Under-raiyati lease for 9 years with covenant of renewal if valid—Ejectment, suit for, at termination of term

Notwithstanding the provisions of sec. 85 of the Bengal Tenancy Act, a stipulation in a lease granted by a raiyat to an under-raiyat that after the expiry of the nine years for which the lease was granted, the raiyat would grant the under-raiyat a fresh lease of the land is valid.

ALI MAHOMED *v.* NAYAN RAJAH (1) *followed.*

ABDUL KARIM *v.* ABDUL RAHAMAN (2) *referred to.*

When there is a covenant for renewal, if the option does not state the terms of the renewal the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself.

If it is possible to interpret an agreement between the parties so as to make it operative, effect should be given to it and the contract should not be pronounced unenforceable.

Held—*That the only reasonable interpretation of the covenant in this case was that the parties agreed that the lease would be renewed on the same terms and for the same period as the original lease.*

This was an appeal from a decision of F. W. Ward, Esq., District Judge of Tippera, dated 24th March 1914, affirming that of Babu Bimal Chandra Chatterjee, Munsiff, Chandpore, dated 13th August 1913.

The facts of the case will appear from the judgment.

Babu Bipin Chandra Bose for the Appelant.

Babu Jatindra Mohun Ghose for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal by the first Defendant in an action in ejectment. On the 23rd March 1903, the Plaintiffs, who are occupancy-raiyats, granted a sub-lease to the Defendant on an annual rent of Rs. 5, for a term of nine years from the 14th April 1903 to the 13th April 1912. The lease, as also its counterpart, contained a covenant that upon the expiry of the term, the tenant would take a fresh settlement and that the landlords would grant him such settlement. On the 19th August 1912, the Plaintiffs served a notice upon the Defendant and offered him a lease for a term of five years on an annual rent of Rs. 10. The Defendant refused to accept this offer and claimed a renewal for nine years at the original rent. On the 7th October 1912, the Plaintiffs instituted this suit to eject the Defendant. The De-

(1) 15 C. L. J. 122 (1908).
(2) 15 C. L. J. 672 : s. c 16 C. W. N. 618 (1911).

fendant pleaded that he was in the position of a lessee who had obtained a renewal of the original lease for a term of nine years at the annual rent of Rs. 5 and was consequently not liable to be ejected. The Courts below refused to give effect to this contention and have decreed the suit. Upon this appeal, the view taken by the Courts below has been assailed as erroneous in law.

It is plain, as was pointed out by Rampini, J., in *Ali Mahomed* v. *Nayan Rajah* (1) that, notwithstanding the provisions of sec. 85 of the Bengal Tenancy Act, a stipulation in a lease granted by a raiyat to an under-raiyat that after the expiry of the nine years for which the lease was granted, the raiyat would grant the under-raiyat a fresh lease of the land, is valid. This view was accepted as correct in *Abdul Karim* v. *Abdul Rahaman* (2). We start, then, with the position that the covenant mentioned is binding upon the parties; the question for consideration is its legal effect. The Plaintiffs-Respondents argue that it is inoperative in law, because it is so vague and uncertain that it cannot be deemed specifically enforceable; and in support of this contention they rely upon the decision in *Surendra Nath* v. *Dinabandhu* (3). In our opinion, this contention is not well-founded on principle. To hold that the covenant left the term of the lease and the rent payable thereunder both uncertain, is to impute to the contracting parties an intention that the covenant, though deliberately inserted in the lease and its counterpart, was futile. The only reasonable interpretation of the covenant is that the parties agreed that the lease would be renewed on the same terms and for the same period as the original lease. If they intended that the fresh lease would be for a different period and at a different rent, nothing was easier for them than to make such intention explicit. The clause might, for instance, have provided that on the expiry of the term, there would be a fresh settlement for a specified number of years and rate of rent; or, it might have laid down that the lease would be renewed at what might be deemed fair rent. In the absence of such stipulation, we cannot but hold that the covenant is for the renewal of the lease for the same period and on the same rent as the original lease.

The principle applicable to cases of this character is stated *in Secretary of State for India in Council* v. *Forbes* (4), which explains that where there is a covenant for renewal, if the option does not state the terms of renewal, the new lease would be for the same period and on the same terms as the original lease, in respect of all the essential conditions thereof, except as to the covenant for renewal itself. This view is supported by the decisions in *Price* v. *Assheton* (5), *Rickards* v. *Rickards* (6), *Lewis* v. *Stephenson* (7) and *Austin* v. *Newham* (8). The Respondents have ingeniously argued that if this view be adopted, the effect of the renewal clause would be the grant of a lease in perpetuity and an indirect evasion of sec. 85 of the Bengal Tenancy Act. This contenton is fallacious, because, the covenant for renewal itself is not reproduced in the renewed lease, unless there is clear indication that the parties intended the lease to be perpetual. The arguments of the Respondents is best answered in

(1) 15 C. L. J. 122 (1908).
(2) 15 C. L. J. 672: s. c. 16 C. W. N. 618 (1911).
(3) 13 C. W. N. 595 (1908).
(4) 16 C. L. J. 217 (1912).
(5) 1 Y. & C. Ex. 62; 41 R. R. 222 (1834).
(6) 2 Y. & C. Ch. 419 at p. 427 (1840).
(7) 67 L. J. Q. B. 296 (1898).
(8) [1906] 2 K. B. 167.

the words of Knight Bruce, V. C., in *Rickards* v. *Rickards* (6). "It is not every new lease that is a renewal of a lease. The word 'renewal' is a relative term, which of necessity requires to be construed by reference to something else. By reference to what? To the lease that he has at the moment; it can be construed with reference to nothing else. But it is said that the word 'renewal' though referring to the same property as included in that lease may not mean the same or similar species of lease. That, I apprehend, is an inaccurate interpretation of the word. I take it, that the term 'renewal' means a renovation, a restoration of something to a former or original state, a repetition, a beginning again; it may mean each or either of those things, so far as there is any difference between them; it must, however, be a renewal, a renovation, or repetition or restoration of the same subject. A renewal of a lease, where the context does not require any different interpretation to be given to it, must, therefore, mean the obtaining lease as near as possible in every practicable circumstance to the existing lease, as if the subject, worn or wearing out, was to begin again." The choice lies, in fact, between two alternatives; either to construe the covenant as futile or to interpret it as intended by the parties to provide for a fresh lease on the same terms as the original lease. Now, it is an elementary rule that if it is possible so to interpret an agreement between the parties as to make it operative, effect should be given to it and the contract should not be pronounced unenforceable; as Kay, L. J., said in *Mills* v. *Dunham* (9), referring to *Abbott* v. *Middleton* (10) and *Grey* v. *Pearson* (11), where a clause in a contract is ambiguous, a construction which will make it valid is to be preferred to one which will make it void. The interpretation which we put upon the clause is undoubtedly consistent with the language used; and we should not consequently accept, as the Court did in *Surendra Nath* v. *Dinabandhu* (3), the contention of the Plaintiffs that although the parties intended to provide for a renewal of the lease, they made the covenant so vague and uncertain in material particulars that their intention was sure to be defeated. The result is that the Defendant is in the same position as if he had been granted a lease for nine years at the rate of Rs. 5 a year from the 14th April 1912. Consequently the present suit for ejectment cannot be maintained.

The appeal is thus allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

N. G. *Appeal allowed.*

(6) 2 Y. & C. Ch 419 at p 427 (1843).
(9) [1891] 1 Ch. 576 (590).
(10) 7 H. L. C 68 (1858).
(3) 18 C. W. N. 595 (1903).
(11) 6 H. L. C. 61 (1857).

PATNA HIGH COURT.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE ORDER No. 516 OF 1914.

ROE, J.
JWALA PRASAD, J.
1916,
16, May.

RABU SURAJDEO NARAYAN SINGH, Judgment-debtor, Appellant,
v.
MUSHAROO RAUT and two ors., Decree-holders, Respondents.

Decree, redemption suit—Limitation, application for execution—Time, if runs from date of decree or date of ascertainment of exact amount.

Where in a suit for redemption a certain decree was passed on 27th July 1909

BABU SURAJDEO NARAYAN SINGH *v.* MUSHAROO RAUT.

and it was directed therein "that it will be necessary to have fresh accounts taken to determine the amount due to the Appellants," and the amount was not definitely ascertained till the 23rd February 1910 and the application for execution was filed on 29th January 1913:

Held, *that the judgment of the District Judge, dated 27th July 1909, sets forth clearly the exact method of ascertaining the sum to be paid in redemption and the calculation of that sum was a matter purely of office routine and that the application for execution was barred by limitation.*

GOLAM GAFFAR MONDAL *v.* GOLJAN BIBI (1) *followed.*

This is an appeal from Appellate Order passed by R. L. Ross, Esq., District Judge of Durbhanga, dated 27th July 1914, modifying the order passed by R. L. Dass, Esq., Subordinate Judge of Durbhanga, dated 28th May 1[illegible].

The facts out of which the above appeal arises are shortly as follows:—

On 27th July 1909 the District Judge passed a judgment in appeal in a suit for redemption decreeing the appeal with costs and directing fresh accounts to be taken. A Commission was appointed and his report was confirmed with certain modification by the District Judge on the 4th February 1910. The result of the Commissioner's enquiries was embodied in the decree which was signed on 23rd Feburary 1910, although it bore the date of the original judgment, *viz.*, 27th July 1909.

The first application for execution was filed on 29th January 1913, which was dismissed for default. The second application for execution was filed on 23rd September 1913 and the question arose whether the first application was barred by limitation or not. The appellate decree dated 27th July 1909 ran thus: "The appeals are therefore decreed with costs and it will be necessary to have fresh accounts taken to determine the amount due to the Appellants."

The learned Subordinate Judge held that the execution case so far as regards the amount which became payable before the appointment of the Commissioner was barred, but that the decree-holder was entitled to execute the decree so far as the Commissioner's fees amounting to Rs. 32 was concerned. On appeal preferred by the decree-holders the learned District Judge held that the judgment of the 27th July 1909 was a preliminary judgment and the judgment confirming the Commissioner's report on 4th February 1910 was the final judgment in which the decree was framed and allowed the whole execution case to proceed. Thereupon the judgment-debtor preferred this second appeal.

Mr. Baidyanath Sinha for the Appellant.

Mr. Sharoshi Charan Mitter for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises from an order of the District Judge of Darbhanga holding that an application for the execution of a decree bearing the signature of the District Judge under date the 27th day of July 1909 and made in a suit for redemption was not barred by limitation on the 29th day of January 1913. The decree was actually signed on the 23rd of February 1910. The reason upon which the learned District Judge has based his decision that limitation should run from February 1910, is that it was necessary, in order to the preparing of the decree

(1) I. L. R. 25 Cal. 109 (1897).

made upon the judgment dated the 27th July 1909, to take an account through a Commissioner and ascertain the exact amount for which the property in suit might be redeemed, and that amount was not definitely ascertained till the 23rd February 1910. That part of the decree under execution before us is not with reference to the redemption of the property, but with reference to the costs payable by the Plaintiffs for redemption to the Defendant-mortgagees. This, however, is immaterial. The decree itself bears a certain date. That date has been placed upon it in accordance with the provisions of the Code, and before it can be said that it should be regarded as bearing any other date, there must be some ground more substantial than that given by the learned District Judge. The judgment of the District Judge dated the 27th July 1909 sets forth clearly that exact method of ascertaining the sum to be paid in redemption. The calculation of that sum was a matter purely of office routine, and it would have been unnecessary for the District Judge to pass any further orders on the matter at all. That he chose to appoint a Commissioner to assist in the preparation of the decree, and himself supervised the work of the Commissioner does not affect the fact that the preparation of the decree is a routine matter.

We hold that the decree was rightly dated by the District Judge the 27th July 1909 and it was barred by limitation on the 29th January 1913. In this view we are fortified by the decision in the case of *Golam Gaffar Mondal* v. *Goljan Bibi* (1). The facts of the case before us are indistinguishable from the facts of that case. The appeal must therefore be decreed with costs, hearing fee 1 gold mohur.

A. K. R. *Appeal allowed.*

(1) I. L. R. 25 Cal. 10) (1897).

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER No. 71 OF 1914.

CHAMIER, C. J.
JWALA PRASAD, J.
1916,
27, April.

MAHANTH KRISHNA DAYAL GIR, Appellant,
v.
MUSST. SAKINA BIBI and others, Respondents.

Limitation—Sec. 48 of the Code of Civil Procedure (Act V of 1908), if would govern applications for execution of mortgage-decrees passed when the previous Code (Act XIV of 1882) was in force—Sec 6, General Clauses Act (X of 1897)—Rights and remedies under a repealed Act—Acknowledgment—Sec. 19 of the Limitation Act (IX of 1908)

In support of an application for execution made in 1913 for realisation of the balance of the decretal amount due on a mortgage-decree made absolute in 1898, sec. 6 of the General Clauses Act, 1897, which provides that the repeal of an enactment shall not affect any right acquired under the enactment repealed or affect any legal proceeding or remedy in respect of any such right was relied on and it was contended that sec. 48 of the Code of Civil Procedure (Act V of 1908) did not apply as the decree was passed when the previous Code (Act XIV of 1882) was in force, and inasmuch as sec. 230 thereof did not apply to mortgage decrees, the application was not time-barred.

Held—*That the application was governed by sec. 48 of the present Code (Act V of 1908) and was time-barred as it could not be said that the decree-holder acquired any right under the Code of Civil Procedure of 1882 within the meaning of sec. 6 of the General Clauses Act, 1897.*

MAHANTH KRISHNA DAYAL GIR *v.* MUSST. SAKINA BIBI.

BISSESWAR SONAMUT *v.* JASODA LAL (1) and MANJHOORI BIBI *v.* AKHEL MAHMUD (3) *followed.*

KAUNSILLA *v.* ISHRI SINGH (4) *dissented from.*

Held *further, that assuming that there was an acknowledgment of liability within the meaning of sec. 19 of the Limitation Act by the judgment-debtor in March 1902, it would give the decree-holder only three years from the time of such acknowledgment within which the decree-holder would be entitled to apply for further execution of the decree.*

That the passing of the Code of 1908 could not be held to give retrospective operation to the acknowledgment of 1902 in such a way as to give the decree-holder a fresh period of 12 years within which to apply for further execution.

The words "a fresh period of limitation" in sec. 19 of the Limitation Act do not refer to the term of 12 years prescribed by sec. 48 of the Code of Civil Procedure.

This was an appeal from an original order passed by Rai Rakhal Ch. Basu Bahadur, Subordinate Judge, First Court of Gaya, on the 14th January 1914.

The facts of the case are briefly as follows :—

Rai Baijnath Singh and others obtained a mortgage-decree for Rs. 8,200 against Muhammad Bukhsh Khan on the 11th August 1896. The decree was made absolute on the 6th February 1898. The mortgaged properties were the shares of the judgment-debtor in all the mouzas appertaining to Taluks Azamgarh and Khaira in the District of Gaya. The decree-holders after executing the decree several times and after realising Rs. 45,000 sold the decree to Mohunt Krishna Dyal Gir of Budh Gaya. He also executed the decree in several execution cases and realised Rs. 67,000. This appeal arose out of his petition for execution made on the 18th July 1913 for realisation of the balance of the decretal sum amounting to about Rs. 32,000.

Messrs. Hasan Imam, S. Sinha and *Sailendra Nath Palit* for the Appellant.

Mr. M. Mustafa Khan for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHAMIER, C. J.—This is an appeal against an order of the Subordinate Judge of Gaya dismissing an application made by the Appellant for execution of a decree. The facts are as follows :—

A decree *nisi* was passed for the sale of mortgaged property on August 11th, 1896, and was made absolute on February 6th, 1898. Various applications were made for execution of the decree with which we are not now concerned. The first application which it is necessary to notice was made on February 16th, 1904. It was dismissed by the Subordinate Judge on January 23rd, 1905, but was allowed by the High Court on appeal on June 28th, 1906. The next application was made on September 4th, 1907, and was also disallowed by the Subordinate Judge, but was allowed by the High Court on appeal on June 29th, 1910. The next application was made on July 28th, 1911, and was struck off on June 29th, 1912, after the decree-holder had recovered a sum of about Rs. 67,000. The next application for execution was made on September 6th, 1912, and was dismissed for want of prosecution on December 5th, 1912. Finally the present

(1) I. L. R. 40 Cal. 704 : s c. 17 C. W. N. 622 (1913).
(3) 17 C. W. N. 389 (1913)
(4) I. L. R. 32 All. 499 (1910).

application for execution was made on July 18th, 1913. The Subordinate Judge held that it must be dismissed under sec. 48 of the Code of Civil Procedure as it was made more than 12 years from the date of the decree sought to be executed.

The first question for decision in this appeal is whether sec. 48 of the Code of Civil Procedure applies to the application for execution. The Appellant relies upon sec. 6 of the General Clauses Act, 1897, which provides that the repeal of an enactment shall not affect any right acquired under the enactment repealed, or affect any legal proceeding or remedy in respect of any such right. He contends that if sec. 48 of the present Code of Civil Procedure is held to apply to the application for execution now in question, the result will be that the right which he had acquired under the Code of 1882 to execute his decree will be taken away. The point was considered in two cases by the Calcutta High Court and in one case by the Allahabad High Court. In both the Calcutta cases it was held that sec. 48 governed an application made after the passing of the Code of Civil Procedure, 1908, for execution of a decree for sale passed at a time when the Code of Civil Procedure, 1882, was in force. See *Bisseswar Sonamut* v. *Jasoda Lal* (1), and *Jai Mangalbati Misrain* v. *Badan Chand Das* (2). The view taken in these two cases is strongly supported by the judgments of Mookerjee, Carnduff and N. R. Chatterjea, JJ., in the case of *Manjhoori Bibi* v. *Akhel Mahmud* (3). A contrary view was taken by Knox and Karamat Hussain, JJ., in *Kaunsilla* v. *Ishri Singh* (4). Those learned Judges were of opinion that a right to enforce execution of such a decree was a substantive right acquired under the Code of 1882 and was not affected by the passing of the Code of 1908. The Calcutta High Court on the other hand held that in such a case it could not be said that the decree-holder had acquired a right under the Code of Civil Procedure, 1882, within the meaning of sec. 6 of the General Clauses Act, 1897. They held that the decree-holder was entitled to execute the decree in accordance with the provisions of the Code of 1882 as long as it was in force, but had no vested right in the procedure prescribed by that Code, that the right enjoyed by the decree-holder had been created by the mortgage-debt and had merged in the decree passed in the suit, and therefore could not be said to have been acquired under the Civil Procedure Code of 1882. The view taken by the Calcutta High Court is supported by a long string of English decisions, some of which are referred to by Carnduff, J., in one of the cases cited above. In my opinion the application for execution now in question should *primâ facie* be dismissed with reference to sec. 48 of the present Code of Civil Procedure. It is argued, however, that the decree-holder was, within the meaning of sub-sec. 2 of that section, prevented by fraud or force on the part of the judgment-debtor from executing the decree. There appears to be no force whatever in this contention. The objections put forward against the applications for execution presented on February 16th, 1904, and September 5th, 1907, were allowed in the first instance by the Subordinate Judge and were disallowed by the High Court on appeal. But it is impossible to hold that the objections put forward on those occasions were fraudulent. They were, as already stated, accepted by

(1) I. L. R. 40 Cal. 704 : s. c. 17 C. W. N. 622 (1913).
(2) 19 I. C. 899 (1913).
(3) 17 C. W. N 889 : s. c. 19 I. C. 798 (1913).
(4) I. L. R. 32 All. 499 (1910).

the Subordinate Judge and they raised fair questions for decision. Next it is contended that there was in March 1902 an acknowledgment of liability within the meaning of sec. 19 of the Limitation Act. I will assume, though it is by no means clear, that the petition relied upon did amount to an acknowledgment within the meaning of the Limitation Act. An acknowledgment made in March 1902 gave the decree-holder a fresh period of three years within which to apply for further execution of the decree. The contention advanced before us was that the acknowledgment gave the decree-holder a fresh period of 12 years, but this contention overlooks the fact that at the time when the so-called acknowledgment was made the Code of Civil Procedure of 1908 had not been passed and sec. 230 of the Code of 1882 did not, according to the decisions of the Calcutta High Court, apply at all to decrees for the sale of mortgaged property. There seems to be no ground whatever for the contention that the acknowledgment gave the decree-holder a further period of 12 years within which to apply for execution of his decree. Sec. 48 of the Code of Civil Procedure, 1908, applies to decrees for sale, but the passing of that Code cannot be held to give retrospective operation to the so-called acknowledgment of March 1902 in such a way as to give the decree-holder a fresh period of 12 years within which to apply for further execution. Nor in my opinion would any such acknowledgment even if made after the passing of the Code of 1908, give a decree-holder a fresh period of 12 years. To construe sec. 19 in the way suggested by the learned Counsel for the decree-holder Appellant, would render many of the provisions in the 3rd column of Art. 182 of the first schedule to the Limitation Act useless in any case in which an acknowledgment of liability had been given. There can, I think, be no doubt that the words "a fresh period of limitation" in sec. 19 of the Limitation Act, do not refer to the term of 12 years prescribed by sec. 48 of the Code of Civil Procedure. Lastly it was contended that the present application for execution was one made in continuation of the application presented on July 28th, 1911. This contention also must be rejected. Upon the application of July 28th, 1911, a large amount of property was put up for sale. The present application for execution contains a prayer that it may be treated as being in continuation of the application of 1911, but it asks for relief altogether different from the relief claimed in 1911 and is directed against property which is not touched by the application of 1911. In my opinion the present application is not one in continuation of the application of 1911. The result is that in my opinion the Court below was right in holding that the present application for execution is barred by sec. 48 of the Code of Civil Procedure. I would dismiss this appeal with costs and would assess the hearing fee at three gold mohurs.

JWALA PRASAD, J.—This is an appeal in a proceeding for the execution of a decree. The question is whether the execution of a decree is barred by limitation. The decree for the sale of the mortgaged property was passed on August 11th, 1896, and was made absolute on February 6th, 1898. The present application for execution was made on July 18th, 1913. The Subordinate Judge dismissed the application holding that it was barred under sec. 48 of the Civil Procedure Code, Act V of 1908, inasmuch as it was made more than 12 years from the date of the decree sought to be executed.

The contention on behalf of the Appel-

lant is that sec. 48 of the present Code does not apply to the application for execution as the decree in question was passed when the old Act of 1882 was in force, sec. 230 of which did not apply to mortgage decrees and hence there was no limit of time for the execution of the decree. The contention is based on sec. 6 of the General Clauses Act, 1897, which provides that the repeal of an enactment shall not affect any right acquired under the enactment repealed.

The contention does not appear to be sound. The decree-holder acquired a right to sell the mortgaged property under the Transfer of Property Act and not under the Code of Civil Procedure, which prescribes rules of procedure for the enforcement of the decree through the aid of the Court. The rule that no order for the execution of a decree shall be made after 12 years from the date of the decree, is a rule of procedure and is a part of the Civil Procedure Code. The decree-holder did not acquire any right under sec. 230 of Act 1882, and hence its repeal by the present Code did not destroy any vested right in him.

The application for execution will therefore be governed by sec. 48 of the Code of 1908 that was in force at the time when the application for the execution was made. This view is supported by a series of decisions of the Calcutta High Court and is based upon the principle that the law of limitation is a branch of the adjective law and governs all proceedings to which it is applicable, from the date of its enactment.

It is further contended that the period occupied in the litigation on account of the objections put forward by the judgment-debtors against the applications for execution presented on 16th February 1904 and 4th September 1907 should be excluded. The objections were partly allowed by the 1st Court, but were disallowed by the High Court on appeal. These objections certainly could not be said to be fraudulent within the meaning of sec. 48, C. P. C.

The 3rd contention of the decree-holder is that the judgment-debtors acknowledged their liability in a petition dated 17th March 1902 presented in Court in Execution Case No. 54 of 1901, and hence the decree-holder is entitled to a fresh period of 12 years from the date of the said acknowledgment.

For the reasons given by the learned Chief Justice in his judgment I agree that the contention should be rejected.

The last contention of the decree-holder is that the present application is in continuation of the application made in 1901. It appears from the order dated 29th June 1912, that the execution case was dismissed on part satisfaction on the prayer of the decree-holder. It is impossible to treat the present application as a continuation of that dismissed application.

The result is that I agree with the learned Chief Justice in the order proposed by him and would dismiss the application with costs.

The order of the Court is that the appeal is dismissed. The hearing fee is assessed at 3 gold mohurs.

D. N. S. *Appeal dismissed.*

THE

Calcutta Weekly Notes.

Vol. XX.] MONDAY, JUNE 26, 1916. [No. 31.

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The third Calcutta Criminal Sessions commences its sitting from date, Mr. Justice Chaudhuri presiding. There are altogether nine cases including one remaining over from last Sessions.

High Court if can grant leave to appeal to Privy Council against orders passed in exercise of disciplinary jurisdiction.

Cl. 10 of the Letters Patent gives the High Court disciplinary jurisdiction over Advocates, Vakils and Attorneys practising in that Court. The question has arisen from time to time whether the High Court is competent to grant leave to appeal to His Majesty in Council against an order passed in the exercise of its disciplinary jurisdiction. The practice in the Allahabad High Court formerly seemed to be to grant leave to appeal in such cases (In the matter of *Parbati Charan Bannerji*, I. L. R. 17 All. 498, In the matter of *Rajendro Nath Mukherji*, I. L. R. 22 All. 49) but in the subsequent case of *S. B. Sarvadhicary* the Judges of the Allahabad High Court thought that no such leave was necessary but nevertheless in conformity with the previous practice they granted leave to appeal against their order suspending the legal practitioner in question for four years from practice as such. But it appears from the report of *Sarvadhicary's* case, L. R. 34 I. A. 41 that the appeal was by special leave and therefore the permission granted by the High Court did not obviate the necessity of the appellant applying for special leave.

In *G. S. D.* v. *The Government Pleader, High Court, Bombay*, I. L. R. 32 Bom. 106 the Bombay High Court held that no appeal lay by right of grant against an order of the High Court in its disciplinary jurisdiction as it was not in the nature of a final judgment, decree or order under cl. 39 of the Letters Patent. The same view was taken by the Calcutta High Court in *In re an Attorney*, I. L. R. 41 Cal. 734 : s. c. 19 C. W. N. 593. The Madras High Court in some instances granted leave to appeal to the Privy Council against such orders but the recent decision of a Full Bench of that Court in *K. R. Ramchandra Ayyar* v. *The President of the Vakils' Association*, I. L. R. 39 Mad. 128 accepts the view of the Calcutta and Bombay High Courts that disciplinary proceedings under cl. 10 of the Letters Patent are not appealable under cl. 39 and the High Court has no power to give leave to appeal to the Privy Council against an order passed in the exercise of such jurisdiction. The aggrieved party must proceed by petition to His Majesty the King for special leave to appeal.

PRIVY COUNCIL RULING IN JAMBU PRASAD *v.* AFTAB ALI KHAN (19 C. W. N. 282) AND NEED FOR LEGISLATION.

The judgment of the Privy Council in *Jambu Prasad* v. *Aftab Ali Khan* delivered by Sir John Edge (19 C. W. N. 282 ; I. L. R. 37 All. 49) has pushed the law with regard to the presentation of documents by the agents of executants or claimants for the purposes of registration to such an extreme that there are no two opinions amongst the members of the legal profession that it is a very fit case for the Indian Legislature to intervene and save various transactions of sale, mortgage, lease and the like from its disastrous consequences. In the case in question His Lordship relying chiefly on a decision of Stanley, C. J., and Knox, J., in the case of *Iswari Prosad* v. *Baijnath* (I. L. R. 28 All. 707) held that even if the executant of the document and the claimant appear before the Registrar and the executant admit execution and the passing of the consideration, the document

must be held invalid if it happened to be presented by an agent of the executant or the claimant and the power-of-attorney given to such agent did not conform strictly to the requirements of sec. 33 of the Registration Act.

The Courts in India were taking an equitable view of such cases and if it appeared to them that the presentation of any document before a Registrar was defective by reason of the authority of the agent being defective under sec. 33 of the Act, yet, if the executant had himself appeared before the Registrar and admitted the execution, they regarded this as a ratification of the presentation and they would not invalidate the document because its presentation by the agent was defective. In the Allahabad High Court in a number of cases since the decision of Stanley, C. J., and Knox, J., in I. L. R. 28 All. 707, conflicting views have been expressed but the general trend of decisions may be said to be in favour of the equitable view. In the Full Bench case *Khaleluddin Ahmed* v. *Banni Bibi* (I. L. R. 35 All. 34) a wife's deed was presented by the husband. The presentation was held to be invalid under secs. 32 and 33 of the Registration Act and it was held that the defect was not cured by admission of the execution by the executant before an officer who had no authority to accept the document but was deputed to examine the executant under sec. 38 of the Act. If the officer who was deputed to examine the executant had been an officer competent to receive the document the Full Bench might have come to the contrary conclusion. It followed, however, the Privy Council decision in I. L. R. 23 All. 233 hereafter discussed.

But in a number of other cases a more equitable view has been taken. For instance in *Karta Hossain* v. *Harnam Chand* which is a later case (I. L. R. 35 All. 72) where a mortgage deed was presented to the Registrar by a servant of the mortgagor who had no authority but the mortgagor was present and assented to the registration, the presentation was held good. The Privy Council case in I. L. R. 23 All. 233 was distinguished in this case. In *Walaiti Begum* v. *Fazul* (9 All. L. J. 148), a lady went in a *duli*, her father presented and she admitted execution and it was held that it was a valid presentation. In *Atma Ram* v. *Ugra Sen* (I. L. R. 35 All. 134) it was held that it is enough if a person competent to present is present at the registration.

But since the approval of the law as laid down by Stanley, C. J., and Knox, J., in I. L. R. 28 All. 707, by the Judicial Committee in *Jambu Prasad*, the contrary view taken in the Indian Courts must be considered superseded. The decision of Stanley, C. J., and Knox, J., of the Allahabad High Court (I. L. R. 28 All. 707) on which Sir John Edge chiefly relies in taking a highly technical view of sec. 33 of the Registraton Act, is based upon the decision of the Judicial Committee of the Privy Council in the case of *Majibunnisa* v. *Abda Rahim* (5 C. W. N. 177; I. L. R. 23 All. 233). In that case the deed was presented by an agent who had the necessary powers under sec. 33 of the Registration Act but the principal having died before the presentation, the power-of-attorney had become infructuous. The principal being dead no question of ratification by the principal or admission of execution at the time of registration could arise. Their Lordships in such circumstances decided that the registration which followed such presentation was invalid. Their Lordships there remarked that presentation by a duly constituted attorney as contemplated by sec. 33 was of the first importance, for some busy-body hearing of a document having been executed might present it for registration and cause serious prejudice to the executant or to claimants under it. The suggestion no doubt is that if the presentation is not an act of the executant or the claimant or their duly constituted agents, they might be put in embarrassing positions or might be the victims of fraud by such unauthorised presentation. Sir John Edge's recent decision in *Jambu Prasad* suggests the same thing but in common with Stanley, C. J., and Knox, J.'s decision in I. L. R. 28 All. 707 makes it into an inflexible rule without due regard to the facts of *Majibunnisa's* case (5 C. W. N. 177 : s. c. I. L. R. 23 All. 233).

In two earlier cases *Mohammed Ewaz* v. *Brij Lal* (4 I. A. 166 : s. c. I. L. R. 1 All. 465), *Sha Mukhun Lal Panday* v. *Sha Kundan Lal* [L. R. 2 I. A. 210 : s. c. 15 B. L. R. (P. C.) 235], their Lordships of the Judicial Committee had put a very liberal construction on sec. 35 of the Registration Act which relates to the duty of the Registrar or Sub-Registrar as regards the procedure for registration or otherwise on the admission or denial of execution by the executant or executants or their agents, representatives or assigns. In the former of these cases a deed purported to be executed by mother and two sons. The sons appeared before the Registering Officer and admitted that it had been executed by them but they denied

that it had been executed by the mother. The Registering Officer endorsed this on the deed but at the same time registered it. The provision of the Act then in force did not expressly contemplate such registration but the Privy Council taking an equitable view of the matter held that the error of the officer in not strictly conforming to the provision of sec. 35 was an error of procedue which was curable under sec. 88 (corresponding to present sec. 87) of the Act of 1871 and the deed was not invalid nor inadmissible in evidence against those who admitted its execution. The Legislature thereafter amended the law according to this section. The above decision was by Sir Barnes Peacock. The same learned Judge had taken a similar liberal view of secs. 34 and 35 of the Act of 1866 in *Sha Mukhun Lal* v. *Sha Kundan Lal* (L. R. 2 I. A. 210). There the Registering Officer on the non-appearance of the executant before him was satisfied on the evidence as to the execution, and registered the deed. Their Lordships regarded this as an error of procedure and would not invalidate the deed on that account. In both these cases their Lordships expressed an adverse opinion regarding the re-opening of registration proceedings many years after on the ground of the non-conformity of some registration procedure by the registering officer.

In the case of *Majibunnissa* (5 C. W. N. 177) their Lordships of the Privy Council distinguished the above cases on the ground that there was no question of presentation by unauthorised persons in either of them. In this case the executant was then dead and, we presume, it is on that account that their Lordships attached so much importance to the procedure contemplated in sec. 33. Their Lordships expressed an opinion that the section provided the starting point of the Registering Officer's jurisdiction and justly apprehended that in a case where the executant is dead, if the presentation was not by a duly authorised agent of his representative or the representative himself under sec. 33, the consequences of allowing volunteers or strangers to present deeds alleged to be executed by deceased persons might open the flood-gate to fraud. Their Lordships therefore laid particular emphasis on the terms of sec. 49 of the Act which says that no document required by sec. 17 to be registered will be received in evidence unless it has been registered "in accordance with the provisions of this Act," *i.e.*, Act III of 1877. Since presentation according to sec. 33 was one of the essentials and that had not been complied with in *Majibunnisa's* case, the document was not receivable in evidence.

Stanley, C. J., and Knox, J., of the Allahabad High Court paid more attention to this interpretation by the Privy Council of sec. 33 in the circumstances of the case, than to the circumstances themselves and Sir John Edge in his recent decision has only crystallised the technicality of that decision and has enjoined on the Law Courts in India to follow an inflexible rule with regard to presentation. With due deference to their Lordships who decided *Majibunnisa's* case, we might say that the general observations in the judgment regarding the scope of sec. 33, apart from the facts of the special case before their Lordships, may be regarded as *obiter*. We have the high authority of Lord Halsbury in *Quinn* v. *Letham* for saying so. If the rule is strictly applied, great hardship will result in many cases.

Take the case where a deed has been presented by an agent whose authority is defective under sec. 33 or has expired without his knowing it, and the executant is not dead but alive. On his coming to know of the defect in presentation and within time he appears before the Registering Officer and admits the execution. Would the fact that it was improperly presented invalidate the document? Even if the executant did not observe the formality of re-presentation but simply admitted the execution before the Registrar within the time limited for presentation, what harm can there be in regarding the admission as amounting to re-presentation of the deed by the executant or in regarding the legal effect of admission as curing the defect in presentation? Both Stanley, C. J., and Knox, J., in *Isri Prosad's* case (I. L. R. 25 All. 707) say that since presentation under sec. 33 is the starting point of the Registrar's jurisdiction any defect in it would invalidate all subsequent acts of the Registrar in connection with the deed. But what bar is there in law, reason or equity to the Registrar commencing exercise of his jurisdiction from the point of time when the executant appeared before him within the time limited by law for presentation and admitted the document and its execution.

What apprehension is there of any fraud being perpetrated in respect of the deed when the executant himself admits it? Sir John Edge in *Jambu Prosad's* case says that the word "shall" in sec. 33 makes proper presentation imperative and the Courts in India must throw out the deed if there has been any defect in its

presentation irrespective of any other consideration. Sir John Edge suggests that there might be fraud otherwise, but does not explain how. Stanley, C. J., Knox, J., and Sir John Edge seem to be agreed that the defect in presentation cannot be regarded as defect in procedure and cannot be cured by sec. 87 of the Act. In *Majibunissa's* case (1900) which is the basis of this strict interpretation of sec. 33 great emphasis is laid, as we have pointed out, on sec. 49 of the Act which at the date of that decision was the Act of 1877. When Stanley, C. J., and Knox, J., decided the case of *Isri Prosad* in 1906, the Act of 1877 was still in force. Sec. 49 in that Act provided that no document which is required by sec. 17 to be registered would be receivable in evidence unless it " shall have been registered in accordance with the provisions of the Act." It is chiefly because of this provision that their Lordships of the Privy Council interpreted sec. 33 of the Act strictly in the case of *Majibunnisa*. Stanley, C. J., and Knox, J., no doubt regarded the view taken by the Judicial Committee in that case as binding on them in 1906, although they might have, as the Calcutta High Court has done in later cases (see 7 C. W. N. 238 : s. c. I. L. R. 30 Cal. 265) distinguished that decision when the circumstances were different. The Allahabad High Court has also in later cases, already cited, done the same.

In the case of *Jambu Prosad* no argument was addressed to their Lordships of the Privy Council with regard to sec. 49 nor was it pointed out to them that sec. 49 had been materially amended by omitting the words quoted above from sec. 49 in the Registration Act of 1908, which is now in force. Sec. 49 now simply says that documents required by law to be registered shall not be received in evidence " unless it has been registered."

Sec. 60 of the Registration Act which relates to the certification of registration says that after such of the provisions of secs. 34, 35, 58 and 59 as apply to any document presented for registration have been complied with, the Registering Officer shall endorse thereon the certificate of registration and the document shall then be admissible as having been duly registered. It is to be noted that this section does not specifically mention sec. 33 which relates to due presentation. No doubt sec. 59 refers to endorsement under sec. 52 and this latter requires that the person presenting shall sign the document at the time of presentation and sec. 59 requires that the signature of presentation shall be endorsed by the Registering Officer. But sec. 60 does not require absolute compliance with the requirements of sec. 33 but only that under secs. 52 and 59 the particulars of the presentation must be endorsed by the Registering Officer. So if regard be had to the fact that the words " unless it shall have been registered under the provisions of the Act" have been replaced by " unless it has been registered " in sec. 49 of the Act of 1908 and that sec. 60 does not require an absolute compliance with sec. 33 but does so with secs. 34 and 35 which relate to admission of execution, etc., for the purpose of certification of registration, it is reasonable to infer that any irregularity with regard to presentation may, in a proper case, be considered cured by compliance with secs. 34 and 35. If the requirements of secs. 34 and 35 may be considered, as has been done by the Privy Council, as matters of procedure, we fail to see why presentation under sec. 33 may not be similarly regarded.

If sec. 87 has been held by the Judicial Committee to cure irregularities with regard to secs. 34 and 35, which are of more vital importance than sec. 33 as affecting the genuineness of a deed, why should it not be held to cure, in a suitable case, any irregularity in respect of the presentation of a deed which has been otherwise properly and regularly registered? Sec. 87 is applicable to registration under repealed Acts as well and its object surely is to prevent documents and transactions being invalidated by reason of some irregularity in registration. The law of Registration as a whole falls within the law of procedure and is no part of the substantive law and the distinction made by the Judicial Committee between sec. 33, and secs. 34 and 35 seems to us to be quite artificial.

It is, therefore, reasonable to maintain that the Courts in India should be left free to disregard the technicalities of procedure incidental to the registration of a document and to see whether it has in fact been properly registered.

As the case of *Jambu Prosad* now stands in the way of the Indian Law Courts taking such a view, it is very desirable that the Bill introduced by the Hon'ble Mr. Malavya in the Imperial Council should be passed into law as early as possible. (See 20 C. W. N. lxx).

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

VISCOUNT HALDANE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

1916,
Heard, 1, 2, 3 and 6, March.
Judgment, 28, March.

SRI KISHAN LAL, Appellant,
v.
MUSSAMAT KASHMIRO and others, Respondents.

Fiduciary relationship*—Purdanashin *woman*—*Person trusted by her as manager and managing her properties, but acting adversely to her interests, acts of, if bind her—Betrayal of trust—Fraud by fiduciary, when may be condoned—Nullity—Sham arbitration proceedings and award—Limitation, if applies to defence—Time for recovery to run from termination of relationship—Family arrangement, award if may be upheld as.

H, a Hindu, who had separated from his brothers, acquired considerable property by money-lending and died in 1892 leaving a widow K and several daughters and a daughter's son P by a predeceased wife. K, who was not a woman of business, came under the influence of F, a separated brother of H, and F managed her properties and K believed that he was acting as her manager until he died in 1905. Shortly after H's death, F in collusion with P got up a sham arbitration proceeding, which resulted in an award by which the properties left by H were divided up amongst the various members of the family, K receiving only a share. The true nature and effect of the proceedings were concealed from her and she was misled and betrayed by F and P, both of whom had interests adverse to her and were acting in their own interests. In a suit by another member of the family to enforce, in his right under the award, a mortgage effected by F from advances made out of properties left by H, K denied the Plaintiff's title altogether and claimed the entire mortgage money in her right as the widow of H. The High Court held that the arbitration was a sham, that it had not been shown that K had any independent advice or understood the effect of the so-called award on her interests and believing that she never knowingly consented to the division of her husband's estate dismissed the suit.

Held, *by the Judicial Committee (without dissenting from the conclusions of the High Court), that from the death of K's husband, F stood to her in a fiduciary relationship which continued till he died and she was entitled to receive from him a full disclosure of all the affairs which concerned her.*

That F having betrayed the confidence K reposed in him, the question in the case was not whether K knew what she was doing, had done or proposed to do, but how her intention to act was produced: whether all that care and providence was placed round her as against those who advised her, which from their situation and relation with respect to her, they were bound to exert on her behalf.

That fraud, such as there was in this case, could not be condoned unless there was full knowledge of the facts and of the rights arising out of those facts and the parties were at arm's length.

HUGUENIN *v.* BASELEY (1) *and* MOXON *v.* PAYNE (2) *referred to.*

That the Indian Limitation Act was no bar to her defence, and even if she were suing to recover property of which she was deprived by the award, time would not, under the circumstances of the case, begin to run against her until F died.

That the award regarded as an award, or as a document embodying a family arrangement was a nullity.

Appeal from a decree of the Allahabad High Court (Sir Henry Richards, C. J.

(1) 14 Ves. Jun. 273 (1807).
(2) 8 Ch. App. 355 (1873).

and Banerji, J.) dated the 13th December 1912 which reversed a decree of the Additional Judge of Meerut. The facts of the case are stated fully in their Lordships' judgment.

The main question on the appeal was whether an award was binding on the widow of Harnam Das named Mussamat Kashmiro.

The trial Judge found that the award was binding on her, but the High Court held the contrary. The learned Judges concluded as follows :—

"In our opinion it is absolutely clear that the arbitration as an arbitration was nothing short of a sham. The questions which are supposed to have arisen between the different members of the family were never in fact submitted to the arbitrators at all, nor did they decide them. It also appears from a number of documents which came into the hands of Piyare Lal, after the death of Faqir Chand, that long before the arbitrators had made their award, Sheo Charan had prepared a draft award according to his liking. This was even before the arbitrators were appointed. Faqir Chand prepared two draft awards according to his views. Fictitious evidence was prepared by Faqir Chand, purporting to be the evidence given by himself and Mussamat Kashmiro (see pages 60 and 61 of the appellant's book). It is so abundantly clear that there was in fact no real arbitration that we think it quite unnecessary to say anything more on this question. Whatever may be said in support of the contention that the so-called award represented a family settlement, it certainly cannot stand as the adjudication of the rights of the parties by duly constituted and independent arbitrators.

* * * * *

After a very careful consideration of the entire evidence and the judgment of the learned Additional Judge, we have come to the conclusion that there was never any honest dispute about Sheo Charan being the adopted son of Harnam Das, or of the family being separate, and that, on the contrary, every one knew well that the property was the separate property of Harnam Das to which his widow became entitled on his death. We have already given our opinion that no disputes were ever referred to arbitration or decided by arbitrators. In our opinion there was no fair family arrangement arrived at after mutual concessions and compromise. It has not been shown that Mussamat Kashmiro had any independent advice, or that she understood the effect of the so-called award or her interests, and we do not believe that she ever knowingly consented to the division of her husband's estate. We think that the circumstances are not such as would justify us in holding her bound by the award either as an award properly so-called or as a family arrangement."

Hence this appeal.

Sir William Garth for the Appellant submitted that the finding of the trial Judge who had seen the witnesses was supported by the weight of evidence. There was a *bonâ fide* dispute among the parties, and the award was properly made in 1893 to the knowledge of Mussamat Kashmiro, who thereafter acted upon it and expressly admitted and accepted it in her statement on oath in 1895. It was not challenged until 1909. If Kashmiro had brought a suit to set aside the award it would have been barred by limitation. The present defence was in the nature of a cross-suit, and ought to be held time-barred. The agreement to refer the dispute to arbitration was registered, and it ought to be presumed that

the Registrar had explained it to her. *Gangamoyi Debi* v. *Troylukhya Nath Chowdhry* (3).

Mr. L. DeGruyther, K.C., and *Mr. Bhugwandin Dubé* for Mussamat Kashmiro submitted that the decision of the High Court was right. Kashmiro was a young and illiterate *purdanashin* woman and was under the influence of her husband's brother Faqir Chand. She did not sign the agreement of reference, but the same was signed for her by her daughter's son, Piyare Lal, who was acting in collusion wth Faqir Chand.

Faqir Chand's influence continued till his death in 1905, and she afterwards repudiated the award. There was no evidence that she understood the terms and effect of the agreement of reference, nor did she ever have independent legal advice. By the agreement of reference she absolutely abandoned all claim to her husband's estate, and undertook to take whatever the arbitrators should think fit to give her. Such an agreement was bad and could not stand. *Moxon* v. *Payne* (2), *Savery* v. *King* (4) and *Mirza Sajjad Husain* v. *Nawab Wazir Ali Khan* (5).

There was no ratification by Kashmiro, and even with regard to ratification it must be shewn that she was fully aware of what she was doing. The onus was heavy upon the Appellant to satisfy the Court that the award brought about by Faqir Chand was such that a Court of Equity would enforce against a *purdanashin* woman under the circumstances of the case.

(2) 8 Ch App 881 (1873).
(3) L. R. 33 I. A. 60 : s. c 10 C. W. N. 522 (1906).
(4) 5 Clarke's H. of L. pp. 627, 655 (1855).
(5) L. R. 39 I. A. 156 : s. c. 16 C. W. N. 889 (1912).

[Lord Haldane referred to *Burdick* v. *Garrick* (6) and *Oldham* v. *Stringer* (7)].

Sir William Garth replied.

Their LORDSHIPS' JUDGMENT was delivered by

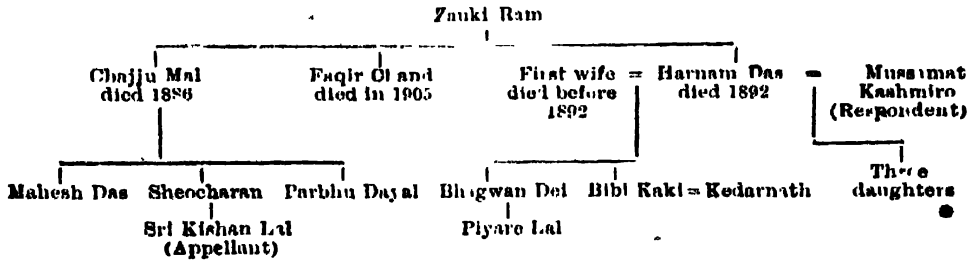
SIR JOHN EDGE.—This is an appeal from a decree, dated the 13th December 1912, of the High Court at Allahabad, which reversed the decree, dated the 11th November 1910, of the Additional Judge of Meerut. The Appellant, Sri Kishan Lal, is the Plaintiff in the suit in which this appeal has arisen.

The suit was brought on the 8th September 1909, by Sri Kishan Lal, a minor, through his certificated guardian, on a mortgage of immoveable property, dated the 6th September 1897, to recover one-fourth of the mortgage money alleged to be then due, together with interest and costs, by sale of the mortgaged property. The mortgage in question had been made by one Haji Muhammad Yahya Khan, in favour of one Faqir Chand, as the manager of Lala Harnam Das's estate. Haji Muhammad Yahya Khan died before this suit was instituted. His descendants and personal representatives are some of the Defendants to the suit; they deny the Plaintiff's title, and allege that the mortgage of 1897 was satisfied as to part of mortgage money by payment to Mussamat Kashmiro, and as to the balance by the grant of another and subsequent mortgage in favour of Mussamat Kashmiro. Others of the Defendants are persons who allege that they purchased in 1903 portions of the mortgaged property from Haji Muhammad Yahya Khan, and paid the consideration money to Faqir Chand. The remaining Defendant is Mussamat

(6) 5 Ch. App. 223 and 453 (1870).
(7) 33 W. R. 251 (1885).

Kashmiro, who denies the Plaintiff's title, and alleges that the money which was advanced in 1897 as the consideration for the mortgage was money which belonged to her for a Hindu widow's estate, and was advanced by Faqir Chand as and being the manager of her estate. On the other hand, the Plaintiff's case is that the estate which was managed by Faqir Chand, and of which the mortgage money formed part, was the ancestral property of a joint Hindu family, and that one-fourth share of the family property has devolved upon him. Hence he claims in this suit to recover one-fourth of the money which he alleges is due.

The following genealogical table will show how the Plaintiff was related to Lala Harnam Das, who was the husband of Mussamat Kashmiro, and the relationship which existed between Faqir Chand, Lala Harnam Das, Piyare Lal, and other persons, to whom it will be necessary to refer. The common ancestor was Lala Zauki Ram.



Having regard to the facts of this case, it is peculiarly necessary to see how the Plaintiff alleges title in himself to sue upon the mortgage of 1897. In his plaint, which was filed on the 8th September 1909, the Plaintiff alleges, so far as is material, as follows :—

"1. The Plaintiff is the mortgagee of the lands owned by the Defendants.

"2. The particulars of the mortgage are as follows:—

"(*a*) Date of mortgage.—Dated and registered on the 6th September 1897.

"(*b*) Names of the mortgagor and the mortgagee.—Haji Muhammad Yahya Khan, mortgagor, and Munshi Faqir Chand, mortgagee.

"(*c*) Amount of mortgage money—Rs. 15,000.

"(*d*) Rate of interest.—Interest at the rate of 12 annas per cent. per mensem and compound interest to be charged annually.

"(*e*) Property mortgaged.—Zamindari in the villages of Dhautala and Uldhan, a detail of which is given in the reliefs.

"(*f*) The amount claimed.—Rs. 10,500.

"3. After the death of Lala Harnam Das a dispute took place among his survivors, in which Babu Sheocharan Lal, deceased, father of the Plaintiff, alleged himself to be the owner of the whole on the ground of adoption. Under the agreement, dated the 28th November 1892, the said dispute was referred to Lala Sri Ram and Mohan Lal, arbitrators, and Lala Daya Ram, umpire for arbitration.

"4. Under the arbitration award, dated the 10th and registered on the 17th January 1893, it was declared that Defendant No. 9 (Mussamat Kashmiro) would remain the owner of an eight-anna share of the property by virtue of life interest; that Munshi Faqir Chand would remain the owner of a four-anna share, and that Parbhu Dayal, Mahesh Das, and Sheocharan Lal would remain the owners of the (remaining) four-anna share. But under the said award the property and the business of all the aforesaid shareholders were allowed to remain joint during the lifetime of Munshi Faqir Chand, and for the management of the whole of the property and the business Munshi Faqir was appointed manager, and his name was recorded in the revenue papers in respect of all the property, and the whole of the business was carried on in his name.

SRI KISHAN LAL *v.* MUSSAMAT KASHMIRO.

"5. The share of Lala Mahesh Das and Parbhu Dayal was received by Lala Sheocharan Lal, father of the Plaintiff.

"6. Munshi Faqir Chand, as manager of the aforesaid property, has advanced the aforesaid loan to the aforesaid mortgagor out of the estate under the aforesaid bond."

* * * * * *

"16. The Plaintiff was a member of the joint family with his father, Sheocharan Lal; he is the owner of the whole of the property and the capital by right of survivorship."

Mussamat Kashmiro, in her written statement, amongst other things, alleged that, after the death of Zauki Ram, the ancestral property left by him was partitioned in or about 1863 amongst his three sons, Lala Harnam Das, Chajju Mal, and Faqir Chand, and thereafter the three brothers lived separate, and were separate in food and in business; and that her husband, Lala Harnam Das, through his ability and business made great additions to his share of the partitioned property, and with the profits of money dealings acquired a great deal of property. She also alleged that Faqir Chand, as her manager and agent, advanced the mortgage money of 1897 out of the property which had come to her as the widow of Lala Harnam Das.

In her written statement Mussamat Kashmiro denied all knowledge of any mutual dispute. She stated that the arbitration proceeding was not taken in good faith, but was taken to defeat the rights of the real heirs of Harnam Das; that the agreement of reference was signed without her authority by Piyare Lal; that she was under the influence of her brother-in-law, Faqir Chand, who deceived her, misrepresented to her the nature and the effect of the agreement of reference, and induced her by his misrepresentations and threats to acknowledge the agreement of reference before the Sub-Registrar, and that she had no legal adviser. According to her, the written contents of the award were never read out to her, and Faqir Chand during his lifetime had made her believe that she was the sole proprietor of the property which had been left by her husband. She alleged that since her husband's death, on the 15th October 1892, she had been in proprietory possession of the money-lending business without the participation of anyone else, and that she had appointed Faqir Chand as the manager of her business.

In order rightly to understand some of the points which arose in this case, it is necessary that the following considerations should be borne in mind. At the time, 1863, when it is alleged that the three sons of Zauki Ram separated, the joint family property was, so far as appears, of the value of about Rs. 9,000. From 1863 until he died in 1892, Lala Harnam Das carried on in his own name a money-lending business, in which he accumulated property of the value of about Rs. 300,000. When Lala Harnam Das died he left surviving him his second wife, Mussamat Kashmiro, three daughters whom he had by her, and two daughters by his first wife, one of whom, Mussamat Kaki, was childless, and the other of whom, Mussamat Bhagwan Dei had a son, Piyare Lal, who has been a prominent witness in this suit. Lala Harnam Das left sirviving him his brother Faqir Chand, who was a Tahsildar, and the eldest male relation of Lala Harnam Das when he died. Chajju Mal, another brother of Lala Harnam Das, had died in 1886, but he had left surviving him three sons, Mahesh Chand, Parbhu Dayal, and Sheocharan Lal, a Munsif, who were living when Lala Harnam Das died. Mussamat Kashmiro was a *purdanashin* lady, she was illiterate, and it has

not been shown that she was a woman of any business capacity. She was a woman who in matters of business, would have to rely for advice and guidance upon others. If on the death of Lala Zauki Ram the three brothers did not separate, but continued to live as a joint Hindu family, it may be assumed that the property which Lala Harnam Das had accumulated was, when he died, joint property. If, on the other hand, the three brothers separated in 1863, it is to be assumed on the evidence that the property which Lala Harnam Das accumulated was his separate property. If there was no separation, the members of the joint family who on the death of Lala Harnam Das were entitled to the property which had been accumulated by Lala Harnam Das, were Faqir Chand, whose interest represented one-half, roughly speaking Rs. 150,000 on a partition, and Mahesh Das, Parbhu Dayal, and Sheocharan, whose interest between them represented the other moiety, or, roughly speaking Rs. 50,000 each on a partition. Mussamat Kashmiro would in that event have been entitled to nothing except maintenance. If the three brothers had separated and Lala Harnam Das had adopted his nephew Sheocharan as his son, Sheocharan would, on the death of Lala Harnam Das, have been entitled to the whole of the property, worth about Rs. 300,000, which Lala Harnam Das had accumulated, and Mussamat Kashmiro would have been entitled to maintenance only. If the three brothers had separated, and Lala Harnam Das had not adopted Sheocharan as his son, Mussamat Kashmiro would have been entitled for a Hindu widow's estate to the whole of the property which Lala Harnam died possessed of, and that property would, on her death, go to Lala Harnam Das's daughters.

Lala Harnam Das died on the 15th October 1892, and thereupon it was arranged between Faqir Chand and his nephew Sheocharan, that Sheocharan should be put forward as the adopted son of Lala Harnam Das, Faqir Chand, however, insisting that he should be appointed manager of the estate. On the 20th October 1892, Faqir Chand, having had prepared an application to the Revenue Court for mutation of names in favour of Sheocharan as the adopted son of Lala Harnam Das, presented it to the Revenue Court. There can be no doubt that at that time it was intended by Faqir Chand and Sheocharan that the whole of the property which was left by Lala Harnam Das should be claimed by Sheocharan as his adopted son. Subsequently on the 25th May 1905, Sheocharan alleged that he "was the heir to, and the owner of, the estate of Lala Harnam Das, deceased, on account of his being an adopted son." Faqir Chand had also had prepared a power of attorney, dated the 20th October 1892, according to which Sheocharan Lal, "adopted son" of Lala Harnam Das and Mussamat Kashmiro, widow, appointed Faqir Chand and Mahesh Das their general attorneys for, amongst other purposes, an application to the Revenue Court for mutation of names. That power of attorney was signed by Sheocharan, and the mark of Mussamat Kashmiro was put to it by Piyare Lal. The reference in that power of attorney to Sheocharan as the adopted son of Lala Harnam Das is the only piece of evidence to which their Lordships' attention has been called as suggesting that Mussamat Kashmiro had on any occasion recognised Sheocharan as the adopted son of her late husband. It is exceedingly improbable that she knew how Sheocharan was described in the power of attorney or

the purposes for which that power of attorney might be used. She was then acting under the guidance and on the advice of her brother-in-law Faqir Chand. Although the design of making it appear that Sheocharan was the adopted son of Lala Harnam Das, and of having his name entered in the registers as the owner of the Zemindari property, which Lala Harnam Das had acquired, was soon abandoned, the application to have his name entered in the registers as the owner is of importance, as it shows that at that time Faqir Chand and Sheocharan were treating the property which Lala Harnam Das had acquired as being the self-acquired property of Lala Harnam Das, and not as property which he had acquired as a member of a joint Hindu family.

Shortly after the 20th October 1892, Faqir Chand came to the conclusion that it would be more to his interests that his name, and not that of Sheocharan, should be entered in the Revenue Registers as the owner, and on the 2nd November he sent to Sheocharan drafts of applications for mutation of names in his, Faqir Chand's, favour, and of an agreement giving him authority to act as manager. Sheocharan sent a vague and evasive reply, and finally on the 19th November 1892, Faqir Chand filed applications in the Revenue Court for a stay of the mutation proceedings. On the 20th November 1892, Faqir Chand, Mahesh Das, and Piyare Lal went to Mussamat Kashmiro at Meerut. The following entry of the 20th November 1892 in the diary of Faqir Chand is instructive as showing the influence which was brought to bear upon this illiterate *purdanashin* lady :—

"Sunday, the 20th.—I went to 'Bhabhi Saheba' at Meerut along with Mahesh Das and Piyare Lal. 'Bhabhi Saheba' said that she wanted to have mutation of names in respect of the property effected in her favour alone, that she did not want to have it effected in favour of anyone else, and that she had no confidence in anyone. After a long conversation, entreaties, and hesitation, she consented to mutation of names being effected in my favour; and a telegram asking Sheocharan Lal to come, was sent. Drafts of the applications were caused to be prepared by Shaikh Ghulam Rasul."

Owing to some objections on the part of Sheocharan, the arrangements proposed by Faqir Chand fell through, and it appears from the following entry of the 26th November 1892, in the diary of Faqir Chand, that a new arrangement was agreed to between Faqir Chand, Mahesh Das, Sheocharan, and Piyare Lal :—

"Saturday, 26th (Meerut).—A conversation took place after 12 o'clock in the presence of Faqir Chand, Mahesh Das, Sheocharan Lal, and Piyare Lal, . . . the funds were agreed to be joint; it was further agreed that the Mussamat (as one party), Faqir Chand (as second party), and Mahesh Das, Parbhu Lal, and Sheocharan Lal (as third party) were entitled to one-third share each. The property in respect of which Sheocharan Lal's name was entered in the lifetime of the brother, and the funds belonging to Faqir Chand, which were separate from the joint funds, were kept separate."

It will be observed that on the 26th November 1892, Sheocharan abandoned the position which he had taken up as an adopted son of Lala Harnam Das and abondoned the claim that the property which Lala Harnam Das had acquired was the self-acquired and separate property of Lala Harnam Das, and claimed a share through his natural father, Chajju Mal. It will also be observed that it was at that meeting agreed that Mussamat Kashmiro, who, if the property was joint family property, was not entitled to any share, was to have a one-third share in it. The

agreement that she should have a one-third share is explained by the fact that Piyare Lal was present and assenting and by the fact that he had been promised by Faqir Chand 10,000 rupees if he would consent. Piyare Lal had no interest in the property if it was in fact joint property; he had, however, a mere contingent reversionary interest of a then unascertainable value in the property if it had been separately acquired property of Lala Harnam Das.

On the 27th November 1892, Sheocharan and his brother Mahesh Das, expressed their dissent from the arrangement to which they had agreed on the 26th. However, on the 28th November 1892, an agreement of reference to arbitration was drawn up and was executed by Faqir Chand, Mahesh Das, Sheocharan, "Mussamat Kashmiro, by the pen of Piyare Lal," Parbhu Dayal, Piyare Lal, and Kedar Nath, who was the husband of Mussamat Kaki. By that agreement the arbitrators were not bound to allot to Mussamat Kashmiro a one-third share; they might if they so chose allot to her an infinitesimal share; but out of the share which they might allot to her they were bound to allot a share, to be enjoyed at once, to Mussamat Bhagwan Dei, and a similar share to Mussamat Kaki, neither of whom could in any view of the law have been entitled to a share to be enjoyed during the lifetime of Mussamat Kashmiro. Execution of that agreement was admitted by Mussamat Kashmiro to the District Sub-Registrar, but it is impossible to believe that she understood the nature and effect of the agreement, and equally impossible to believe that anyone who had any regard to her interests could have advised her to be a party to it.

The arbitrators called for statements from the parties, but do not appear to have examined any witnesses, and on the 10th January 1893, they made their award, and allotted to Faqir Chand a 4-anna share, to Parbhu Dayal, Mahesh Das, and Sheocharan, a joint 4-anna share, to Mussamat Bhagwan Dei a 2-anna share, Mussamat Kashmiro (to include the share of her three daughters) a 4½-anna share, and awarded that after the death of Mussamat Bhagwan Dei, her male issue should get her share and the profits accruing therefrom. It appears from the award that Mussamat Kashmiro had given to the arbitrators a written statement signed by the pen of Piyare Lal, in which she alleged herself to be the sole heir and entitled to the estate of Lala Harnam Das, and prayed that she should get the whole estate. The arbitrators had under the agreement of reference power to appoint a manager of the estate, and Faqir Chand was appointed the manager.

It has been contended on behalf of the Plaintiff that some answers which were given by Mussamat Kashmiro to interrogatories on a commission in a suit in 1895 show that Mussamat Kashmiro had fully understood the nature and effect of the agreement of reference of the 28th November 1882, and that the award had been read over to her, and that she had acquiesced in it. It appears to their Lordships that the answers to these interrogatories had been dictated to her by Faqir Chand, and were not such answers as might have been expected from an illiterate *purdanashin* lady like Mussamat Kashmiro, and their Lordships attach no importance to them.

The learned Additional Judge of Meerut who tried this suit found that the award was made with the knowledge of Mussamat Kashmiro, and was explained to and understood by her, and she accepted it.

The Additional Judge came to no precise finding on the question as to whether Lala Harnam Das, Faqir Chand, and Chajju Mal had separated, but he appears to have considered that there may have been some partial separation, and that the brothers, or at least Lala Harnam Das and Chajju Mal, subsequently reunited. Assuming that there was a separation, their Lordships consider that there is no conclusive evidence that the brothers, or any two of them, reunited. The view of the situation of the Additional Judge, apparently, was that Faqir Chand and Mussamat Kashmiro had conjointly defrauded Sheocharan, and had, by guile and trick of the award, got three-fourths of the property out of his hands. This view, it may be observed, involved the assumption that the three brothers, Lala Harnam Das, Faqir Chand, and Chajju Mal, had separated, and that none of them had afterwards reunited, and that the property left by Lala Harnam Das was his property, self-acquired after the separation; and the further assumption that Lala Harnam Das had adopted Sheocharan. The Additional Judge gave the Plaintiff a decree. From that decree the Defendants appealed to the High Court.

On the appeal the High Court considered that two main questions arose :—

"1. Were the arbitration proceedings and the award valid and binding? and

"2. Ought these proceedings to be regarded as a fair family settlement even if the Court considers that there was no real arbitration in the strict sense?"

The learned Judges considered that the second question arose because, as they said, it often happens that the machinery of a pretended arbitration is had recourse to in order to carry out what is in reality a family compromise or arrangement. They found, and their Lordships agree with them, that there was in fact no real arbitration and that the so-called "arbitration was nothing short of a sham."

In arriving at a conclusion as to whether the award could be regarded as embodying an agreement as to a fair family settlement, the learned Judges in the appeal considered (1) How far the claim of Sheocharan to be the adopted son of Lala Harnam Das was honest? (2) How far the claim of Faqir Chand that the family was joint was honest? and (3) How far the interests of Mussamat Kashmiro were protected, and what knowledge she had of the proceedings? They considered, and their Lordships agree with them, that if Sheocharan was really the adopted son of Lala Harnam Das he would never have given up his position as an adopted son. Sheocharan was a Munsif and must have known what his rights were if he was in fact an adopted son. It could not have been difficult for him to prove in 1892, if it was the fact, that he had been adopted by Lala Harnam Das. If he had been the adopted son of Lala Harnam Das and the family was joint, his share in the property which Harnam Das had accumulated would have been of the value of nearly 100,000 rupees; if, on the other hand, that property was self-acquired by Lala Harnam Das, Sheocharan would have taken the whole of it, which was of the value of nearly 300,000 rupees. By abandoning the position of an adopted son, which he had at first on the death of Lala Harnam Das taken up, he reduced his interest in the property, if joint, to a share of about the value of Rs. 50,000. If the award embodies a family agreement, Sheocharan's claim to share in the property was through his father Chajju Mal and not as the adopted son of Lala Harnam Das, and Sheocharan must have known as a Hindu and as a lawyer that if he had been

adopted by Lala Harnam Das he could not claim a share through his natural father.

The learned Judges on the appeal found, and their Lordships agree with them, that the three brothers had separated, that there had been no reunion, and that the property which Lala Harnam Das had accumulated was his self-acquired property. They shrewdly observed that if Faqir Chand had been joint with Lala Harnam Das he would never for a moment have allowed an application for mutation of names in favour of Sheocharan to be made, nor would he have called Sheocharan the adopted son of Lala Harnam Das in the draft agreements which he prepared.

The learned Judges in the appeal to the High Court, having carefully considered the evidence, were of opinion that there was no fair family arrangement arrived at, and found that it had not been shown that Mussamat Kashmiro had any independent advice, or understood the effect of the so-called award on her interests; they believed that she never knowingly consented to the division of her husband's estate, and they allowed the appeal and dismissed the suit with costs.

Their Lordships must not be taken as dissenting from the conclusions of the learned Judges of the High Court, but their Lordships consider that this appeal may properly be dismissed on the broad ground that on the death of Lala Harnam Das his widow, Mussamat Kashmiro, came under the influence of her brother-in-law, Faqir Chand, who was an interested party in all the subsequent proceedings, whom she trusted to advise her, and on whose advice she acted until he died in 1905. His interests conflicted with hers. Faqir Chand advised her in his own interests, and not in hers. He concealed from her the true nature and effect of the different proceedings in this case, and misled her. She was not a woman of business, and he managed the property from 1893 until he died, and she believed that he was acting as manager for her. From the death of her husband Faqir Chand stood to her in a fiduciary relationship, which continued until he died, and she was entitled to receive from him a full disclosure of all the affairs which concerned her, but he betrayed his trust. Piyare Lal, who was her husband's grandson, and in whom Mussamat Kashmiro also trusted as an adviser, acted from interested motives in collusion with Faqir Chand and betrayed the confidence which she reposed in him.

Under such circumstances, the award, whether regarded as an award, or as a document embodying a family arrangement, cannot stand, it must be treated as a nullity. Mussamat Kashmiro cannot be regarded as an assenting party to any arrangement for the division of the property which was left by Lala Harnam Das. The question in such a case as this is, not whether Mussamat Kashmiro knew what she was doing, had done, or proposed to do, but how her intention to act was produced: whether all that care and providence was placed round her, as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf. Fraud, such as there was in this case, cannot be condoned unless there be full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length. [See *Huguenin* v. *Baseley* (1) and *Moxon* v. *Payne* (2).]

It has been contended here that limitation is a bar to Mussamat Kashmiro's defence. The Indian Limitation Act

(1) 14 Ves. Jun. 273 (1807).
(2) 8 Ch. App. 881 (1873).

would not apply to her defence. Even if she were suing to recover possession of property of which she was deprived by the award, time would not, under the circumtances of this case, begin to run against her until Faqir Chand died.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The Appellant must pay the costs of the first Respondent, who alone appeared.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Barrow, Rogers* and *Nevill* for the Respondents.

B. D. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 227 OF 1916.

SANDERSON, C. J. and MOOKERJEE, J.
1916, 1, May.

GANGADHAR KARMAKAR and others, Defendants, Appellants, Petitioners, v. SEKHAR BASINI DASYA and others, Plaintiffs, Respondents, Opposite Party.

Limitation Act (IX of 1908), sec. 12—High Court Judgment—Application for review—Limitation if runs from before the signing of decree—High Court Rules, Appellate Side, Chap. XI, r 4—Deputy Registrar certifying application not in order—Application if must be presented within seven days of return of application with such certificate—Bengal Tenancy Act (VIII of 1885), sec. 153—Question of title raised but not decided by Munsif exercising final jurisdiction—Appeal to District Judge if lies—District Judge deciding question of title in appeal—Second appeal if lies.

In computing the period of limitation for an application for review of a judgment of the High Court, the party applying for review is entitled to have excluded, under sec. 12 of the Limitation Act, the time requisite for taking a copy of the decree, and the period of limitation cannot in such a case commence to run until, at all events, the day the decree was signed by the Judges.

R. 4 of Chap. XI of the Appellate Side Rules was intended to apply to the case where the Deputy Registrar gives a certificate that the review application was in order and not to cases where the certificate is to the effect that the proceedings were not in order.

The application for review was properly presented to the Court presided over by the Chief Justice, as there was no time after the application was put in order to present it to the Bench which had disposed of the appeal in the first instance, one of them having retired from the Court some days before and the other having gone away on furlough two days after that date.

In a suit to recover arrears of rent (the amount in claim being less than Rs. 50) the Defendant objected that the Plaintiff was his benamidar. *The Munsif, who had final jurisdiction under sec. 153 of the Bengal Tenancy Act, declined to go into the question of title but dismissed the suit on the ground that the Plaintiff had failed to prove realisation of rent from the Defendant in previous years. The Plaintiff appealed to the District Judge and also preferred an application for revision under the proviso to sec. 153. The District Judge overruled the Defendant's objection in the appeal that no appeal lay under sec. 153, and found for the Plaintiff on the merits.*

Held—*That no appeal lay to the District Judge from the decision of the Munsif as no question of conflicting title was decided by it; and the decision of the District Judge to the contrary was erroneous in law.*

That a second appeal lay against this decision.

GANGADHAR KARMAKAR *v.* SEKHAR BASINI DASYA.

KALIPADA *v.* SHEKHAR BASINI (7) *overruled.*

Held, *per* SANDERSON, C. J.—*That an appeal lay from the decision of the District Judge, which decided a question of conflicting title under sec. 153, Bengal Tenancy Act.*

BHAGABATI BEWA *v.* NANDA KUMAR CHUCKERBUTTY (1) *explained.*

Per MOOKERJEE, J.—*Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction.*

BHAGABATI BEWA *v.* NANDA KUMAR CHUCKERBUTTY (1), ABDUL HOSSEIN *v.* KASHI SHAHU (4), MEENAKSHI NAIDOO *v.* SUBRAMANIYA SASTRI (5) *and* RANJIT MISSER *v.* RAMUDAR SINGH (6) *discussed.*

The Court directed the District Judge to deal with the application for revision under the proviso to sec. 153 of the Bengal Tenancy Act.

This Rule arises out of an application for review of the judgment of this Court, dated 23rd November 1915, delivered by Holmwood and Mullick, JJ., in Appeal from Appellate Decree No. 1706 of 1913, which had been preferred against the decree of R. N. Dutta, Esq., District Judge of Khulna, dated the 5th April 1913, reversing the decree of Babu Srish Chandra Banerjee, Munsif, 1st Court of Satkhira, dated the 26th April 1912.

The facts of the case were as follows :—

The Respondent Shekhar Basini brought the present suit for rent (the amount claimed being less than Rs. 50) in the Court of the Munsif, 1st Court at Satkhira, who was specially authorised by the Local Government to exercise final jurisdiction under sec. 153, cl. (*b*) of the Bengal Tenancy Act. The principal Defendant in the suit was her father, who, she alleged, had purchased the holding for the rent of which she was suing in the name of her husband. She claimed to have acquired the superior interest of the landlord by purchase. The Defendant, her father, contested the suit on the ground that the purchase of the superior interest was by him in the *benami* of her daughter the Plaintiff. The Munsif declined to go into the question of title, but dismissed the suit on the ground that the Plaintiff had not proved that she had ever realised rent from the Defendant. The Plaintiff appealed to the District Judge and at the same time preferred an application for revision under the proviso to sec. 153, Bengal Tenancy Act. The Defendant pleaded that no appeal lay, but this plea was overruled, and the District Judge upon a consideration of the merits of the case held that the Plaintiff's allegations as to title were true, and gave her a decree. A second appeal to the High Court was dismissed in the first instance by Holmwood and Mullick, JJ., by their judgment dated the 23rd November 1915, [*Kalipada* v. *Shekhar Basini* (7)].

On the 21st February 1916, the Defendant filed an application for review of the above judgment upon a Court-fee Stamp of Re. 1-2 being half of the full amount of the Court-fees payable *ad valorem* upon the amount of the claim. Upon this the Deputy Registrar made a certificate to the effect that the Court-fee paid was insufficient as Rs. 2-4 was due to be paid. The deficit Court-fee was paid on the 8th

(1) 12 C. W. N. 835 (1908).
(4) I. L. R. 27 Cal. 362 (1899).
(5) L. R. 14 I. A. 160 (1887).
(6) 16 C. L. J. 77 (1912).
(7) 23 C. L. J. 285 (1915).

(7) 23 C. L. J. 285 (1915).

GANGADHAR KARMAKAR *v.* SEKHAR BASINI DASYA.

March 1916. On the 29th February 1916, Mr. Justice Mullick retired from the Court and on the 10th March following Mr. Justice Holmwood went away on furlough. The deficit Court-fee having, as above stated, been paid, the Deputy Registrar certified that the application was in order, and within seven days of the handing over of the application so certified to the Petitioner's Vakil, the application was presented by way of motion before the Bench presided over by their Lordships the Chief Justice and Mookerjee, J., and the present Rule was issued.

At the hearing of the Rule, several preliminary objections were taken, and these were disposed of by the following judgment :—

SANDERSON, C. J.—The whole of this matter arises out of the fact that on the 21st of February 1916, when an application for a review of a certain judgment was made, the fee of Re. 1-2 was paid instead of a fee of R[redacted]4. The first point with reference to that, which was made by the learned Vakil for the Respondent, was that the article in the statute of limitation says that the time is ninety days from the date of the decree which must be taken, by reason of another provision, to be the same date as the pronouncement of the judgment. That would be so but for the fact that sec. 12 of the Lmitation Act provides that " in computing the period of lmitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment " (as is the case here) " the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded." In my judgment that is a specific direction which has referred not only to an appeal but to an application for a review of judgment and even though the rules do not prescribe that a copy of the decree should be attached to the application, there is this specific direction contained in the statute that the time requisite for obtaining a copy of the decree shall be excluded; and inasmuch as the decree was not signed until the 6th of January 1916, in my opinion the period of limitation would not commence to run until at all events that day in January 1916. Consequently the payment which was made on the 8th of March 1916 of the additional fee of Re. 1-2 would be within time. Therefore, the first point which the learned Vakil for the Respondent takes fails.

The second point is that under Chap. XI, r. 4, of the High Court Rules, Appellate Side, the Appellant, to whom was handed a certificate by the Deputy Registrar that his application was irregular, ought to have moved the High Court within seven days from the date upon which the Deputy Registrar handed him the certificate. The words of the rule are "within seven days from the date of such certificate, the Applicant, either in person or by a Vakil or Advocate, shall present the application by way of motion in open Court to the Division Court of whose judgment a review is sought." The learned Vakil, when I asked him what was meant by the word *application*, agreed that that could only mean an application for review. I think that is the correct interpretation. It is clear to me that that rule was intended to apply to the case where the Deputy Registrar gives a certificate that all the proceedings were in order, and not to cases where the certificate of the Deputy Registrar was to the effect that the proceedings were not in order. As was pointed out by Mr. Justice Mookerjee, if the Appellant under these last mentioned cir-

cumstances came to the High Court on an application for review of judgment, he would at once be met with the answer that the High Court could not hear the application it not being in order having regard to the certificate of the Deputy Registrar. Therefore, in my opinion, that point is not a good one.

It was next argued, the application should not be heard by this Court now, because the Chief Justice of this Court can only hear an application for review if it is impossible for the Court which passed the judgment to hear it, or at all events, if there is not one of the Judges who decided the appeal available for the purpose. It appears that the additional fee was not paid until 8th of March 1916 of this year. Until then the Deputy Registrar was not in a position to certify that the proceedings were in order. Until that moment, no application could be made for review of judgment and inasmuch as Mr. Justice Mullick retired from this Court on the 29th of February 1916, and Mr. Justice Holmwood went on furlough on the 10th of March, two days after this matter was put in order, there was no time to make the application to either of the Judges. I, therefore, think that the application may be made to this Court and for the reasons above mentioned it is not out of time.

MOOKERJEE, J.—I agree.

[Their Lordships then heard the appeal on the merits.]

Babu Baranashibasi Mukerjee for the Petitioner.

Babus Sarat Ch. Roy Chaudhuri, Dhirendra Krishna Ray and *Sasodhar Ray* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—In this case the facts are a little peculiar. The action was brought by the Plaintiff against the first Defendant who is her father, and the second Defendant who is her husband, and the action was brought for arrears of rent. The Plaintiff alleged that she had purchased the property from the superior landlord of the first Defendant, her father, on the 1st of September 1908, and she sued for four years' arrears of rent,—two, before the purchase and two after the purchase.

The defence set up by the first Defendant, the Plaintiff's father, was that the land had not been purchased by the Plaintiff at all, but that he himself was the purchaser and that the purchase had been carried through in the name of his daughter the Plaintiff. When the case came before the Court of first instance this issue as to whether the Plaintiff was the owner in her own right and in the interest which she claimed, or whether she was simply a nominee of her father, was raised; but the learned Munsif did not deal with it: he expressly said that he did not deal with the question of title; but he said that inasmuch as the Plaintiff had not proved the receipt of any rent from the first Defendant, he was justified in giving judgment for the Defendant against the Plaintiff. Thereupon, the Plaintiff appealed to the District Judge and besides appealing she made an application at the same time as the appeal under the proviso of sec. 153 of the Bengal Tenancy Act.

On the hearing of the appeal, it was urged before the learned District Judge on behalf of the Defendant that it was not competent for the Plaintiff to appeal, because the case had been heard by the Munsif in pursuance of sec. 153, cl. (*b*), the Munsif being a judicial officer especially empowered by the Local Government to exercise final jurisdiction under

this section, and the amount claimed in the suit not exceeding fifty rupees. It was urged that those being the facts no appeal lay from the decision of the learned Munsif. On the other hand, the Plaintiff said that an appeal did lie, because, she urged, the learned Munsif had decided a question relating to the title to the land, and the learned District Judge came to the conclusion that the learned Munsif had decided a question relating to the title to the land, and therefore, he held that an appeal lay, and he heard the appeal and decided that the truth lay on the side of the Plaintiff that she in fact was the purchaser of the superior landlord's interest in the land and her father was liable to pay the rent for which she was suing. The application for revision under the proviso of sec. 153 naturally was not pressed, because the Plaintiff got all that she wanted, she having succeeded in the appeal, and that application was dismissed, each party paying his own costs. Then the Defendant appealed to the High Court, and the High Court decided first that the learned District Judge was wrong in holding that there was an appeal from the learned Munsif to himself, and inasmuch as there was no appeal from the Court of first instance to the learned District Judge there was no appeal from the learned District Judge to the High Court: and, on these grounds, the two learned Judges of this Court dismissed the appeal. An application was made to those two learned Judges on behalf of the Defendant to exercise their powers of revision under sec. 115 of the Civil Procedure Code, but they said that having regard to the nature of the case and the facts which the learned District Judge found, they did not intend to exercise their power of revision under sec. 115.

Under those circumstances the Defendant obtained a Rule from this Court for a review of the judgment of the two learned Judges of the High Court.

The first question we have to consider is whether the learned Judges were right in holding that inasmuch as there was no appeal from the learned Munsif to the District Judge there was no appeal from the District Judge to the High Court.

I agree with the decision that there was in this case no appeal from the Court of first instance to the learned District Judge, because the section says that "an appeal shall not lie from any decree or order passed, whether in the first instance or an appeal, in any suit instituted by a landlord for the recovery of rent where—(*b*)"—I have already read cl. (*b*) and I need not read it again—"unless in either case the decree or order has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto . ." As I have already said, in my opinion, there was raised before the Court of first instance a question relating to title to land as between parties having conflicting claims thereto. But the Munsif expressly refrained from deciding that question. Therefore that question did not come within the words of the section, *viz.*, "where the decree or order decided a question relating to title to land as between parties having conflicting claims thereto."

Then comes the second branch of the question whether the learned Judges were right in holding that there was no appeal to this Court. In my judgment, with every respect to them, they were wrong. The judgment was based upon a decision, to which our attention was drawn this morning, in Bhagabati Dasya v. Nanda

Kumar Chuckerbutty (1). In that case the head-note is to this effect: a suit by a co-sharer landlord for his share of the rent only, without making the other co-sharers parties, is a suit instituted by a landlord for the recovery of rent within the meaning of sec. 153, Bengal Tenancy Act. Where the rent claimed in such a suit did not exceed Rs. 50, and it was tried and dismissed by a Munsif who was specially empowered under cl. (*b*) of sec. 153: *Held*—that no appeal lay to the Subordinate Judge and hence no second appeal from his decision reversing that of the Munsif. Now, at the first sight that would appear to be material to this case. But when we look at the facts of the case it is clear that neither the learned Munsif nor the learned Judge of the first Appellate Court had decided a question of title to land: and, as in that case neither of the Courts had decided that point, it may have been right to have held, that "if no appeal lies from the Munsif to the Subordinate Judge, no appeal lies from the Subordinate Judge to the High Court." I express no opinion on that question, as it is not necessary for the purposes of this case to do so. For in the present case the learned District Judge had decided a question of title between the parties, and therefore, in my judgment the case clearly comes within sec. 153 which, I may repeat, says that an appeal shall not lie from any decree or order passed whether in the first instance or on appeal . . . . . unless in either case the decree or order has decided a question relating to title to land. In this case it seems to be obvious that on appeal there was a question of title decided by the learned District Judge. Therefore, the case comes within the express provision of that section, and an appeal did lie from the learned District Judge to this Court. Therefore, the position is this: It being decided that an appeal does lie from the District Judge to this Court, and it having been already decided that there was no appeal from the learned Munsif to the learned District Judge, the consequence is that the decision of this Court must be set aside, and as a natural consequence, the decision of the learned District Judge must also be set aside.

I should be sorry if the matter had to rest there, because one cannot disregard the finding of the learned District Judge who has investigated the case and has come to the conclusion that the Plaintiff is entitled to the relief which she sought in this case, and has found that the truth lay on her side and that she was the real purchaser of this property; and, I am glad to find that it is open to us to direct further investigation in the matter. It is not disputed by the learned Vakil for the Defendant that we have jurisdiction to send this case back to the District Judge for further inquiry to be made either by himself, or if he thinks right, by the learned Munsif: and, we think that the proper course to adopt is that this matter should be sent back to the learned District Judge in order that he may investigate the application which was made under the proviso of sec. 153 for the revision of the judgment of the learned Munsif. That proviso is to this effect: "the District Judge may call for the record of any case in which a judicial officer as aforesaid has passed a decree or order to which this section applies, if it appears that the judicial officer has exercised a jurisdiction not vested in him by law, or has failed to exercise a jurisdiction so vested or has acted in the exercise of his jurisdiction illegally or with material

(1) 12 C. W. N. 835 (1908).

irregularity, and may pass such order as the District Judge thinks fit."

Therefore, this case will go back to the District Judge, and if he has sufficient material already before him, to enable him to deal with the application under the proviso of sec. 153, of course he will deal with it. But if he thinks that it will be necessary to refer the matter to the learned Munsif for taking evidence as to the facts —which may be necessary for making the further enquiry—he will do so.

The result of my decision is that the judgment of the High Court and that of the District Judge must be set aside, and the Defendant must have the costs of this Rule (hearing-fee—two gold mohurs) and also the costs of the appeal to the High Court as well as the costs of the appeal to the learned District Judge.

MOOKERJEE, J.—I agree that this application for review of judgment must be granted as the proceedings throughout this litigation have been characterized by a succession of inexplicable errors.

The Plaintiff instituted the suit to recover arrears of rent from her father. The amount claimed did not exceed Rs. 50 and the suit was tried by a judicial officer specially empowered by the Local Government to exercise final jurisdiction under sec. 153 of the Bengal Tenancy Act. The Defendant pleaded that the Plaintiff had no title to the rent claimed, inasmuch as the interest of the superior landlord had been purchased, not by the Plaintiff but by himself. On this state of the pleadings, a question clearly arose "relating to an interest in the land as between parties having conflicting claims thereto". The trial Court, however, declined to investigate this point and dismissed the suit on the ground that as the Plaintiff had failed to prove realisation of rent from the Defendant in previous years, she was not entitled to succeed in her present claim. The first question is, did an appeal lie against this decree. Now in order to determine whether an appeal lies from a judgment passed by a judicial officer specially empowered by the Local Government to exercise final jurisdiction under sec. 153 of the Bengal Tenancy Act, the test to be applied is, not whether one of the special questions mentioned in the section has been in controversy between the parties, but whether the decree has actually decided such a question. In the case before us, the judgment of the trial Court makes it clear that the question of conflicting title was not decided. Consequently, no appeal lay to the District Judge; yet an appeal was preferred to him. A preliminary objection that the appeal was incompetent was erroneously overruled; the appeal was heard on the merits, the judgment of the trial Court was reversed and a decree was made in favour of the Plaintiff on the ground that the interest of the superior landlord had been purchased by her and not by the Defendant. A second appeal was then preferred to this Court, and the decree of the District Judge was assailed on the ground that it had been made without jurisdiction. This was controverted by the Respondent, who argued that the appeal to the District Judge was competent. This contention was rightly overruled on the authority of the decision in *Shilabati* v. *Roderigues* (2). This Court (Holmwood and Mullick, JJ.), however did not give effect to the view that the appeal to the District Judge was incompetent, but proceeded to hold on the basis of the decision in *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty* (1) that inasmuch as the decree of the District Judge had been

(1) 12 C. W. N. 815 (1908).
(2) I. L. R. 35 Cal. 845 (1908).

passed without jurisdiction the appeal to this Court was incompetent. The result was that the appeal to this Court was dismissed and the decree of the District Judge stood untouched. On the present application for review of judgment, we are invited to consider the correctness of this decision.

On behalf of the Respondent, the view has been maintained, that if an appeal has been heard without jurisdiction, no appeal lies from the Appellate decree which must be deemed a nullity; reliance has been placed on the decision in *Bhagabati* v. *Nanda Kumar* (1) and the observations in *Amrita Lal Mukerjee* v. *Ram Chandra Roy* (3). In my opinion, the proposition formulated by the Respondent is unsound in principle and is opposed to the authorities. It is clear that the observations in *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty* (1), though expressed in general terms, must be limited by the facts of the case then before the Court. The facts were such as made an appeal from the decision of the trial Court to the Subordinate Judge incompetent, and the decision of the Subordinate Judge was also of such a character as made a second appeal to this Court incompetent under sec. 153. That decision when analysed cannot rightly be regarded as an authority for the general proposition that if an appeal has been heard without jurisdiction, no appeal lies against the appellate decree. The observations in *Amrita Lal Mukerjee* v. *Ram Chandra Roy* (3) are also capable of a similarly limited interpretation. On the other hand, we have the decision in *Abdul Hossein* v. *Kashi Shahu* (4) where this Court heard an appeal against an appellate decree made without jurisdiction, and reversed the decision of the Court of appeal below. That the Court was competent to do so is plain from the decision of the Judicial Committee in *Meenakshi Naidoo* v. *Subramaniya Sastri* (5). We have finally the decision in *Ranjit Misser* v. *Ramudar Singh* (6) in which this very question was discussed and the rule was laid down that where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction. A decree made without jurisdiction possesses none the less the qualities of a decree as between the parties thereto, and if there is a statutory appeal from decrees made in suits of that character, the decree does not become unassailable because it has been made without jurisdiction. That an appeal lies against a decree made without jurisdiction is indeed also clear from the terms of secs. 99 and 115 of the Civil Procedure Code. In the case before us, as the Subordinate Judge had decided a question of interest in the land as between parties having conflicting claims thereto, an appeal did lie to this Court against his decree, under the express provisions of sec. 153; it is difficult to appreciate how that appeal could be nullified because the decree was vitiated by absence of jurisdiction in addition to other possible errors. I am clearly of opinion that the decision of this Court passed in appeal was consequently erroneous and that this Court should have reversed the decision of the District Judge on the ground that it had been passed without jurisdiction. This application for review must accordingly succeed and the decision of this Court set aside.

The result of our order is that the appeal

(1) 12 C. W. N. 835 (1908).
(3) I. L. R. 29 Cal. 60 (1901).
(4) I. L. R. 27 Cal. 362 (1899).
(5) L. R. 14 I. A. 160 (1887).
(6) 16 C. L. J. 77 (1912).

to this Court stands revived for disposal under Or. 47, r. 8 of the Code of Civil Procedure. For reasons already assigned, that appeal must be allowed, the decree of the Lower Appellate Court discharged and that of the Court of first instance restored. But the question arises, what further course, if any, should be adopted in the interests of justice. It is plain that the decision of the trial Court was liable to be revised by the District Judge under sec. 153 of the Bengal Tenancy Act. As a matter of fact, an application for revision was presented to him, but when the appeal succeeded, the application was abandoned. Now that it has been held that the appeal was incompetent, the Plaintiff should clearly be allowed to fall back upon the application, which may be deemed to stand revived; it will consequently be open to the District Judge to proceed on the basis of that application and to make such order as he is competent to pass under sec. 153 of the Bengal Tenancy Act.

On these grounds, I agree with the order proposed by the Chief Justice in this matter.

N. G.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 959 OF 1915.

HOLMWOOD, J. IMAM, J. 1916, 7, January.	SATYENDRA NATH DEY, Petitioner, *v.* THE SECRETARY OF STATE FOR INDIA, Opposite Party.

Lunacy Act (IV of 1912), sec. 56—Guardian of lunatic obtaining District Judge's permission to take out compensation money in deposit with Land Acquisition Judge—Latter may refuse to pay.

Where the natural guardian of a lunatic, in whose name a sum of money representing his share of compensation money paid by the Land Acquisition Collector was in deposit in the Court of the Land Acquisition Judge, obtained an order from the District Judge under sec. 56 of Act IV of 1912 for payment to him of a portion thereof for the maintenance of the lunatic, the Land Acquisition Judge had no jurisdiction to refuse the guardian's application for withdrawing the money.

This was a Rule granted on the 2nd September 1915 against an order of H. P. Duval, Esq., Land Acquisition Judge, 24-Pergunnahs, dated 1st June 1915.

The Petitioner was the brother and natural guardian of one Gnanendra Nath Dey, a lunatic, who was residing in the Lunatic Asylum at Berhampur, and had been maintaining the lunatic and his family at his own expense until the date of the application in respect of which the present Rule was issued. In his application he stated that he was finding it difficult to meet the just expenses incurred on the lunatic's account; that the Land Acquisition Collector of Alipur had acquired the ancestral dwelling-house of the Petitioner and the lunatic and made in favour of the latter an award of Rs. 592 being the share of compensation due to him, and had duly deposited the same with Special Land Acquisition Judge to the credit of the lunatic; and the Petitioner prayed that the money might be paid to him in order to enable him to meet expenses of maintaining the lunatic and his family and filed receipts from the Lunatic Asylum for sums actually paid by him.

The District Judge granted the prayer ordering that Rs. 200 might be paid out to the Petitioner for the present.

Thereafter Petitioner applied to the Land Acquisition Judge for an order allowing him to withdraw the sum of Rs. 200 but the Judge rejected the application holding that the Petitioner had not been ap-

pointed guardian of the lunatic by the Court.

Against this the Petitioner moved this Court and obtained this Rule.

Babu Santosh Kumar Bose for the Petitioner.

Babu Atul Chandra Dutt for *Babu Ram Ch. Mitter* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The order of the District Judge appears to be in accordance with sec. 56 of Act IV of 1912, the provisions of which are the same as sec. 20 of Act XXXV of 1858 on which the learned Judge relies. The Land Acquisition Judge therefore has no jurisdiction to refuse to pay out the particular sum directed by the District Judge to be applied by the Petitioner for the maintenance of the lunatic or his family. The Rule is therefore made absolute and the order complained of is set aside. There will be no order for costs as the Secretary of State leaves the matter in the hands of the Court and does not oppose.

N. G. *Rule made absolute.*

[ORIGINAL CRIMINAL JURISDICTION.]
FIRST SESSION, CASE NO. 13 OF 1916.

SANDERSON, C. J.		**KING-EMPEROR,**
1916,		***v.***
8, March.		**SREENATH MAHAPATRA and two others.**

Criminal Procedure Code (Act V of 1898), sec. 292—Prosecutor's right of reply—Adducing of evidence by accused.

During the cross-examination of some of the witnesses for the prosecution counsel for one of three accused persons in the case put to the witnesses certain letters as being written by them or their employers. The witnesses identified the letters which were then tendered as evidence and admitted. At the end of the case for the prosecution none of the accused adduced any evidence.

Held—*That under the circumstances the prosecution had no right of reply.*

That sec. 292, Cr. P. C., must be read in connection with sec. 289 and must be construed accordingly. Reading the two sections together the right to reply which is given by sec. 292 arises only if the accused or any of the accused takes advantage of the right to adduce evidence at the time and in the manner specified by the Act, viz., after the case for the prosecution is concluded. The correct test of deciding whether the prosecution has the right of reply under sec. 292 is not whether the prosecution has been taken by surprise.

The three prisoners were tried at the First Criminal Sessions of the High Court before Sir Lancelot Sanderson, C. J., and a common jury on a charge of having criminally conspired to commit the offences of forgery for the purpose of cheating and certain other offen[illegible].

During the cross-examination of two of the witnesses for the prosecution Mr. Thornton, Counsel for one of the accused, put to the witnesses certain letters as having been written by them or their employers. The witnesses identified the letters which were then tendered as evidence and admitted.

After the prosecution concluded its case none of prisoners called witnesses or adduced evidence.

Mr. Norton, Counsel for the Crown, claimed a right to reply.

Mr. Eardley Norton (with him *Mr. McNair*) for the Crown.—Sec. 289 has nothing to do with sec. 292 which must be construed independently. The circumstances of this case give me a right of reply under sec. 292, Cr. P. C. The test is whether the prosecution has

been taken by surprise. Referred to *Emperor* v. *Bhaskar Balwant* (1) and *Emperor* v. *Timol* (2).

Mr. Thornton for the accused on whose behalf the letters in question were put to the prosecution witnesses.—Secs. 289 and 292 must be read together. This being so, it is clear that the prosecution has no right to reply in this case.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case the three prisoners were charged with criminal conspiracy to commit the offences of forgery for the purpose of cheating, fraudulently and dishonestly using as genuine a forged document, and cheating and certain other offences, which it is not necessary to specify in detail.

During the cross-examination of certain of the witnesses for the prosecution the learned Counsel appearing for one of the prisoners [redacted] the witnesses certain letters as having been written by them or their employers.

The witnesses identified the letters, which were then tendered as evidence and admitted.

At the end of the case for the prosecution the learned Counsel for all the three prisoners declared that they did not mean to call witnesses or adduce evidence.

The learned Counsel for the prosecution thereupon claimed the right to reply under sec. 292 of the Code of Criminal Procedure of 1898, alleging that one of the accused had adduced evidence by reason of the letters which the learned Counsel appearing for him had put in during the cross-examination of the witnesses for the prosecution and therefore that the terms of sec. 292 gave him a right of reply. I hold that the learned Counsel for the prosecution had not under the circumstances above mentioned the right to reply and at the request of the learned Counsel engaged in the case who urged that it was desirable to have a definite ruling on the point, I undertook to put my reasons for so holding into writing.

In my judgment the question depends upon whether sec. 292 is to be construed independently of the preceding sections of the Act or whether it must be read in connection with them and in particular with reference to sec. 289.

If sec. 292 is to be construed independently of sec. 289, then the putting in evidence of the letters by the learned Counsel for one of the accused during the cross-examination of the witnesses for the prosection would in my opinion bring the case within the section and give the prosecution the right of reply : for I do not think that the correct test of deciding this matter is whether the prosecution is taken by surprise as has been suggested in some of the decisions. There is nothing to this effect in sec. 292 and to hold that this was the test would mean the implied addition to the section of some such words as " provided that the Judge who tries the case thinks the prosecution has been taken by surprise by the evidence adduced by any of the accused." Such an implication in my judgment is not permissible or necessary.

In my judgment however sec. 292 must be read in connection with sec. 289 and must be construed accordingly. When so read, the intention of the legislature to my mind is clear. The scheme of the Act is that at a certain stage of the proceedings, *viz.*, " where the examination of the witnesses for the prosecution and the examin-

(1) I. L. R. 30 Bom. 421 (1906).
(2) 10 C. W. N. cclxvii (1906).

ation of any of the accused are concluded," the question is to be put to the accused whether he means to adduce evidence. If the accused does not then adduce evidence, provisions as to the course to be adopted are made by the Act: if he does, then certain other provisions as to the course to be adopted are made, one of which is the provision contained in sec. 292 as to the right of reply. Reading, therefore, the two sections together the right to reply which is given by sec. 292 arises only if the accused or any of the accused takes advantage of the right to adduce evidence at the time and in the manner specified by the Act, *viz.*, after the case for the prosecution is concluded.

The object of the legislature, in my opinion, being to give each side an opportunity of commenting on the evidence of the other, this is accomplished by giving the prosecution the right to sum up at the conclusion of the case for the prosecution when the accused does not adduce evidence in the sense above mentioned, but confines himself to getting in certain facts or documents by the legitimate employment of the cross-examination of the witnesses for the prosecution, and in giving a right of reply to the prosecution when the accused does adduce evidence in the manner specified by the Act. It is to be noted that this should not give rise to any inconvenience for in the cases where documents are put in by means of legitimate cross-examination of the witnesses for the prosecution, it must be obvious to those conducting the case for the prosecution for what purpose or with what object they are put in, and the prosecution will have an opportunity of commenting upon them in the summing up which is expressly provided by the Act, at the conclusion of the case for the prosecution. For these reasons I held that the learned Counsel for the prosecution in this case had not the right to reply.

Mr. T. H. Hume, Public Prosecutor, for the Crown.

Babu Bepin Bihary Palit, Attorney, for accused Sreenath Mahapatra.

Babu Jogendra Nath Chatterji, Attorney, for the other two accused.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 376 OF 1916.

CHITTY, J. WALMSLEY, J. 1916, 12, May.	MANMOTHA NATH CHATTERJEE and anr., 1st and 2nd Parties, Petitioners, *v.* GANGA GIR GOSSAIN and anr., 3rd & 4th Parties, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145—Addition of parties—Sub-sec. 4 (1)—Wrongful and forcible dispossession—Digging tank with sanction of Municipality—Party [illegible] had notice of the proceeding to the [illegible] the dispute

Where in a proceeding under sec. 145, Cr. P. C., it appeared that one of the parties within two months from the commencement of the proceeding obtained sanction from the Municipality and proceeded to dig a tank on the land in dispute to the exclusion of another party who was then found to be in possession:

Held—*That it was forcible and wrongful dispossession within the meaning of sub-sec. 4, cl.* (1), *of sec. 145.*

Held further—*That under the Full Bench Ruling in* KRISHNA KAMINI *v.* ABDUL JUBBAR (1) *a party may be added provided he was concerned originally in the dispute which was the foundation of*

(1) I. L. R. 30 Cal. 155: s. c. 6 C. W. N. 737 (1902).

the proceeding and there is no necessity for a fresh proceeding. Further if a party is added before the inquiry begins, there is no irregularity.

That whether or not there was then an apprehension of a breach of the peace is a matter eminently for the exercise of the Magistrate's discretion.

For a person to be concerned in a dispute relating to land, it is not necessary to be actually present near the land or to have had notice of the proceeding when started.

This was a Rule granted on the 27th March 1916 against an order of Babu Braja Durlabh Hazra, Deputy Magistrate of Howrah, dated the 22nd March 1916.

The material portion of the order of the Magistrate was as follows :—

" After enquiry into a petition filed by Manmotha Nath Chatterjee on 26th April 1915, the Police Sub-Inspector of [illegible] submitted a report on 23rd May 1915 that there was [illegible] the fishing rights (?) [illegible] regarding possession of a [illegible] about five or six bighas of land and that this dispute was likely to lead to a breach of the peace. Proceeding under sec. 145, Cr. P. C., was therefore taken on 9th June 1915 and parties were called upon to file written statements of their respective claims regarding actual possession of the land.

On 5th July 1915 a petition was filed by first and second parties effecting a compromise by which possession was given to second party to the exclusion of third party. The fact that third party was excluded was not brought to my notice and I erroneously decided the case in accordance with the compromise, relying on the conduct (?) of pleaders who appeared.

The matter was then taken to High Court; the case was remanded. First, notice was accordingly issued on 22nd December 1915. Ganga Gir, third party and the first party appeared on 21st January 1916. The first party filed a petition stating that he had relinquished all claims to possession in favour of second party and that it appears from the evidence adduced for several parties, there have been trespass and assault committed by different persons and it is clear there is likelihood of breach of the peace.

Ganga Gir appears to be at the root. He admits that he executed a deed in favour of Satkari in consideration of some money and Satkari and his *mali* got and retained possession until eight months ago, when second party took forcible possession. The agent of second party admits that second party got possession only in July 1915, *i.e.*, after the present proceeding was ordered. Before that, second party was not in possession. This is also the evidence of other witnesses for the second party.

It is thus clear, second party obtained forcible possession, and that, since the order in the present proceeding. The third party Ganga Gir himself said that fourth party was in possession until eight months ago, when second party obtained forcible possession.

So this case settles down to a dispute between first party and fourth party. Evidence of third party and second party support the possession of fourth party.

For the first party some witnesses have been examined, but their evidence is unsatisfactory so far as actual possession of the land is concerned. The evidence of the *mali* is very vague and unworthy of credit. The only evidence to which I should refer is that regarding the re-excavation of the tank in April and May 1915. The first party got this work done. But it seems that by this, the fourth party was forcibly ousted from the land. Witness Chinta Roy did not see who erected the

MANMOTHA NATH CHATTERJEE *v.* GANGA GIR GOSSAIN.

fence or the hut on the land which was pulled down by the second party. Witness Gokul is now in the service of the second party. He brought a criminal case against Ganga Gir for taking fruit etc. from the land, but his case was dismissed. And there is no satisfactory evidence that beyond employing men to re-excavate the tank, the first party took any crops or fruit or exercised any act of possession.

Apart from all this, the first party has filed statements relinquishing all claim to possession and he cannot now come in for possession for the benefit of a party—the second party—who has never been in peaceful possession and who only entered on the land by force. Further it seems absurd that the first party should have gone in for a lease in June 1914, of property which had already been leased out in September 1911.

The act of possession that the first party exercised was in May and April 1915, which was within two months of the proceeding and that party cannot get any benefit on account of it, inasmuch as the fourth party was thereby forcibly dispossessed.

As I have already observed above there is ample evidence to prove the possession of the fourth party, who got pillars put up at boundaries, excavated the tank, had a hut erected, and also kept *malis* who grew crops on the land. One of the *malis* Balaram on behalf of Satkari, successfully prosecuted Ganga Gir for trespass on the land and got him fined on 7th May 1912.

From all this I consider that the fourth party has been in actual possession until he was forcibly ousted within two months before the date of the proceeding, and I accordingly declare the said fourth party Satkari Das to be in possession of the land and I hereby forbid all disturbance of such possession until he be evicted in due course of law."

Babus Monmotha Nath Mukerjee and *Narendra Nath Set* for the Petitioners.

Babus Dasarathi Sanyal, Debendra Narain Bhuttacharya and *Satindra Nath Mukerjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

We adjourned this matter for settlement between the parties but unfortunately they have been unable to come to terms; and it is incumbent on us, therefore, to decide whether the Rule should be made absolute or discharged. After hearing the parties at length we are of opinion that the Rule should be discharged.

The important dates have been given to us by the learned Pleader who showed cause but we do not think it necessary to [illegible] out in full in this judgment. The [illegible] is granted on four groun[illegible] Nos. [illegible] of [illegible] 17 in the [illegible] the dis[illegible] ground related [illegible] the fourth party Satka[illegible] February 1916. The proceedings had commenced on 8th June 1915; but, in consequence of the petition of compromise between the first and the second parties and the subsequent application to this Court, matters were delayed and nothing had been done towards holding the enquiry. On 7th February 1916, the fourth party, Satkari Das, applied to be made a party alleging that he had all along been in possession of this land under a lease from Ganga Gir, dated September 1911. He was accordingly made a party and the proceedings went on.

It is argued for the petitioners first and second parties, that the Sub-divisional Officer had no jurisdiction so to add Satkari Das without drawing up fresh proceedings. This matter appears to be decided by the Full Bench case of *Krishna Kamini* v.

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Abdul Jubbar (1). There it was held that a party might be so added provided he was concerned originally in the dispute which was the foundation of the proceeding. If that was so, there would be no necessity for a fresh proceeding. It was further held that if a party were added before the enquiry began, there would be no irregularity. In this case, the enquiry did not commence until 4th March when the first witness was examined. It was argued that Satkari was not concerned in the dispute which was the foundation of the proceedings. It is true that he was absent from Calcutta at the time and, therefore, was not likely to be actually involved in the breach of the peace which was then apprehended; but that he was concerned in the dispute as to possession there can be no doubt. If he had appeared and the matter had been [illegible] I had given notice, there can be no doubt *Sri* [illegible] v. *Sukhi* [illegible] he could have applied [illegible]ng law [illegible] the suit be made a party. Besides, as [illegible] turned [illegible] construction of cl. (3) [illegible] sec. 50 of the Bengal Tenancy Act, it [illegible] his no bearing on the case before us. [illegible] the view [illegible] effect of [illegible] chase of [illegible] have been concerned in the interim.

Then it was argued that there was no further apprehension of a breach of the peace, this being the subject of ground No. 3. As to that, we have the explicit finding by the Magistrate that in consequence of certain things having taken place he thought that there was still a likelihood of a breach of the peace even at the date of his order, 22nd March 1916. This is a matter eminently for the exercise of the Magistrate's discretion and we should be sorry to interfere with it.

The last ground was that the Magistrate has no jurisdiction to pass the order on the basis of wrongful and forcible dispossession within the meaning of sec. 145 (4) (*i*). As to that it appears that on 12th April 1915 within two months from the commencement of the proceeding, the first party obtained sanction from the Municipality and proceeded to dig a tank on the land in dispute to the exclusion of the fourth party who was then found to be in possession. It is argued that that is not a wrongful and forcible dispossession. It was admitted that it might be wrongful but would not be forcible. We think that it comes within the meaning of the word "forcible" used in its ordinary significance, though possibly not within the meaning of "criminal force" as defined by the Indian Penal Code.

We accordingly discharge the Rule.

S. C. M. *Rule discharged.*

(1) I. L. R. 30 Cal. 155: s. c. 6 C. W. N. 737 (1901).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 411 OF 1916.

CHITTY, J.
WALMSLEY, J.
1916,
18, May.

CHANDRA KANTA KANJILAL, Petitioner,
v.
KING-EMPEROR, on the complaint of Parbati Sarkar, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 144, 195, 476—Indian Penal Code (Act XLV of 1860), sec. 188—Prohibition order under sec. 144, Cr. P. C., passed without any evidence—Prosecution for disobedience of order not properly passed—Cognizance of case under sec 188 by the same Magistrate who passed the order disobeyed.

A servant of the first party filed a petition before the Sub-divisional Magistrate complaining that the second party were about to construct a drain and if the first party opposed them there was a likelihood of a breach of the peace, whereupon the Magistrate without taking any evidence issued an injunction under sec. 144, Cr. P. C., against the second party. On the next

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day on the complaint of the same man the Magistrate summoned the second party under sec. 188, I. P. C. Subsequently he transferred the case to a Magistrate with second class powers and again withdrew it from his file and sent it to the Additional District Magistrate.

Held—*That the proceedings were wholly irregular.*

That the order under sec. 144, Cr. P. C., should never have been made.

That in summoning the second party under sec. 188, I. P. C., the Sub-divisional Magistrate was taking cognizance of the offence under sec. 188, I. P. C., which he had no power to do. Either action by the Magistrate under sec. 476, Cr. P. C., or an application for sanction under sec. 195, Cr. P. C., was necessary.

The High Court quashed the proceedings under sec. 188, I. P. C., and also set aside the order under sec. 144, Cr. P. C., which was the foundation of those proceedings although that order had expired.

This was a Rule granted on the 17th April 1916 against the proceedings under sec. 188, I. P. C., pending against the Petitioner in the Court of the Sub-divisional Magistrate of Manikgunj.

The facts are as follows :—

Hem Chandra Ray Chowdhury and Dinesh Chandra Ray Chowdhury are joint owners of a piece of land lying between their respective houses. That piece of land is used by both parties as a common passage and for drainage of water from their houses. The kutcha drain adjoining Hem Chandra's house and passing over the said land, having been partly filled up, a pucca drain was begun to be constructed for proper discharge of water.

One Parbati Sarkar, a Tahsildar of Dinesh Babu, complained against the Petitioner under secs. 144 and 107, Cr. P. C., alleging, *inter alia*, that the Petitioner was about to build a pucca drain upon *ijmali* land and that there was a likelihood of a breach of the peace.

The Sub-divisional Officer without making enquiry, without calling for a police report, and without examination of the complainant, passed the order: "Whereas it appears from the petition that second party wants to forcibly make a pucca drain to the detriment of the interest of the first party and whereas both are rich zemindars and persistence on the part of one may lead to a riot or breach of public peace, I hereby direct under sec. 144, Cr. P. C., that second party do give up making drain unless permitted by a Court of competent jurisdiction."

Next day on a report alleging that the Petitioner disobeyed the order given [illegible] was served at 9 P.M. and construction [illegible] necessary to [illegible] the Magistrate sum[illegible]. The [illegible] under sec. 144 was granted on the 17th [illegible] ground related [illegible] the fourth party Satka[illegible] February th[illegible] Class P[illegible] had summoned [illegible] that there was some [illegible] consequence [illegible] ing inasmuch as the requirements of sec. 195 or 476 had not been fully met.

The Sub-divisional Officer thereupon withdrew the case to his own file and ordered as follows :—

"This case has been started on the complaint of Parbati Sarkar and subsequent examination of process service peon. I find that under strict sense of the law, I should have sent it up after Nazir's report and examination of peon to nearest Magistrate of first class and not to second officer having only second class power.

I accordingly withdraw it from his file and send it to Additional District Magistrate at Dacca, the nearest Magistrate of first class powers, for disposal."

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The Additional District Magistrate of Dacca, in spite of Petitioner's objections, took cognisance of the case and transferred it for trial to Moulvi Mohamed, second officer of Manikgunj.

Babus Dasarathi Sanyal and *Ramoni Mohan Chatterji* for the Petitioner.

Babus Monmotha Nath Mukerjee and *Jogesh Ch. Gupta* for the Opposite Party.

Mr. Camell for the Crown.

The JUDGMENT OF THE COURT was as follows :—

We have heard the learned Deputy Legal Remembrancer who shows cause in this case on behalf of the Magistrate; but we think that the proceedings now commenced under sec. 188, I. P. C., are defective [illegible] more than one reason. In the [illegible] upport [illegible] the order as made under I had [illegible] P. C., by the Sub-d[illegible]*dit Si[illegible]* v. *Suk[illegible]* December 1915, existing law o[illegible] the su[illegible]ade. A sear[illegible]. Besides, as turned [illegible] t[illegible]onstruction of cl. (3) [illegible] sec. 50 of the Bengal Tenancy Act, it ha[illegible] no bearing [illegible] the case before us. [illegible] the view we take of the effect of [illegible] Chase of the tenure by the [illegible]ed [illegible]d collect interest of the [illegible]ber of sirdars and *lathials* granted [illegible] the Defendants obliterated the [illegible] pathway or constructed a drain there and if the first party opposed them then there would be a likelihood of a serious breach of the peace. The Magistrate took no evidence and had nothing before him on which to make the necessary record of the material facts of the case; but on that petition alone he passed an injunction against the second party under sec. 144, Cr. P. C. This appears to us to be wholly irregular. The threat of a breach of the peace was from the first party and the Magistrate might well have on that petition said to the person who presented it that he would bind him down under sec. 107. The proceedings were pushed through with great haste; the order is said to have been served at 9 P.M. on that day. On the 10th, on the complaint of the same man, Parbati Sarkar, the same Sub-divisional Officer passed the following order :—" Summon Chandra Kant Kanjilal, Debendra Nath Ganguli, Khider Sarkar and Chandrapal Singh under sec. 188, I. P. C., for 9th January 1916." As we read this order, it can only mean that the Sub-divisional Officer was taking cognisance of the offence under sec. 188, which he had clearly no power to do. There would have to be either action by him under sec. 476; or an application for sanction under sec. 195. It is now suggested that that order should be taken to be an order under sec. 476, because on 22nd March, a long time after, the Sub-divisional Officer transferred the case to the file of another Magistrate for trial. It may be noted in passing that the Magistrate to whom he then purported to transfer it had no jurisdiction to try the case, if the order was under sec. 476. We think that the whole proceedings were irregular. The Rule must be made absolute. The order under sec. 144, Cr. P. C., has expired, but it is set aside as being the foundation for the proceedings under sec. 188, I. P. C., which are also quashed.

S. C. M. *Rule made absolute.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2301 OF 1914.

ROE, J.
JWALA PRASAD, J.
1916,
23, May.

HARIHAR MISSER, Plaintiff, Appellant,
v.
SYED MOHAMED and ors., Defendants, Respondents.

Calcutta High Court, decision of, binding upon

HARIHAR MISSER *v.* SYED MOHAMED.

Patna High Court, until dissented from by Full Bench—Civil Procedure Code (Act V of 1908), Or. XXII, rr. 11 and 9—Withdrawal of surplus sale-proceeds belonging to the Plaintiff by Defendant—Suit instituted more than three years from date of withdrawal—Limitation Act (IX of 1908), Art. 62 or 120 applicable.

Where an application for substitution was made more than six months after the Appellant's death before the Registrar and the Respondents did not put in any objection before the Registrar to the hearing of the appeal, the application for substitution was treated as an application for the restoration of the appeal after abatement.

The Plaintiff, a purchaser at auction sale of a revenue-paying estate, made default in the payment of Government revenue and the estate was sold and the surplus sale-proceeds were withdrawn by the Defendants, the original proprietors whose names still remained in the register and a suit was instituted by the Plaintiff for the recovery of the money so withdrawn, more than three years after the date of withdrawal.

Held—*That Art. 62 of the Limitation Act applied and the suit was barred by limitation.*

MUHAMMAD WAHIB *v.* MUHAMMAD AMEER (1) *and* LACHMI NARAIN SINGH *v.* DHANUKDHARI PRASAD SINGH (2) *referred to.*

Money paid to one party with the implied intention that it should finally reach the hands of the party to whom it actually belongs, is money, within the meaning of Art. 62, paid to that party for the use of the actual person in whom the right to receive it vests.

The decision by a Divisional Bench of the Calcutta High Court is binding upon the Patna High Court until dissented from by a Full Bench.

This was an appeal preferred on the 11th August 1914 against a decision of R. Sheepshanks, Esq., District Judge of Mozufferpur, dated the 20th May 1914, affirming a decision of Babu Amrit Lal Palit, Subordinate Judge of Mozufferpur, dated 30th November 1912.

The facts out of which this appeal arises are shortly as follows :—

The Plaintiff purchased in June 1902 Mouza Narwara Kulwati, bearing Touzi No. 11733 at a sale for arrears of Government revenue. This Touzi formerly belonged to Syed Kasim Ali whose heirs and legal representatives are the Defendants. After his purchase the Plaintiff, it was alleged, lost his only son, [illegible] given out on pilgrimage to Benares; [illegible] showed [illegible] and therefore [illegible] necessary to [illegible] the possession of it. The [illegible] is granted [illegible] also was [illegible] 17 in [illegible] ground relating [illegible] the [illegible] party Satk[illegible] Das [illegible] February [illegible] The [illegible] had commenced [illegible] there was some [illegible] consequence [illegible] revenue and it was [illegible] required [illegible] been [illegible] Dhari for Rs. 1,22[illegible] fully [illegible] 1903. After the deduction [illegible] Government demands, Rs. 1,220-2-3 remained in deposit in the Collectorate as surplus sale-proceeds. The Defendants, it was alleged by the Plaintiff, having found the Plaintiff overwhelmed with grief and taking advantage of the same, withdrew from the Mozufferpur Collectorate the entire surplus sale-proceeds on 9th February 1906 on the strength of their ancestor's name being on the record. The Plaintiff alleged that when he came back from pilgrimage and made enquiry he came to know on the 15th January 1911 of the fraudulent proceedings taken by the Defendants and

(1) I. L. R. 32 Cal. 527 (1905).
(2) 17 Ind. Cas. 351 (1912).

HARIHAR MISSER *v.* SYED MOHAMED.

therefore filed the present suit on 6th February 1912 for the recovery of the amount together with interest. The defence *inter alia* was that the suit was barred by limitation and that it was not true that the Plaintiff became aware of the withdrawal of the money in January 1911. The Subordinate Judge held that there was no reliable evidence in the record to support the Plaintiff's averment that he came to know that the Defendants withdrew the money in January 1911 and that the Subordinate Judge was not prepared to believe the story. He further held that Art. 62 applied to the case and dismissed the suit. On appeal the District Judge confirmed the judgment of the Primary Court. The Plaintiff thereupon preferred this second appeal.

[illegible] *roshi Charan Mitra* and the Ap[illegible] had [illegible] *Jaddit Sin*[illegible] *Sukh Bakuntho Nath* [illegible] existing law o[illegible] he su[illegible] rt. Besides, as i[illegible] urned [illegible] construction of cl. (3) o[illegible] ec. 50 of the Bengal Tenancy Act, it ha[illegible]s o bearing [illegible] the case before us.

[illegible] the view I take of the effect of [illegible]n is [illegible] chase of the tenure by the pred[illegible] and no [illegible] interest of the [illegible]ssed under Or. XXII, r. [illegible] granted to [illegible] setting aside that abatement [illegible] appellant died on the 29th August 1914, and the application made for substitution before the Registrar was filed on the 6th March. It is patent, therefore, that when that application was made to the Registrar the appeal had actually abated and should have been struck off the file, to be restored only after proceedings in due form under r. 9 of Or. XXII. The application for substitution was therefore made in wrong form. It appears to have been treated, however, by the Registrar as an application for the restoration of the appeal upon the file; notices were issued to the Respondents, and they did not put in any objection before the Registrar to the hearing of the appeal. We have, therefore, in considering this application, dealt with it as an application to set aside an order of abatement, and having regard to all the facts of the case, are satisfied that the Appellant was prevented by reasonable cause from making the substitution in due time. We therefore direct that the abatement be set aside and the appeal heard upon its merits.

The facts of the case upon the merits are, that the Appellant was the purchaser in auction sale of a revenue-paying estate. He defaulted in payment of the revenue, and almost immediately after his purchase the estate was again brought to sale. The original owner remained on Register D as the proprietor of the estate, no attempt being made by the Plaintiff to obtain substitution of his name. Taking advantage of this fact, the Defendant withdrew the sale-proceeds lying in the Collectorate. The Plaintiff therefore instituted this suit for the recovery of the money paid to the Defendant by the Collector.

The Plaintiff instituted his suit more than three and less than six years from the date of the payment. There has been a definite finding of fact by the lower Courts, that the position of the Plaintiff was such that he could not possibly have been kept out of knowledge of the payment to the Defendant, and his right to sue thereon, by any fraud of the Defendant. The sole question for decision is—Does Art. 62 or Art. 120 of the *Limitation* Act apply? The argument of the learned Vakil for the Appellant is, that it cannot be said that money has been paid to the Defendant for the use of the Plaintiff, unless there was a deliberate intention on the part of the Defendant to accept the money for the Plaintiff's use. He contends, that Art. 62

is inapplicable. In putting forward this argument the learned Vakil has the whole case-law of India against him. It is not a question of the Defendant's intention in taking the money. He undoubtedly intended to rob the Plaintiff and intended to keep the money for his own use. But this is not the point. The point is, for whose use did the party making the payment intend the money? The greater number of the cases before us are suits upon mortgage deeds, in which the right of the Plaintiff was known to the mortgagor paying in redemption, and this, in fact, was the position in the case of *Muhammad Wahib* v. *Muhammad Ameer* (1). An attempt is made to distinguish that case and the analogous cases from the present case, on the ground that the Collector, who paid the money to the Defendant, neither knew nor cared anything about the Plaintiff's rights. A case actually in point is before us in *Lachmi Narain Singh* v. *Dhanukdhari Prasad Singh* (2). This was a decision by a Divisional Bench of the Calcutta High Court, and it is binding upon this Court until dissented from by a Full Bench. We are in entire agreement with the conclusions arrived at in that case. The Collector, though he may have been ignorant of the Plaintiff's rights, paid the money to the Defendant, not because he was the owner, but because under sec. 31, Act XI of 1859, he was bound by law to pay the money to the recorded proprietor or his heirs or representatives. The Collector must have been fully aware of the right of the owner to ultimately recover and enjoy the money. We must take it as reasonable to suppose that he handed the money to the Defendant with the intention that it should be made over to the real owner, if, indeed, that real owner was other than the recorded proprietor.

We are of opinion, therefore, that not only is the case governed by the case that we have quoted, but also that that case is in accordance with the whole trend of case-law throughout the Courts of India, that money paid to one party with the implied intention that it should finally reach the hands of the party to whom it actually belongs, is money, within the meaning of Art. 62, paid to that party for the use of the actual person in whom the right to receive it vests.

The appeal is dismissed with costs.

A. K. R. *Appeal dismissed.*

(1) I. L. R. 32 Cal. 527 (1905).
(2) 17 Ind. Cas. 851 (1912).

PATNA HIGH COURT.

APPELLATE JURISDICTION.

FROM ORIGINAL DECREE.

478 OF 1913.

Application for probate of compromise between propounder and objector dividing testator's property—Probate case decided on such compromise without proof of Will, whether legal—Civil Procedure Code (Act V of 1908), Or. XXIII, r. 3—Sec. 83, Probate and Administration Act (V of 1881).

There can be no dismissal of a probate case in accordance with the terms of a petition of compromise between the propounder and objector. The main issue in such a case is whether or not the Will has been proved and the only effect of a compromise is to reduce a contentious proceeding into one which is not contentious, but this does not absolve the Court from the

task of either granting probate or refusing it. If a compromise has been made and the objector withdraws from the contest, the Court will grant probate in common form, but the Court cannot dismiss the case altogether and embody the terms of the compromise as if the decree was one capable of execution by him.

Sec. 83 of the Probate and Administration Act read with Or. 23, r. 3, C. P. C., merely means that in a probate case the Civil Procedure Code so far as possible determines the procedure of the Court. These sections nowhere say that it is competent to the Court to allow the parties to divide the testator's property without proving the Will.

KUNJA LAL CHOWDHURY *v.* KAILASH CHOWDHURY (1), ... SARODA ... ASS *v.* GOBINDO ... *dit Sinha* (2) ... *to* ... existing law ... the su... was an appeal. Besides, as ... turned ... construction of cl. (3) ... sec. 50 of the Bengal Tenancy Act, it has ... no bearing ... the case before us. ... the view we take of the effect of ... chase of the tenure by the pred... interest of the *Dath Sinha* for the Appeal granted to.

Mr. ... Prasan Mukerjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MULLICK, J.—Rudra Nand, Kula Nand and Tirtha Nand were three brothers of a Mitakshara family, living joint in food and worship. It is alleged that Kula Nand separated from the joint family about twenty years before the Will, which is the subject of the case before us.

Rudra Nand died on the 14th of June 1911, leaving a Will alleged to have been executed on the 9th of June 1911. Probate of the Will was applied for by Gira Nand and Gaja Nand, sons of Tirtha Nand, on the 6th of December 1911. On the 18th May 1912, Janakbati, the widow of Rudra Nand, filed an objection attacking the Will as a forgery. On the 18th of August 1912 a petition alleged to have been signed by Janakbati was filed before the Court stating that she and the propounders had agreed to divide the testator's property and praying that the application for probate might be dismissed on compromise without decision. It appears that on the same day another petition purporting to have been signed by Janakbati was filed before the Court stating that the petition of compromise had not in fact been signed by her.

On the 25th of May 1912 the learned District Judge framed the following issues for determination :—

1. Is the Will propounded by the Plaintiffs genuine?

2. Was the testator Rudra Nand Thakur in a sound disposing state of mind when he is alleged to have executed the said Will?

3. Are the Plaintiffs entitled to probate as prayed?

But on the 19th of August 1913 he disregarded the issues framed on the 25th of May 1912 and addressed himself only to the two following issues :—

1. Can this case be disposed of in terms of the petition of compromise?

2. Did Mussammat Janakbati sign the petition of compromise with full knowledge of its contents after it was written?

The learned District Judge took evidence upon the two issues above mentioned and found that inasmuch as the objectrix had with full knowledge signed the petition of compromise, she was no longer competent to resile from the same. He accordingly

(1) 14 C. W. N. 1068 (1910).
(2) 18 C. L. J. 91 (1910).

ordered the case to be dismissed in terms of the petition of compromise. The learned District Judge's decree is to the same effect and after reciting that the case is dismissed in accordance with the petition of compromise it proceeds to embody in it the full terms of that compromise. The present appeal before us is preferred by the objectrix who asks that the case should be remanded in order that the execution of the Will may be proved in solemn form.

It is quite clear and the learned Vakil for the Respondent admits that the learned District Judge's order, as it stands, cannot be supported. In a probate case a decree such as that passed by him is meaningless. There can be no dismissal of a probate case in accordance with the terms of a petition of compromise. The main issue in such a case is whether or not the Will has been proved and as has been pointed out in several decisions in the Courts the only effect of a compromise is to reduce a contentious proceeding into one which is not contentious; but this does not absolve the Court from the task of either granting probate or refusing it. If a compromise has been made and the objector withdraws from the contest the Court will grant probate in common form but the Court cannot dismiss the case altogether and embody the terms of the compromise as if the decree was one capable of execution by him.

The learned Vakil for the Respondent relies upon Or. XXIII, r. 3 of the Civil Procedure Code read with sec. 83 of the Indian Probate and Administration Act. But these sections merely mean that in a probate case the Civil Procedure Code so far as possible determines the procedure of the Court. These sections nowhere say that it is competent to the Court to allow the parties to divide the testator's property without proving the Will.

The cases of *Kunja Lal Chowdhury* v. *Kailash Chandra Chowdhury* (1) and *Saroda Kanta Dass* v. *Gobindo Mohan Dass* (2), carry the case of the Respondent no further. In the first of these two cases it was no doubt laid down that when probate has been given in common form upon the filing of a petition of compromise by the objector it will no longer be open to the same objector to re-open the proceedings by way of revocation. But the learned Vakil for the Respondent has been unable to show any case which goes so far as to say that before probate is given by the Court it is not open to the objector to insist upon the proof of the Will. The view of the learn[illegible] given in [illegible] County [illegible] go to have been that [illegible] showed [illegible] 28[illegible] b[illegible] 1912 the object[illegible]ssary to [illegible] the [illegible]romise it was not. The [illegible] granted o[illegible] from it ex[illegible]. [illegible] 17 in the [illegible] ground relate[illegible] the [illegible] the [illegible]rth party Satk[illegible] on the [illegible]bruary [illegible] [illegible] [illegible] may [illegible] there was some [illegible] consequence [illegible] the objectrix had come [illegible] requ[illegible]een t[illegible] her objection but it is [illegible]een fully [illegible]on the 19th of August 191[illegible] withdrawn that petition and that she was insisting upon the trial of the issue whether the Will had been duly executed. She was not estopped from withdrawing her objection and from asking that the Will should be proved in solemn form. This being so the Order and Decree of the lower Court must be set aside and the case remanded for disposal according to law. The objectrix will have a chance of contesting the genuineness of the Will and if she fails probate must be given in

(1) 14 C. W. N. 1068 (1910).
(2) 12 C. L. J. 91 (1910).

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Calcutta Weekly Notes.

Vol. XX.] MONDAY, JULY 3, 1916. [No. 32.

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Appeal in bad livelihood cases.

Chap. VIII of the Code of Criminal Procedure deals with security for keeping the peace and for good behaviour, secs. 106 and 107 providing [illegible] of the former and secs. 108, 109 [illegible] latter class. The [illegible]sa and [illegible]um [illegible] I had [illegible] a bond for keeping [illegible] *dit Sin[illegible]* ca[illegible] v. *Su[illegible]* under sec. 106 existing law o[illegible] a[illegible] the su[illegible] maximum perio[illegible] the su[illegible] of bond [illegible]rt. Besides, as [illegible] th[illegible] turned [illegible] t[illegible]nstruction of cl. (3) of bo[illegible] sec. 50 of the Bengal Tenancy Act, it has W[illegible] no bearing [illegible] the case before us.

[illegible]trat[illegible] [illegible]a the view I take of the effect of [illegible]e pe[illegible] [illegible]chase of the tenure by the pred[illegible]ur [illegible]ter [illegible]nterest of the D[illegible]ear, such M[illegible]ich person does not furnish th[illegible] granted to [illegible]red, issue a warrant directing him [illegible] it is [illegible]ined in prison pending the orders of the Sessions Judge and the proceedings shall be laid as soon as conveniently may be, before such Court and such Court after examining the proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary may pass such order on the case as it thinks fit. (Sec. 123). On a reference under sec. 123 the Sessions Judge is bound to come to a decision on the merits of the order demanding security (*In re Gagan Chandra Dass*, 12 C. W. N. 463) and his order should on the face of it show that he has considered the case of each of the accused, if there are several, on the merits and separately from that of the others (*Kalu Mirza*, I. L. R. 37 Cal. 91). Any person ordered by a Magistrate other than the District Magistrate to give security for good behaviour under secs. 108, 109 and 110 may appeal to the District Magistrate irrespective of the period for which the bond has been ordered to be executed. Now a person against whom an order has been made by a Magistrate other than the District Magistrate to execute a bond for good behaviour under sec. 110 for a period exceeding one year has the right to appeal to the District Magistrate under sec. 406 but whether or not he exercises the right of appeal the matter goes to the Sessions Judge under sec. 123. Both the Sessions Judge and the District Magistrate have power to decide the case on the merits. What are the two Courts to do if the case is pending before both on appeal and reference respectively?

Is it incumbent in such a case on the person ordered to furnish security to file an appeal before the District Magistrate? The importance of this question becomes apparent on a reference to sec. 439, cl. 5, which lays down that where under the Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. Now, if in a case coming within the purview of sec. 123 no appeal is preferred to the District Magistrate and the order for bond is affirmed by the Sessions Judge on reference, would an application to the High Court in revision be barred under cl. 5 of sec. 439? Surely it should not, but the whole difficulty is caused by the anomalous provisions of secs. 123 and 406 and the obvious remedy is to amend sec. 406 and make the appeal lie to the Sessions Judge instead of to the District Magistrate.

The previous history of the sections show that this was the provision in the first Code of Criminal Procedure that was passed. Any person convicted on a trial held by a Magistrate of the first class may under sec. 408 appear to the Sessions Judge and by the law as it stood in sec. 409 of the Code of 1861 an appeal lay

to the same Court in cases of security for good behaviour also. In passing the Code of 1872 the legislature showed great anxiety to lay down clearly the position in which the Subordinate Magistrates stand to the District Magistrate and in going to emphasise the responsibility of that officer for the peace and order of the district enacted that appeals from orders by Magistrates to furnish security for good behaviour shall in every instance lie to that officer. The result has been the anomaly noticed above. It is to be hoped that in amending the Code of Criminal Procedure, which is likely to be done in the near future, the legislature will make the necessary alterations.

Curtailment of the jurisdiction of the higher Courts has always been condemned and no one would suggest the taking away of the powers of the Sessions Judge under sec. 123 and making the District Magistrate the only appellate authority in such cases. There is much to be said against this for it is well known that in all important bad livelihood cases the District Magistrate as the head of the police controls the investigation and initiation of proceedings. Then as regards the position of the District Magistrate as the officer responsible for the peace of the district the suggested alteration giving the appellate powers under sec. 406 to the Sessions Judge will not in any way be derogatory to him inasmuch as under sec. 125 of the Code, as it now stands, he will have power to cancel any bond whether for keeping the peace or for good behaviour executed by order of any Court in his district not superior to his own and the powers of the District Magistrate under this section have been interpreted to be full plenary powers (*Nabu Sirdar*, I. L. R. 34 Cal. 1 : s. c. 11 C. W. N. 25 F. B.) entitling him to cancel the bond even on other grounds than that it is no longer necessary.

New rules for the enrolment of Advocates of other High Courts as Advocates of the Calcutta High Court.

We publish below some new rules passed by the Calcutta High Court which came into effect from the 1st of July last regarding the conditions of enrolment of advocates enrolled in any other High Court in India seeking enrolment in the Calcutta High Court. Of course the general condition of enrolment in the Calcutta High Court is that one must be either an English barrister or an Irish barrister or a Scotch advocate. The new rule requires that besides the above if any such person is enrolled as an advocate in any other High Court in India he must in his application for being enrolled in the Calcutta High Court give an undertaking to have his name removed from the roll of the High Court to which he belongs within three months of his admission to the Calcutta High Court. It would seem that the rule has been necessitated by the newly-framed rules of the Patna High Court which however restricts only the advocates of the Calcutta High Court from being enrolled as advocates of the Patna High Court unless he has removed his name from the rolls of the former High Court from the commencement of the Long Vacation of 1917.

The orders of the Calcutta High Court are evidently not to have any retrospective effect. Until Long Vacation, 1917, advocates and vakils of the Calcutta High Court have been given liberty under the Patna High Court Rules to enrol themselves un[illegible] given [illegible]ally but at the[illegible]gu[illegible]mencement of the [illegible] showed [illegible]tion, 19[illegible]ed [illegible]st exercise their [illegible]ssary to [illegible]n- [illegible] b[illegible] the [illegible] of either of the H[illegible] [illegible]d *Additi*[illegible]: ou[illegible] [illegible]f these rules ha[illegible]. The [illegible]d *fo*[illegible]s granted o[illegible]logy of [illegible]os. [illegible] *ion of* [illegible]d 7 in th[illegible] [illegible]en t ground relate[illegible] ad[illegible] the [illegible] th party Satka[illegible]s on 7[illegible] [illegible]bruary [illegible] [illegible] had [illegible]mme[illegible] [illegible] Hig[illegible] there was some [illegible]nsequence [illegible] Side of the Calcutta[illegible]he requi[illegible]en th[illegible] he be otherwise qualified t[illegible]een fully m[illegible]s an Advocate of the Calcutta [illegible] also on the Original Side and in the Court taking appeals from the Original Side. We discussed the question in our editorial columns some months ago and cited instances when such permission had been given in the Calcutta High Court as a matter of course. We shall be glad to see the other High Courts in India adopt this new rule as that would set at rest the controversy that is sometimes raised in connection with the question.

The Calcutta High Court Order referred to above is as follows:—

It is ordered that the following additions to the Rules of the High Court, 1914, be read and passed as Rules and Orders of the High Court of Judicature at Fort William in Bengal, to take effect from the first day of July 1916.

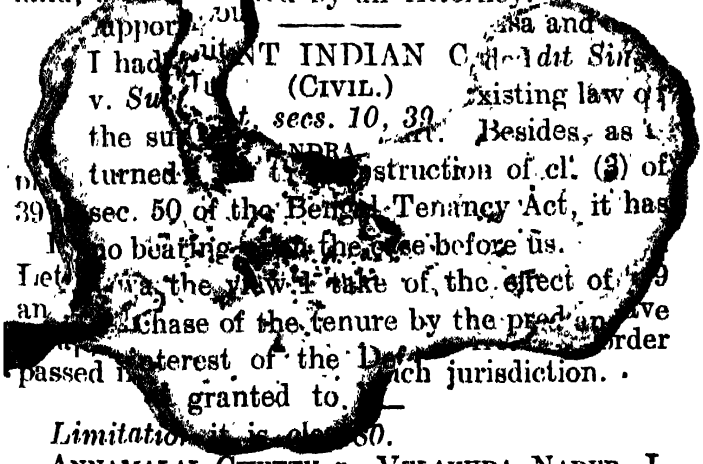
The following further proviso to be added to Rule 1 of Chapter I :—

" Provided further that an Advocate of any other High Court in India, who is otherwise eligible under the Rules contained in this Chapter, may be admitted as an Advocate of this Court, upon his undertaking in his application to have his name removed from the roll of Advocates of the High Court to which he at the time belongs, within three months from the date of his admission to this Court.

In the event of such undertaking not being carried out the Court may direct that the Advocate's name be removed from the roll."

The following rule, to be numbered 1A, be added after Rule 1 of Chapter II :—

" *Rule 1A.*—An Advocate of any other High Court in India may, with the permission of the Chief Justice, appear and plead for parties on either side of the Court, but, on the Original Side or in appeals from the Original Side, not unless he is an English or Irish barrister, or a member of the Faculty of Advocates in Scotland, a[illegible]ted by an Attorney."



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v. Su[illegible] (CIVIL.) existing law o
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granted to [illegible].

Limitation—it is [illegible]80.

ANNAMALAI CHETTY *v.* VELAYUDA NADER, I. L. R. 39 Mad. 129 (F. B.).

A suit on a promissory note payable on demand but accompanied by a writing postponing the right to sue for ten months is governed by Art. 80 and time begins to run from the expiry of the period fixed by the accompanying writing.

Notes of Cases.

ENGLISH LAW COURTS.

CHANCERY DIVISION.—Before MR. JUSTICE SARGANT. *MacConnell v. E. Brill & Co., Ltd.* 11th May 1916.

Companies Consolidation Act, sec. 69 and Art. 49, Table A—Sec. 129 (3) of Companies Act, 1862—Notice of Meeting to Shareholders of the Company, its sufficiency for an extraordinary meeting or resolution—Interim injunction.

The Plaintiff moved for an interim injunction to restrain the Defendants, the company and its directors, from acting on or carrying into effect a resolution passed at an extraordinary general meeting of the company, purporting to increase its capital.

The notice of the meeting simply said to each shareholder—

" You are kindly requested to attend an extraordinary general meeting, to be held at the above address on Friday, February 25th, 1916, at 12 noon.— Agenda : To pass resolution to increase capital of the company."

The resolution passed was :—

" That the capital of the company be increased to £3,500 by the creation and issue of 1,500 shares of £1 each."

The company was in part governed by Table A in the First Schedule to the Companies (Consolidation) Act, 1908, and cl. 41 of that table, which was applicable, is as follows :—

" The directors may, with the sanction of an extraordinary resolution of the company, increase the capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe." It was urged for the Plaintiff, that the notice was insufficient (1) because it did not specify the resolution which was actually passed, and (2) that it did not state the intention to pass the resolution as an extraordinary one.

MR. JUSTICE SARGANT said :—As regards the first objection, it is obvious that the notice signifies merely an intention to propose some increase or other in the capital of the company, and not an intention to make the specific increase embodied in the resolution that was actually passed. It seems to me that shareholders should be protected in matters of this kind by specific notice of what is intended to be done. And there is a marked difference between the very definite language in this respect of sec. 69 of the Act of 1908 and the much looser and general language of Art. 49 in Table A with regard to notice of any special business that is proposed to be transacted at a meeting of the company. In the latter case notice is required only of the general nature of any special business to be transacted, while in the case of an extraordinary resolution the notice has to specify the resolution.

As to the second objection, nothing can be clearer than the very precise language of

sec. 69, which requires, in the case of an extraordinary resolution, that the notice shall specify the intention to propose the resolution as an extraordinary resolution. So clear, indeed, is the language that it was at one time doubted, until the doubt was dispelled in *In re Penarth Pontoon Slipway and Ship-Repairing Company* ([1911] W. N. 240), whether it had not become necessary, even for the validity of a special resolution under the Act of 1908, that the notice of the first meeting should contain words specifying the intention to pass the resolution at that first meeting as an extraordinary resolution. And in the case of an extraordinary resolution itself, the only reason suggested for doubting the necessity for inserting these words in the notice appears to arise from the decisions under sec. 129 (3) of the Companies Act, 1862.

But those decisions did not turn on any express definition of the phrase " extraordinary resolution " in the Act of 1862, but merely on the question whether the notice that had been sent gave shareholders sufficient warning that it was intended to put the company into liquidation by a single extraordinary resolution under sec. 129 (3) of the Act, rather than by the more normal process of a special resolution.

Further, as regards the whole subject of an extraordinary resolution, the present Act of 1908 differs materially from the Act of 1862. The definition in that Act of the expression " extraordinary resolution " was not a general one, and was used merely for the purpose of defining the method of winding up a company summarily under sec. 129 (3). But in the present Act the definition of an " extraordinary resolution " in sec. 69 is quite general, and extends at least to one new matter, namely, the provision in Art. 41 of Table A, as redrawn in 1906, and enacted in the same terms in 1908, as to increasing the capital of a company. It will be noticed also that, whereas the Act of 1862 first defined a special resolution and then defined an extraordinary resolution with reference to that first definition, the present Act first defines an extraordinary resolution and then defines a special resolution with reference to the definition of an extraordinary resolution.

No doubt the *primâ facie* presumption in the case of a Consolidation Act, such as the present Companies Act of 1908, is that the Legislature intended to reproduce the existing position, and my first inclination would be to hold that, as under sec. 129 (3) of the 186 Act, any notice is sufficient which sufficientl informs shareholders of the intention to ac by way of extraordinary resolution. But th *primâ facie* view must yield to plain words t the contrary. Accordingly, I grant an inte locutory injunction, until the hearing of th action, in the terms of the notice of motion.

Mr. Manning for the Plaintiff.

Mr. Bischoff for the Defendants.

B. D.

NOTICE.

The Judges have decided to print Weekl and Daily Lists of cases for hearing on th Appellate Side of the Court. It is hoped tha these Lists will be of considerable use t members of the legal profession and to th public and copies will be available for suppl to the profession and the public on paymen of the charges noted below.

2. The Weekly Cause List will contain list of the Appeals from Orders, Appeals fron Original Decrees and Appeals given Appellat Dep[illegible] each Group who showed [illegible] ed [illegible], and will be pu[illegible]ssary to [illegible] b[illegible] the Saturday precedin[illegible] The [illegible] Addit[illegible] our[illegible] slates. The W[illegible] The [illegible] and fo[illegible]s granted o[illegible] Nos. 2[illegible] tion of [illegible]17 in [illegible] the [illegible] e of [illegible] t ground relate[illegible] adj[illegible] the [illegible] th party Satka[illegible] February [illegible] The Class [illegible] had commence[illegible] [illegible] there was some [illegible] consequence [illegible] day [illegible] the requi[illegible]een the evening early as can be [illegible]een fully [illegible] the list before the day to w[illegible] for each Monday beinn[illegible] on the preceding Friday evening. The Daily Lists will contain only the number and year of each case with the names of the parties. The names of the Vakils can be ascertained by reference to the Weekly Lists.

4. The Weekly and Daily Lists will be supplied to regular subscribers at an inclusive rate of Rs. 3 a month payable (in advance) to the Accountant, Appellate Side, on the 1st of each month in the year, except October and November. Single copies will be supplied at the rate of 2 annas for each Daily List and 4 annas for each Weekly List, payable in cash only.

H. M. VEITCH,
Registrar,
Appellate Side,
30-6-16.

solemn form. If she withdraws her objection probate must be given in common form but the Court must do either one or the other of these two things. If she succeeds the application of the propounders will be dismissed. As regards the compromise alleged to have been made by the objectrix the Court has no greater power to enforce it than any other contract made out of Court.

The appeal is decreed with costs which will be according to scale.

KINGSFORD, J.—I agree.

A. K. R. *Appeal allowed.*

[PRIVY COUNCIL.]

[APPEAL FROM BENGAL.]

MAHARAJA RAM NARAYAN SINGH, since d[illegible]sa and [illegible] represe[illegible]dit Sing rajk existing law of [illegible]art. Besides, as [illegible] turned [illegible] t[illegible]struction of cl. (3) of sec. 50 of the Bengal Tenancy Act, it has no bearing [illegible] the case before us.

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cuted, if creates a charge —Per granted to h[illegible]***y if to be implied from fact that*** it is clea[illegible]***ntioned advance of money —Transfer of Property Act (IV of 1882), secs. 59, 67, 100.***

Held, *on the construction of a document which purported to be a usufructuary mortgage, but was not enforceable as such by reason of its not being attested as required by sec. 59 of the Transfer of Property Act, that the mortgagor did not intend that he should be personally liable to repay the advance and the Trial Court and the High Court erred in assuming from the mention in the document that a certain sum had been advanced that it might be inferred that it was the intention of the parties that the mortgagor should be personally liable.*

That the document did not create a charge within the meaning of sec. 100, Transfer of Property Act.

Appeal from a judgment and decree of the Calcutta High Court (Mookerjee and Carnduff, JJ.), dated 30th August 1911, which modified the decree of the Subordinate Judge of Hazaribagh.

The grandfather of the Appellant borrowed a large sum of money from the predecessor-in-title of the Plaintiffs-Respondents, and executed a Zarbharna deed, which is quoted in their Lordships' judgment. The deed provided that for the repayment of the loan with interest, the creditor was to be placed in possession of specified properties for a term of seven years, expiring on the 13th January 1903. The creditors remained in possession for the agreed term, but they complained that they were not able to satisfy the debt from the profits of the mortgaged properties by reason of a number of circumstances for which they blamed the Defendant. They instituted the present suit on the 13th January 1909, to recover the alleged balance of the debt from the properties specified in the deed, or in the alternative for a decree for money against the Defendant personally. The Defendant pleaded, *inter alia*, that under the terms of the deed there was no personal covenant to pay the debt. The Subordinate Judge held that the debt was not a charge upon the properties specified in the deed, but that the Defendant was personally liable to pay the same. He accordingly made a preliminary decree and referred to a Commissioner the trial of questions relating to the sum of money to which the Plaintiffs were entitled. On Defendant's appeal, the High Court held that the Subordinate Judge was not com-

was no personal promise to pay—express or implied. The creditor's remedy was to realize the money in the ways specified in the deed, and those only. *Kalka Singh* v. *Paras Ram* (3).

The Plaintiffs' suit on the causes of action alleged in the plaint were long barred by limitation.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal from an order of the High Court at Calcutta, dated the 30th August 1911, which set aside a preliminary decree of the Subordinate Judge of Hazaribagh, dated the 30th June 1910, in a suit brought upon a mortgage, and remanded the case to the Court of the Subordinate Judge to be dealt with in accordance with the directions contained in the judgment of the High Court. The Respondents, who are the Plaintiffs, have not appeared.

The deed upon which the suit was brought was made on the 14th April 1896, by Maharaja Nam Narayan Singh in favour of Rai Babu Jadu Nath Mukhurji, a Government pleader who had been employed as a pleader by the Maharaja. The consideration was Rs. 1,30,000 which were advanced by Jadu Nath Mukhurji to Maharaja Nam Narayan Singh. The principal moneys, together with interest, at the rate of 10 annas per centum per mensem, were to be repaid as provided by the deed, by and out of the rents and cesses of certain Mokurari villages of Maharaja Nam Narayan Singh, which were mortgaged with possession to Jadu Nath Mukhurji. A schedule to the deed shows how the repayment with interest was to be effected, and that on the determination, on the 14th January 1903, of the period for which the mortgage was granted, it was contemplated that the debt with interest would be satisfied, and a balance of Rs. 230-11-3 would be payable to the Maharaja by Jadu Nath Mukhurji. The total period for which the mortgage was granted was from the Sambat year 1953 to the Sambat year 1959, that is, from A.D. 1896 to the 14th January 1903, and the times when possession of the different Mokurari villages was to be given to Jadu Nath Mukhurji were specified.

Having regard to the claim which has been made in this suit, the following extracts from the deed appear to their Lordships to be of importance :—

"It is desired that the said pleader Zarbharnadar should realise in full his dues, principal with interest, by remaining in possession of each of the said given [illegible] due [illegible]ed [illegible] years and by c[illegible] showed [illegible]b[illegible] the[illegible]ses thereof. The [illegible]ary to [illegible] Addit[illegible] oth[illegible]d the manner in[illegible] The [illegible] fo[illegible]s granted o[illegible] will b[illegible]os. [illegible] on of [illegible] of [illegible]17 in th[illegible] [illegible] ground relate[illegible] adj[illegible] the [illegible] party Satk[illegible] [illegible] February [illegible] zil[illegible] [illegible] [illegible] had [illegible] [illegible] given [illegible] was some [illegible] consequence [illegible] Zarbharnadar should be requ[illegible]een th[illegible]ar from the Elakadars [illegible]een fully [illegible]ned in this deed in accord[illegible] above specifications. If any Elakadars or tenants mentioned in this deed put off paying the rents, etc., then it is and will be in the power of the said pleader Zarbharnadar to realise the same with interest, damages, and costs by instituting suits in Court in his own name as Zarbharnadar Plaintiff, with prayer for ejectment or in any other proper way. In case of ejectment, the said pleader Zarbharnadar will realise the Zarbharna money from the Kham Tehsil or from Thikadar of such village, and any amount of excess jumma resulting from the Kham jumma or Thikadari jumma in respect of the resumed villages over the jumma mentioned in the bond, whatever it may be, shall be paid on taking receipt by the

(3) L. R. 22 I. A. 68, 74 : s. c. I. L. R. 22 Cal. 434 (1894)

said Zarbharnadar or his heirs to me the executant, or my heirs, year after year. I, the executant, will give the thicca pottah of the resumed villages. The Zarbharnadar shall have no right to grant the thicca pottah of such villages. If, for any reason, the jumma of any village as mentioned in the bond decreases, the said Zarbharnadar shall be entitled to get from me, the executant, the amount of decrease with interest at the above-mentioned rate. After the expiry of the term of the Zarbharna, I, the executant, shall have the right to take possession of the resumed villages as well as of the other villages mentioned in this bond on account of the expiry of the term and redemption of mortgage, and the said pleader Zarbharnadar shall have no right whatever to the same.

"During the term of the Zarbharna, I, the executant, or my heirs and representatives [illegible] no account collect the rents [illegible] of the Zarbharna [illegible] and [illegible] I had [illegible] this bond. [illegible] *dit Singh* v. *Su[illegible]* Instake I, the exec[illegible] existing law of [illegible] the su[illegible] any collection. [illegible] liable [illegible]. Besides, as [illegible] turned [illegible] construction of cl. (3) of sec. 50 of the Bengal Tenancy Act, it has no bearing upon the case before us.

[illegible]a, the view I take of the effect of [illegible] chase of the tenure by the pred[illegible] ta-tives, [illegible] interest of the D[illegible] realisation and non-realisa[illegible] granted to [illegible] is made, it is and shall be [illegible] it is clear and void. The said pleader Zarbharnadar shall not be in any way liable for the Government revenue, Road and Public Works cesses or any other public demand. These things shall concern me, the executant. The sum of Rs. 230-11-3, the excess amount payable by the Zarbharnadar to me, the executant, in 1959, as stated in the account mentioned in this deed, shall be paid to me, the executant, on taking receipt by the said Zarbharnadar in Pous of the said year. In case of default on the due date aforesaid, interest at the above rate up to the date of realisation shall be paid on the excess amount by the Zarbharnadar."

The mortgage was in their Lordships' opinion an usufructuary mortgage within the meaning of sec. 67 (*a*) of the Transfer of Property Act, 1882, but as it was not attested by at least two witnesses, as required by sec. 59 of that Act, it was not enforceable as a mortgage. However, possession of the respective Mokurari villages was at the time specified in the mortgage given to Jadu Nath Mukhurji. Except in the events mentioned in the extracts which have been set out above, Maharaja Nam Narayan Singh did not bind himself personally to repay the mortgage money or any of it. The clear intention of the parties, to be inferred from the deed, was that the mortgage money should be repayable from the usufruct and not personally by the Maharaja. On the termination of the mortgage period possession of the Mokurari villages which had been mortgaged was given to the Maharaja or his representatives. Jadu Nath Mukhurji died in 1902.

On the 13th January, 1909, this suit was instituted against Raja Ram Narayan Singh, son of Maharaja Nam Narayan Singh who had died. The Plaintiffs, who claim to represent Jadu Nath Mukhurji, alleged in their plaint that Rs. 85,272-14-9 only had been realised under the deed, and prayed for the following reliefs:—

"(*a*) That a decree be passed for Rs. 1,57,985-5-3, or a decree be passed ordering, according to Or. XXXIV, r. 4, of the Code of Civil Procedure (1908), that (1) An account be taken of what will be due to the Plaintiffs for principal and interest on the bond (the mortgage deed) and for cost of the suit; that (2) Defendant do pay into Court the amount so due on a day within six months from the date of the decree; that (3) in default of payment as aforesaid the charged properties, as per Sch. B, or a sufficient part thereof be sold and the sale proceeds be applied in payment of what is declared due to the Plaintiffs as aforesaid,

together with subsequent interest and subsequent cost.

"(b) That if in the opinion of the Court the Plaintiffs be not entitled to a decree under Or. XXXIV, r. 4, a simple money decree for the amount of Rs. 1,57,985-5-3, or whatever may be due with cost and subsequent interest be passed against the Defendant, to be realised out of the properties which devolved on him after his father's death."

In order to understand the object and meaning of these alternative claims it must be mentioned that the Plaintiffs' case was that the deed of the 14th April, 1896, was not a usufructuary mortgage, but that it had created a charge within the meaning of sec. 100 of the Transfer of Property Act, 1882, upon the Mokurari villages. It had, however, been treated by Maharaja Nam Narayan Singh and Jadu Nath Mukhurji as a usufructuary mortgage, and under it Jadu Nath Mukhurji obtained and held possession of the Mokurari villages, and it contained the terms upon which the Rs. 1,30,000 were advanced, and the terms upon which that advance was to be repaid. That document certainly did not create a charge within the meaning of sec. 100 of the Transfer of Property Act, 1882; it was a usufructuary mortgage, which could not be enforced as a mortgage. Even if it could be regarded as an enforceable usufructuary mortgage the Plaintiffs could not, by reason of sec. 67 (*a*), institute a suit for sale based upon it.

Their Lordships are in this appeal placed in a disadvantageous position by reason of the Respondents not having appeared, but it is necessary for them to consider whether the Plaintiffs have in their plaint stated any cause of action which is shown by their plaint as maintainable and not barred by limitation, and for this purpose it is necessary to consider the causes of action which are alleged in the plaint and the agreement upon which the Rs. 1,30,000 were advanced, which is to be found in the document of the 14th April, 1896. The Subordinate Judge and the High Court have assumed from the mention in that document that the Rs. 1,30,000 had been advanced that it might be inferred that it was the intention of the parties that the Maharaja Nam Narayan Singh should be personally liable to repay the advance. Their Lordships do not draw that inference from that document. On the contrary, their Lordships draw the inference from that document that the Maharaja Nam Narayan Singh did not intend that he should be personally liable for the repayment of any portion of the money advanced except to the extent to which it showed [illegible] the events mentioned [illegible] which have been already [illegible] Nath Mukhurji. The [illegible] granted [illegible] 17 in the [illegible] ground related [illegible] the party Satka[illegible] February [illegible] there was some consequence [illegible] the requirements of Property Act, [illegible] fully [illegible] as a mortgage, Jadu [illegible] got possession under it of the Mokurari villages, and held possession for the agreed period.

The case, which the Plaintiffs attempted to make in the Courts below, was substantially based upon the existence of a personal liability in debt on the part of the mortgagor even after the determination of the period of the usufructuary mortgage and arising by implication from its terms. Since in their opinion this case fails, their Lordships think it unnecessary to discuss the other causes of action pleaded, which, though possibly

capable of being sustained in other suits if brought within the periods of limitation, are not established in the present suit. It is enough to add that their Lordships are not satisfied that any of these alleged causes of action, even if they were otherwise maintainable, were not barred by limitation when this suit was instituted.

An examination of the schedule attached to the plaint shows that the amount claimed is to a considerable extent composed of charges in respect of collection expenses, of costs of suits, of interest upon such collection expenses and costs, and of compound interest.

Lokendra Nath Mukhurji, a son of Jadu Nath Mukhurji, in his evidence stated that when his father died in 1902 all his books were with him, and they were found after his death, and [illegible] I had [illegible] cross-examination [illegible] suit he had depo[illegible] (usufructuary [illegible]. Besides, as [illegible] turned [illegible] construction of cl. (3) of sec. 50 of the Bengal Tenancy Act, it has no bearing upon the case before us.

[illegible] the view I take of the effect of [illegible] chase of the tenure by the pred[illegible] interest of the Def[illegible] His Maj[illegible] granted to h[illegible] appeal should be allowe[illegible] granted to h[illegible]r of the High Court and the preliminary decree of the Subordinate Judge should be set aside, and that the suit should be dismissed with costs throughout.

The Respondents must pay the costs of the appeal.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for the Appellant.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 87 OF 1914.

SANDERSON, C. J. WOODROFFE, J. MOOKERJEE, J. 1916, Heard, 2 and 24, January. Judgment, 24, January.	KETOKEY CHURAN BANERJEE and another, Debtors, Appellants, *v.* SREEMUTTY SARAT KUMARI DABEE, Creditor, Respondent.

***Presidency Towns Insolvency Act** (III of 1909)—Creditor, if includes his* benamdar—*Secs 12 (1) (a), 13—Secs. 8 (2) (b), and 86—Sch. II, secs. 25, 26, 27—Official Assignee, if may examine petitioning creditor's claim and remove his name*—Benamdar; *onus of proof of advances on own behalf*—*"Person aggrieved"—Admission by attorney; if binds client.*

It is open to the Official Assignee after the insolvency to examine the claim of the petitioning creditor and if he finds that in fact there is no debt due to the petitioning creditor he must strike out the name of such creditor from the list.

A benamdar *is not entitled to claim as a creditor in the insolvency. The persons who really advanced the moneys should come forward and prove their claims before the Court.*

MOOKERJEE, J.—*The term "creditor" in the Presidency Towns Insolvency Act does not include the* benamdar *of a creditor.*

Any person who makes an application to a Court for a decision or any person who is brought before the Court to submit to a decision is, if the decision goes against him, thereby a person aggrieved by that decision, within the meaning of that expression in sec. 86 of the Act.

An admission by an attorney, unless

KETOKEY CHURAN BANERJEE *v.* SREEMUTTY SARAT KUMARI DABEE.

satisfactorily explained away, furnishes cogent evidence against the client.

This was an appeal preferred on 4th December 1914 against the order of the Hon'ble Mr. Justice Chaudhuri made in the Insolvency Jurisdiction.

The facts and arguments appear sufficiently from the judgments of the Court.

Mr. N. N. Sircar (with *Mr. P. C. Sen*) for the Appellants.

Mr. H. D. Bose (with *Mr. A. N. Chaudhuri*) for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case the adjudication in insolvency was made on the 2nd of February 1912, upon the petition of Sarat Kumari Dabee. An application for the cancellation of the adjudication was made in March 1912, based, as I understand, on the ground that there was no debt due to Sarat Kumari Dabee, and this application for the cancellation of the adjudication was dismissed, and, therefore, the adjudication in insolvency stood. And, the first point taken by the learned Counsel appearing for Sarat Kumari Dabee was that inasmuch as the adjudication had been made upon her petition, it was not now open to the insolvents to question her right to claim in the insolvency as a creditor. I do not think that is a sound point for the reason that if we look at the sections of the second Schedule to the Presidency Towns Insolvency Act, secs. 25, 26 and 27, it is clear, to my mind, that after the adjudication of insolvency the Official Assignee is to examine every proof and the grounds of the debt and in writing to admit or reject it in whole or in part, or require further evidence in support of it: and, if he rejects a proof, he shall state in writing to the creditor the grounds of the rejection. In my opinion, it must be open to the Official Assignee after the insolvency to examine the claim of the petitioning creditor and if he finds that in fact there is no debt due to the petitioning creditor, he surely must say so and strike out his or her name from the list of creditors. For this reason I do not think that the first point taken by learned Counsel is a good one.

The second point which the learned Counsel for Sarat Kumari Dabee argued was that the learned Judge's judgment ought to be supported on the merits of the case. Now, it appears that the claim of the alleged creditor in the first instance was stated to be Rs. 8,000 and then subsequently it was increased to Rs. 15,641, and that appears to be the [illegible] of an account which appears [illegible] showed [illegible] is set out in the [illegible] to [illegible] the [illegible] have been in [illegible]. The [illegible] is granted [illegible] in the [illegible] of [illegible] 17 in [illegible] ground relate[illegible] the party Satk[illegible] February [illegible] these [illegible] had [illegible] and [illegible] was some [illegible] consequence [illegible] Kumari Dabee [illegible] required [illegible] been [illegible] by the learned Co[illegible]een fully [illegible]s for her that that mone[illegible]anced by her husband Surendra Nath Bannerjee, and was not her money at all. The second item which appears in that account is a sum of Rs. 14,498-13-6 pies: that appears to have been originally a debt due from the firm to Nogendra Nath Bannerjee, brother-in-law of the lady. That item was transferred from the account of Nogendra Nath Bannerjee in January 1909 to the account of the lady, and it is not suggested that any consideration passed for that transaction, and it is now admitted that that really was money advanced by Nogendra Nath, and the lady

in respect of that item was not in fact a creditor of the firm. Now, with regard to the rest of the items, when we once get it admitted that of these two items, the first represents a debt due to her husband and the second a debt due to her brother-in-law, it makes the Court particularly careful to require proof of the remainder of the items. The lady has not been called as a witness. She has not come forward to say that she advanced those moneys. Her husband has not been called as a witness to say that the money was his wife's, and, the result is that I am led to think that this account is not an account of the lady at all : it is partly an account of her husband and partly an account of her brother-in-law. In addition to the reasons which have been given by [illegible] Assignee in his judgment, supported [illegible] and [illegible] I had cited [illegible] statement of the law in *Siddit Singh* v. *Sukh* [illegible] the judgment at [illegible] existing law of [illegible] the subject [illegible] this is that [illegible] Besides, as [illegible] turned [illegible] the construction of cl. (3) of sec. 50 of the Bengal Tenancy Act, it has no bearing [illegible] the case before us.

[illegible] the view I take of the effect of [illegible] chase of the tenure by the pred[illegible] interest of the Def[illegible] their claim [illegible] granted to h[illegible]. It is right that the p[illegible] it is clear [illegible] ally advanced the moneys should come forward and prove their claims to the Court. As between them and the firm and other creditors in the case different questions may arise than what would arise between the lady and the firm and other creditors of the firm.

There is only one other point which has been urged by the learned Counsel and that is that inasmuch as the lady, if she was in the position of a *benamdar*, could sue for the money, she is entitled to claim as a creditor in the insolvency.

Speaking for myself, I do not think that is so; she is not in the position of a trustee or executor, to which reference was made by learned Counsel and in the absence of evidence as to her real position it must be assumed that the lady was simply a conduit pipe for the money being advanced, and in all probability she knew nothing of the money being advanced, and her name was taken merely as a blind for the real transaction that had taken place, and I do not think that this last contention is a good one.

For these reasons I think this appeal should be allowed and the order of the Official Assignee should be restored with costs both of this Court and the Court below, and the name of Sarat Kumari Dabee should be removed from the list of creditors.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—I agree that the order of Mr. Justice Chaudhuri cannot be supported. The appeal has been preferred by three persons who were adjudicated insolvents on the 2nd February 1912 at the instance of the Respondent. An endeavour was made to have the adjudication annulled, but as the conditions imposed by the Court were not fulfilled, the attempt proved infructuous. The appeal to Chaudhuri, J., was preferred under sec. 86 of the Presidency Towns Insolvency Act against a decision by the Official Assignee that the Respondent is not a creditor of the insolvents as she asserts, but a *benamdar* for her husband's brother who is alleged to have been a partner of the insolvents. The present appeal has been preferred under sec. 8, cl. (2) from the order of Chaudhuri, J., who reversed the decision of the Official Assignee.

The preliminary objection taken on behalf of the Respondent to the competency of this appeal has been overruled on

the principle that any person who makes an application to a Court for a decision or any person who is brought before the Court to submit to a decision, is, if the decision goes against him, thereby a "a person aggrieved by that decision" within the meaning of that expression in sec. 86 [*Ex parte Official Receiver* (1) and *In re Lamb* (2)].

As regards the merits the decision of Chaudhuri, J., has been sought to be supported on three grounds:—*First*, that it is not now open to the Appellants to assert that the Respondent is not their creditor, inasmuch as an order for adjudication has already been made at her instance on the basis that she was a creditor; *secondly*, that even if it be found, as was held by the Official Assignee, that she was not a real creditor but a *benamdar* of her husband's brother, who at one time was a partner of the firm of the insolvents, she was entitled to rank as a creditor in the proceedings; and *thirdly*, that the evidence establishes that she was not a *benamdar* of her husband's brother as alleged by the insolvents.

As regards the first point, I am of opinion that the provisions of the Insolvency Act taken together indicate with reasonable certainty that it cannot possibly be supported. If the contention of the Respondent were to prevail, the result would follow that when an adjudication order has been made at the instance of a person claiming to be a creditor whose debt exceeded the statutory amount, it would not be open to the Official Assignee, on the investigation to be held thereafter, to find that the amount due to the petitioning creditor was smaller than that mentioned in sec. 12 (1) (*a*). But secs. 12 and 13 read with the provisions contained in the second Schedule for investigation and proof of the claim of a creditor, make it obvious that this was not intended by the Legislature. I hold, accordingly, that the Official Assignee was competent to come to the conclusion he did, namely, that nothing was due to the Respondent as a creditor of the insolvents.

As regards the second point, I am of opinion that the term "creditor" in the Presidency Towns Insolvency Act does not include a *benamdar* of the creditor. The Respondent has argued that as it has been ruled by the Judicial Committee [*Gopee Krist* v. *Gunga Persaud* (3)] that a *benamdar* for the real creditor can maintain a suit for recovery of the money, he is equally competent to pose as a creditor in Insolvency proceeding[illegible] clearly [illegible]gn that we should [illegible]showed [illegible]his [illegible]ed [illegible]. The ordinary m[illegible]ary to [illegible]b[illegible] the [illegible]itor" is that he [illegible]. The [illegible]s granted o[illegible]payable. [illegible]os. [illegible]17 in th[illegible]n [illegible] ground relate[illegible]ad[illegible] the party Satk[illegible]s m[illegible]ordinary [illegible] Bliss [illegible] had [illegible] there was some [illegible]consequence [illegible] *benamdar*, while requ[illegible]een t[illegible]ted, may conclude th[illegible]een fully [illegible]ut this does not justify t[illegible] that the term "creditor," as used in the Presidency Towns Insolvency Act, includes the *benamdar* of a creditor. A *benamdar* is merely a name lender, a mask for the real owner, and is, undoubtedly, not in the position of a trustee; the view cannot consequently be maintained that, although the money is established to be not really payable to the person who pretends to be a creditor of the insolvent, yet such person should be allowed to rank as a creditor in insolvency proceedings, merely

(1) 13 Q. B. D. 174; 4 Morrel 235 (1887).
(2) [1894] 2 Q. B. 805; 1 Manson 395.
(3) 6 M. I. A. 53, 72 (1854).

because the transaction took place in his name.

As regards the third point, there is no room for reasonable doubt that the Respondent is not a creditor of the insolvents. Our attention has been drawn to the circumstance that an account was opened in the name of the Respondent as early as the 18th March 1906, and that, so far as the evidence goes, a sum of Rs. 2,487-8-6 pies was advanced by her to the partnership concern. It has not been maintained, however, that this was her own money, for it has been conceded on her behalf that the money really belonged to her husband, Surendra Nath Bannerjee.

Another sum of Rs. 14,233-13-6 pies, it is plain from the accounts placed before us, originally constituted a debt payable by [illegible] partnership concern to N[illegible]ra and others. I had [illegible]jee. On the 10th [illegible]dit Singh v. Sub[illegible]um was transferred [illegible]xisting law of the su[illegible] Respondent. Besides, as [illegible]turned [illegible] the construction of cl. (3) of sec. 50 of the Bengal Tenancy Act, it has no bearing [illegible] the case before us. [illegible]a, the view I take of the effect of [illegible]chase of the tenure by the pred[illegible]and be[illegible]terest of the Def[illegible]mother, and his sis[illegible] granted to h[illegible]sent Respondent: Mr. Bo[illegible] it is clear [illegible]iated the effect of such admission, which, until satisfactorily explained away, furnished cogent evidence against the Respondent: [*Slatterie* v. *Pooley* (4) and *Chandra Kunwar* v. *Narpat Singh* (5)]; he was consequently constrained to present her case before us on the basis that this transfer was a *benami* transaction, and that in respect of this sum, which ultimately found its way into the account of the Respondent, she was a *benamdar* for her brother-in-law. He argued, however, that in the absence of evidence to show the source of the subsequent advances to the partnership firm, the inference should be drawn that they were the moneys of the Respondent in the sense that they were the moneys of her husband. In my opinion, this inference cannot legitimately be drawn in favour of the Respondent. The essence of the matter is that her account opens with two sums, Rs. 2,487-8-6 pies and Rs. 14,233-13-6 pies respectively; in respect of one of these sums, the lady was a *benamdar* of her husband, while in respect of the other, she was a *benamdar* of her brother-in-law. True it is that there is no evidence of the source of the subsequent advances, but in the absence of tangible proof, we cannot assume that those sums belonged rather to her husband than to her brother-in-law. There is further significant admission by Nogendra Nath Bannerjee that he and his brother Surendra Nath Bannerjee are joint, and this account may lend some support to a possible theory that both the brothers used the name of the Respondent as their *benamdar*. But whatever the real state of affairs may be, one cardinal fact is established beyond controversy, namely, that the Respondent is not a creditor of the insolvents. How much of the sum which stands in her name is her husband's money and how much thereof is her brother-in-law's money, we do not know; but if she be not a creditor of the insolvents, as I hold she is not, the conclusion is irresistible that her name must be removed from the category of the creditors of the insolvents in these proceedings. This, it may be added, will not debar either Nogendra or Surendra from taking such steps as they may be advised to adopt for the establishment of their claims, if any, as against the insolvents.

(4) 6 M. & W. 664, 669 (1840).
(5) L. R. 34 I. A. 27: s. c. I. L. R. 29 All. 184; 11 C. W. N. 321 (1906).

KETOKEY CHURAN BANERJEE *v.* SREEMUTTY SARAT KUMARI DAREE.

Babu K. N. Ganguli, Attorney, for the Appellants.

Babu Subodh Chandra Mitter, Attorney, for the Respondent.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1354 OF 1913.

SANDERSON, C. J. NEWBOULD, J. 1916, 17, March.	KALI PRASANNA SIL Plaintiff, Appellant, *v.* PUNCHANAN NANDI CHOWDHURY and ors., Defendants, Respondents.

***Civil Procedure Code** (Act V of 1908), Or. 23, r. 1 (b)—Suit dismissed by trial Court, on evidence allowed to be withdrawn with liberty to sue again by appeal Court, though no formal defect by reason of which suit might fail was made out—Fresh suit if barred*—Res judicata.

Where a contested suit, in which evidence was called on both sides, having been dismissed by the trial Court, the Plaintiff was allowed by the Appellate Court to withdraw from the suit with liberty to bring a fresh suit, though no formal defect by reason of which the suit would fail was made out and really because the Plaintiff was unable to produce the necessary evidence in time:

Held—*That the order of the Appellate Court was made without jurisdiction and a subsequent suit in respect of the same property and in which the same relief was prayed for was barred by the rule of* res judicata.

The "sufficient grounds" for permitting withdrawal with liberty to bring a fresh suit on the same cause of action referred to in cl. (b) of r. 1, Or. 23 of the Civil Procedure Code must be something of the same nature as the "formal defect" mentioned in cl. (a).

KHARDA CO., LD. *v.* DURGA CHARAN CHANDRA (1) *and* MABULLA SARDAR *v.* HEMANGINI DEBI (2) *followed.*

This was an appeal from a decision of Babu Ashutosh Banerjee, Subordinate Judge of Burdwan, dated the 12th September 1912, confirming a decision of Babu Binod Bihari Mukerjee, Munsif of Kalna, dated the 16th January 1912.

The facts of the case will appear from the judgment.

Babus Mohendra Nath Roy, Jadunath Mondle and *Monmotha Nath Roy* for the Appellant.

Babus Baranosibasi Mukherjee and *Biraj Mohun Majumdar* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This [illegible] showed [illegible] argument of the learned [illegible] to the [illegible] of Burdwan ma[illegible] The [illegible] was granted on the [illegible] 1913, in [illegible] Nos. [illegible] 17 in the [illegible] ground related [illegible] the party Satk[illegible] February [illegible] class [illegible] had commenced [illegible] was some consequence [illegible] suit [illegible] for [illegible] requ[illegible] been the [illegible] asked for in the pr[illegible] en fully [illegible] suit was contested, evide[illegible] on both sides, and the Court of first instance which heard that evidence dismissed the Plaintiff's suit. Then on appeal to the lower Appellate Court, and at some stage of that hearing, he applied under sec. 373 of the old Civil Procedure Code for leave to withdraw from the suit alleging, first of all, a formal defect, and *secondly*, his inability to produce the necessary evidence in time. It was admitted by the learned Vakil who argued this case for the Appellant that, as far as he knew, there was no

(1) 11 C. L. J. 45 (1909).
(2) 11 C. L. J. 512 (1910).

formal defect proved before the Appellate Court, and that the only ground which could be relied upon by the petitioner in that case was the second one, namely, that he had not been able to produce the necessary evidence in time at the trial before the Court of first instance. Thereupon, the Appellate Court made an order to this effect: "The appeal is dismissed with costs and the Plaintiff's suit allowed to be withdrawn with leave for fresh action for the same subject-matter, if not barred." Thereupon, this suit was brought, and the point was taken by the Defendant that the order of the Appellate Court of the 18th of May 1906 had been made without jurisdiction and that consequently the subject-matter of the present suit was *res judicata* by reason of the decision which was given by the Court of first instance in the previous suit in 1905. The learned *Addit Sir*[illegible] v. *Su*[illegible] Judge has upheld that existing law of the su[illegible] dismissed. Besides, as turned [illegible] construction of cl. (2) of sec. 50 of the Bengal Tenancy Act, it has no bearing upon the case before us.

[illegible] the view I take of the effect of [illegible] chase of the tenure by the pro[illegible] and upon wh[illegible]terest of the Defe[illegible]8th of May 1906 was [illegible] granted to h[illegible]isdiction. If it was within [illegible] it is clear [illegible]udge's jurisdiction to make it, but it was a wrong order, then I can quite understand that the learned Vakil for the Appellant has something to say, inasmuch as the order had been allowed to stand and the Defendant against whom the order was made had taken no steps to attack that order. But if it was made without jurisdiction, and it is brought to our notice now that it was made without jurisdiction and, if we are satisfied that it was made without jurisdiction, then we are bound to say so and also to say that as a matter of consequence all proceedings taken in consequence of that order failed on that ground. Therefore, the only question is whether the order was made without jurisdiction. I think it was. I need not read the section in full. The section says ". . . . . If the Court is satisfied on the application of the Plaintiff (*a*) that the suit must fail by reason of some formal defect or (*b*) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit . . . . ." Now, the words, as they stand in the section, are of course of general application, namely, "That there are sufficient grounds for permitting him to withdraw from the suit": but there are decisions of this Court which, in my opinion, are binding upon us:—It is quite true they are not upon the same section, but they are upon Or. XXIII, r. 1 of the Civil Procedure Code which is now in operation, but the learned Vakil who argued the case for the Appellant admitted that there is no substantial difference between this Rule and sec. 373 of the old Code. In the first case, *Kharda Co., Ld.* v. *Durga Charan Chandra* (1), it was held by my learned brother Mr. Justice Mookerjee that cls. (*a*) and (*b*) of sub-r. (2) have to be read together and that the intention is that a ground included in cl. (*b*) must be of the same nature as the ground specified in cl. (*a*), that is to say, it must be something of the same nature as *formal defect*; and, inasmuch as in that case the ground for allowing the suit to be started afresh was that the Plaintiff should be allowed to bring a fresh suit not because there was a formal defect but for some other reason, the order was illegal.

(1) 11 C. L. J. [illegible] (1909).

KALI PRASANNA SIL *v.* PUNCHANAN NANDI CHOWDHURY.

Then again the learned Chief Justice Sir Lawrence Jenkins in *Mabulla Sardar* v. *Hemangini Debi* (2) says "The decision in *Kharda Co., Ld.* v. *Durga Charan Chandra* (1) shows that cl. (*b*) of sub-r. (2) must be read in connection with cl. (*a*) and with the limitations cl. (*a*) suggests, and so reading it, it is clear that it is not within the jurisdiction of a Court of appeal to grant the permission on the terms which have been approved by the Court in this case. In my opinion, this Rule should be made absolute." Therefore, in the present case, inasmuch as the only ground that can be suggested for the order of the 18th of May 1906 was that the Plaintiff had not been able to adduce all the evidence which he would have liked to adduce at the first hearing, I am of opinion that that was not a ground which is contemplated by sec. 373 of the old Civil Procedure Code: and, therefore, the order which was made by the Appellate Court was made without jurisdiction. Consequently, that order having been made without jurisdiction a fresh suit should never have been brought, and the Defendant was perfectly competent and was within his rights when he raised the point that the matter was *res judicata*. I am of opinion that the lower Appellate Court was right in coming to the conclusion that it did, and this appeal must be dismissed with costs.

NEWBOULD, J.—I agree.

N. G. *Appeal dismissed.*

(1) 11 C. L. J. 45 (1909).
(2) 11 C. L. J. 512 (1910).

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 49 OF 1914.

SANDERSON, C. J. MOOKERJEE, J. 1916, Heard, 31, May and 1, June. Judgment, 1, June.	CHANDRA KANTA CHAKRABARTI, Plaintiff, Appellant, *v.* RAM KRISHNA MAHALANABISH, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 6, 7—Rent, enhancement of—Part of tenure created before Permanent Settlement but separated by assignment and held at proportional rent by assignee—Confirmatory sanad if creates new tenure.

When a part of a tenure existing at the date of the Permanent Settlement was assigned subject to confirmation by the landlord, a sanad *granted by the landlord in favour of the assignee confirming the transfer, allowing the assignee to be recorded as a sharer on payment of a proportionate share of the original rent, does not create a new tenure, and the provisions of sections 6 and 7 in the Bengal Tenancy Act do not apply to the case. The ground relating to the adjustment of rent between the plaintiff and the defendant Satkari Das on the 27th February 1911 when the Bengal Tenancy Act had commenced to operate was some consequence of the transfer and the requirement that the rent should be fixed in proportion to the area of land transferred, but the continuity of a tenure which has been fully recognized is not affected by sub-division or consolidation.*

UDOY CHANDRA KARJI *v.* NRIPENDRA NARAYAN BHUP (3) *commented on.*

This was an appeal under sec. 15 of the Letters Patent from a decision of D. Chatterjee, J., one of the Judges of this Court, dated the 3rd April 1914 in S. A. No. 2284 of 1911 which had been preferred against a decision of C. H. Mosely, Esq., Additional District Judge of Mymensingh, dated the 18th April 1911, confirming a decision of Babu Satish Chandra Bose,

(3) I. L. R. 36 Cal. 287: s. c. 13 C. W. N. 419 (1909).

CHANDRA KANTA CHAKRABARTI *v.* RAM KRISHNA MAHALANABISH.

Munsif, 1st Court of Kishoreganj, dated the 14th March 1910.

The appeal arose out of a suit for enhancement of the rent of a tenure.

The material facts of the case will appear from the judgment.

The case turned mainly upon the effect to be given to a *sanad* Ex. 16, the question being whether by that *sanad* a new tenure was created. The *sanad* was in the following terms :—

" To

The good in behaviour Sree Ram Sundar Roy.

This *sanad* is executed to the effect following :—

Mouza Karati inclusive of Para Birampur, appertaining to Hissa 3 annas 11 gandas 3 karas Joar eleven thousand in support Bajuhar, mahal Khalisa and others, I had[illegible]gana Nasirujial is record[illegible]*dit Sin*[illegible]ice v. *Sul*[illegible]earing a *taksim-jama* existing law [illegible]5-1 the su[illegible]poses one hundr[illegible]. Besides, as [illegible]en turned [illegible] t[illegible]nstruction of cl. (3) of sec. 50 of the Bengal Tenancy Act, it has no bearing upon the case before us. [illegible]ni, [illegible]a the view I take of the effect of Main [illegible]chase of the tenure by the pr[illegible] and *bari*, interest of the Defendaries, appertaining to [illegible] granted to hissa of the said village and [illegible] it is clear rent of Rs. 19-13-17-1 (rupees nineteen, thirteen annas, seventeen gandas and one kara), and you have got the deed of sale. Therefore, with reference to the deed of sale, I grant you this *sanad*. You shall hold possession of the lands and *baris*, as also the culturable and jungle lands and all lands and waters together with trees, etc., inclusive of all rights appertaining thereto. Being incuded as a *sanad* holder within my revenue-paying zemindary, you shall get the *taluk* registered in your name at a *taksim-jama* of Rs. 19-13-17-1, (rupees nineteen, thirteen annas, seventeen gandas and one kara), payable from (the profits of) the said village, and on payment of rent in the department in which the (torn) sanad-holding *talukdars* pay rent, go on holding possession down to your sons, sons' sons, and so on in succession, with right of transfer by sale and gift, *khamar*, *khana bari*, (torn) *talukdars*. Dated the 12th Agrahayan 1200.

Mahomed Muzaffar."

The Munsif as well as the District Judge on appeal held that the *sanad* showed that the tenure in suit was part of a larger tenure which existed before the Permament Settlement and that the rent was not liable to enhancement.

On second appeal D. Chatterjee, J., affirmed this finding in the following terms :—

" I have no doubt that upon a proper construction of the *sanad* produced in this case, the tenure existing from before the Permanent Settlement was continued."

Hence the present appeal under the Letters Patent.

Babu Sasanka Jiban Roy for the Appellant.

Babu Gobind Ch. Dey Roy for the Respondent.

* *

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case I think that the appeal should be dismissed. The whole question, in my opinion, turns upon the construction of the *sanad* which is to be found at p. 19 of the paper-book. If by that, a part of the *taluk* which was existing at the date of the Permanent Settlement was assigned to the Defendant's predecessor, then the Plaintiff had no case. On the other hand, if there was a new tenure created at a new rate of rent, different from that which was applicable to the *taluk* which was existing

before that date, then the Plaintiff had some case for consideration.

The question depends upon sec. 6 of the Bengal Tenancy Act, which says that where a tenure has been held from the time of the Permanent Settlement, its rent shall not be liable to enhancement except on proof of certain matters mentioned in that section.

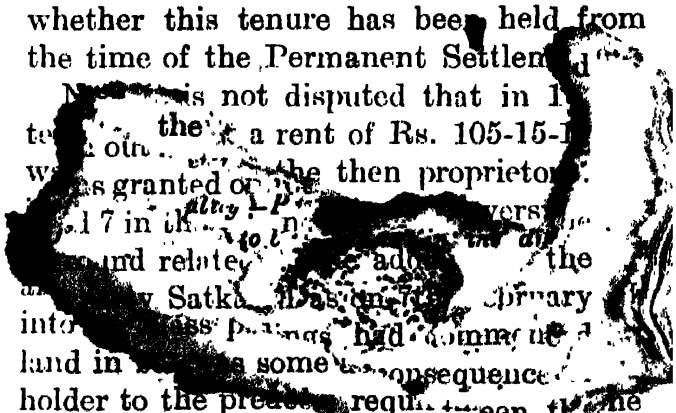
Now, looking at this *sanad*, it seems to me that there had been before the date of it a *taluk* in a certain village the rent of which was Rs. 105-15-1, in respect of certain lands which in themselves had been carved out of a larger tenure, the word used being *taksim-jama*. Then by this transaction it appears that the *talukdars* of that particular village had assigned a portion of the *taluki* right to the Defendant's predecessor, and they assigned it subject to confirmation by the superior landlord. That confirmation was given by the document which is now before us. It recites that the *talukdars* assigned a part of their *taluk* and at a particular rate of rent which in my opinion must be assumed to be the same rate at which the larger *taluk* had been held by the *talukdar*. Therefore, in my judgment the learned Judge of this Court and the learned Judge of the first Appellate Court were right in holding that there was no new tenure created but that there was an assignment of part of the old tenure; and, therefore, this tenure was one that had been held from the time of the Permanent Settlement.

Then it is said that the Plaintiffs can rely upon sub-sec. (*b*) of sec. 6 of the Bengal Tenancy Act because, they say, the tenure-holder has received a reduction of his rent. Upon that point I agree with what is said by Mr. Justice Digambar Chatterjee and I do not think it necessary to add anything further to what he has said.

For these reasons I think the appeal should be dismissed with costs.

Mookerjee, J.—I agree that the judgment of Mr. Justice Digambar Chatterjee, which affirms the concurrent decisions of the Courts below, takes a correct view of the rights of the parties and cannot be successfully assailed.

The Plaintiff seeks to enhance the rent of a tenure held by the Defendant under him. The Defendant pleads that his tenure has been in existence from the time of the Permanent Settlement, and its rent is consequently not liable to enhancement, as neither of the contingencies mentioned in cls. (*a*) and (*b*) of sec. 6 of the Bengal Tenancy Act has admittedly happened. The question for decision, accordingly, is, whether this tenure has been held from the time of the Permanent Settlement.



It is not disputed that in 1[illegible] the [illegible] a rent of Rs. 105-15-1 [illegible] was granted [illegible] the then proprietor [illegible] 17 in the [illegible] and related [illegible] the [illegible] Satka [illegible] primary into [illegible] had commenced land in [illegible] some consequence holder to the [illegible] required [illegible] the Defendant, on the [illegible] fully [illegible] rent proportionately payable [illegible] of the land conveyed was Rs. 19-13 annas 17 gandas 1 kara. The purchaser, thereupon, went to the proprietor, and in order to secure recognition as a separate tenure-holder, obtained from him a *sanad* which recited the conveyance and entitled him to continue in occupation on payment of the amount of rent mentioned from generation to generation. The contention of the landlord is that this *sanad* created a new tenure; while the contention of the tenant is that there was no breach in the continuity of the pre-existing tenure. In my opinion, it is perfectly clear that the con-

tention of the Respondent is well founded on principle. There is no dispute that the tenure was transferable. The purchaser, consequently, under the deed of sale, acquired the interest of a tenure-holder in the land conveyed to him. The only object why a *sanad* was obtained was to enable him to pay rent separately in respect of the land purchased by him, in other words, to separate his liability for rent from the liability of the holder of the remainder of the tenure. Now, it is well settled that the continuity of a transferable tenure is not affected by sub-division or by consolidation. [*James Hills* v. *Huro Lal Sein* (1) and *Kazee Khoda Newaz* v. *Naba Kishore Rai* (2)]. The decision in *Udoy Chandra Karji* v. *Nripendra Narayan Bhup* (3), which is apparently an authority in support of the contrary view, overlooks, as I had occasion to point out in *Adit Singh* v. *Sukhraj Rai* (4), the pre-existing law on the subject in this Court. Besides, as it turned upon the construction of cl. (3) of sec. 50 of the Bengal Tenancy Act, it has no bearing upon the case before us.

In the view I take of the effect of the purchase of the tenure by the predecessor-in-interest of the Defendant and of the *sanad* granted to him by the then proprietor; it is clear that the tenure must be deemed in law to have existed from before the Permanent Settlement. The Plaintiff is consequently not competent to enhance the rent of the tenure under sec. 6 of the Bengal Tenancy Act.

N. G. *Appeal dismissed.*

(1) 8 W. R. Act X Rulings 135 (1865).
(2) 5 W. R. Act X Rulings 53 (1866).
(3) I. L. R. 36 Cal. 287 : s. c. 13 C. W. N. 410 (1909).
(4) 17 C. L. J. 435 (1912).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2537 OF 1914.

SANDERSON, C. J.
MOOKERJEE, J.
1916,
15, March.

SHEIKH AKLOO, Defendant, Appellant,
v.
SHEIKH EMANON, Plaintiff, Respondent.

Transfer of Property Act (IV of 1882), secs. 106, 107—Land held not for agricultural or manufacturing purpose on oral settlement at an annual rent—Presumption that tenancy annual—"Contract to the contrary," not valid, because not registered—Notice, length of.

Where, there being no written lease, the tenants were found to have been holding the land on an annual rent of Rs. 15 and not for an agricultural or manufacturing purpose:

Held—*That from the fact that the rent was an annual rent, the presumption ought to be drawn that the tenancy was an annual tenancy.*

That, in the absence of anything to rebut the presumption, sec. 106 of the Transfer of Property Act, if it stood alone, would be inapplicable, there being "a contract to the contrary" within the meaning of that section. This contract, however, not being in writing and registered was invalid under sec. 107.

That the tenancy was therefore terminable under sec. 106 on fifteen days' notice expiring with the end of a month of the tenancy.

DURGI NIKARINI v. GOBERDHAN BOSE (1) *referred to.*

This was an appeal preferred on the 31st August 1914, against the decree of Babu Upendra Chandra Mukherjee, Officiating

(1) 19 C. W. N. 525 : s. c. 20 C. L. J. 448 at p. 454 (1916).

SHEIKH AKLOO v. SHEIKH EMANON.

Subordinate Judge, 2nd Court of Zillah Hooghly, dated the 25th May 1914, reversing the decree of Babu Barada Prosad Roy, Munsif, 2nd Court at Howrah, dated the 12th March 1913.

The facts of the case appear from the judgment.

Babu Manmatha Nath Roy for the Appellant.—Two principal questions arise in this appeal; (1) that the lease was a heritable one, and (2) that the notice to quit was bad. As regards the first question, the lease was for the purpose of residence and was without any term; in such a case, the heirs of the lessee cannot be evicted if in possession and willing to pay rent. *Juhooree Lal* v. *H. Deak* (5). Although the document may not be quite clear, the intention of the parties as evidenced by their conduct, *viz.*, the possession of the holding by the heirs of the original tenant Sheikh Chandu, is that the lease was heritable, although it might not be permanent. *Narsingh Dayal* v. *Ram Narain* (6).

As regards the second question, the notice to quit was bad on two grounds, *firstly*, because it was on only one of the heirs of Chandu, and *secondly*, because it was a notice of less than a month—the notice dated the 10th Kartik 1318 corresponding to the 27th October 1911 required the Defendant to vacate the land within the 30th Kartik 1318 corresponding to the 16th November 1911. With reference to the first ground, all the heirs of Chandu were co-sharer tenants with the Defendant and lived with him on the land in dispute; all of them should have been served with the notice to quit, and made parties in the suit. The Defendant alone could not be ejected. With reference to the second ground, it is first submitted that the tenancy was an annual and not a monthly one. The Court of first instance has found that the rent payable was annual and not monthly and this finding has not been disturbed by the lower Appellate Court. The Defendant therefore was an annual tenant and six months' notice was necessary. Sec. 106 of the Transfer of Property Act did not apply, because there was an agreement to the contrary in the present case. *Kishori Mohan* v. *Nunda Gopal* (7) relied on. It is also submitted that having regard to the findings of the first Court undisturbed by the Court of Appeal below, *viz.*, that the Defendant was *substituted* as a tenant after Chandu, the parties in the case would be governed by the original *kabuliyat* executed by Sheikh Chandu. Under the *kabuliyat*, the Defendant is entitled to one month's notice. So that in either case whether the parties are governed by the *kabuliyat* or not, the notice is insufficient.

Babu Jyotish Chandra Hazrah for the Respondent.—The first Court says that the right of Chandu was that of a *pucca* tenant only, and the Appellate Court that Chandu was a tenant-at-will.

[*Babu Manmatha Nath Roy.*—That only means "not permanent."]

The Court of first instance did not find that the tenancy was an annual one; at least the finding of the first Court is that the rent is payable yearly. Under sec. 106 of the Transfer of Property Act, in the absence of a contract to the contrary, a lease in respect of immoveable property for agricultural or manufacturing purposes was a lease from year to year and a lease for any other purpose was from month to month. This is not a lease for agricultural or manufacturing purposes. Again, under sec. 107 of this Act a lease from year to

(5) 23 W. R. 399 (1875).
(6) I. L. R. 30 Cal. 883 (1903).
(7) I. L. R. 24 Cal. 720 (1897).

year or reserving a yearly rent must be in writing and registered? There is no such contract in writing and registered; which is necessary in order that it may be a tenancy reserving a yearly rent. There is therefore no contract to the contrary and the tenancy must be regarded as a tenancy of immoveable property for residential purposes falling under sec. 106 of the Transfer of Property Act. *Debendra Nath* v. *Shyama Prasanno* (8) and *Durgi Nikarini* v. *Goberdhan Bose* (1) relied on.

Babu Manmatha Nath Roy in reply.—The Court of first instance found that the Defendant's name had been substituted in the landlord's *sherista* for that of his brother Chandu, the previous tenant. The Defendant's tenancy was therefore a continuation of the old tenancy which has been created under a registered *kabuliyat*. There was therefore a binding contract in writing and registered between the parties. The case in *Debendra Nath* v. *Shyama Prasanno* (8) is [illegible]pplicable to the case of a tenancy when the transferee assignee or representative of the previous tenant was substituted in the latter's place and the old tenancy was under a registered instrument. Besides the observation in *Debendra Nath* v. *Shyama Prasanno* (8) relied on by the Respondent is an *obiter*, the operative portion of the judgment being that six months' notice according to the Bengali Calendar was sufficient. Again, the Plaintiff himself cannot challenge the validity of the Defendant's lease, the Plaintiff himself being a party to it.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—In this case I think the appeal must be dismissed. The lease was given on the 18th of January 1904 to the Defendant's brother, one Sheikh Chandu, of a particular area of land which was two cottahs, and the rent was Rs. 12 a year. In 1909, Chandu died. From that time the Defendant and the heirs of Chandu, and I think all his heirs, lived on the land in question; but apparently after the death of Chandu the land occupied by the Defendant and the heirs, who according to the judgment of the lower Appellate Court, were probably living with the Defendant, was 2½ cottahs and the rent that was paid was not Rs. 12 a year, but was Rs. 15 a year, and the first question raised is whether the tenancy was a heritable one.

The learned Subordinate Judge has held that the tenancy was not a heritable one, and he bases his judgment upon the terms of the lease. That has been examined by my learned brother Mr. Justice Mookerjee and he agrees that there is nothing in the lease to show that the tenancy was a heritable one. Further than that, the fact that the area occupied after Chandu's death was different from that included in the lease, and the fact that the rent was different from that which was specified in the lease, leads me to come to the conclusion that the judgment of the learned Subordinate Judge that the holding was not a heritable one was correct. Therefore, the position is this: The lease has come to an end; a new tenancy must have been created, and upon that two questions arise—with whom was the new tenancy created, and secondly, on what terms.

Now upon the first point, the learned Vakil who has argued the case for the Appellant urges that the tenants were not only the Defendant but also the heirs who were co-sharer tenants, as he suggests,

(1) 19 C. W. N. 525: s. c. 20 C. L. J. 448 at p. 454 (1914)
(8) 11 C. W. N. 1124 (1906).

with the Defendant. That point is really a question of fact and that has been decided by the learned Subordinate Judge against him, who has held that the Defendant was the only tenant, and if it is necessary for me to express any opinion, I think that the learned Judge was perfectly right in coming to that conclusion as far as I can judge from the materials before me :—it is not necessary for me to go into detail; they are referred to in the two judgments that are before us. Therefore, the tenancy was between the Plaintiff and the Defendant.

Then the second point arises, what were the terms of that tenancy? There is no dispute as to that, because the Court of first instance has held that the rent was an annual rent of Rs. 15 a year. The contest had been as to whether the rent was a monthly rent or a yearly rent :—the amount was agreed between the parties, and as to that there was no dispute. The question was whether it was an annual rent of Rs. 15 or a monthly rent at Re. 1-4. The Court of first instance has dealt with that specific question which is a question of fact and has found that the rent was an annual rent of Rs. 15 a year. Then arises the next question whether from that fact, it can be presumed that the tenancy was an annual tenancy. I should be prepared to follow what was said by my learned brother Mr. Justice Mookerjee in the case *Durgi Nikarini* v. *Gobcrdhan Bose* (1), namely, " It may possibly be accepted as a proposition generally true that, as indicated in *Wilkinson* v. *Hall* (2), the mode in which rent is expressed to be reserved affords a presumption that the tenancy is of a character corresponding thereto. The rule, however, is not of universal application, and, it was pointed out by Mr. Justice Maule in *Atherstone* v. *Bostock* (3) that the presumption of yearly taking from the rent being paid yearly does not apply to the case of lodgings, and the same view is supported by the case of *Wilson* v. *Abbott* (4)." Now, in this case there is nothing to rebut the presumption which I think ought to be drawn from the fact that the rent was to be an annual rent. Therefore, the presumption ought to be drawn that the tenancy was to be an annual tenancy; and, so far that conclusion at which I have arrived is in favour of the Appellant. Therefore, within the words of sec. 106 of the Transfer of Property Act, there would be a contract, namely, such as I have described, a contract of tenancy between the Plaintiff on the one hand and the Defendant on the other, and an annual tenancy for which an annual rent of Rs. 15 was to be paid; and, therefore, sec. 106, if it stood by itself, would apply because there would be a contract to the contrary. But unfortunately for the Appellant, there is sec. 107 which says that such a contract as that, a contract such as I have described which reserves a yearly rent can be made only by a registered instrument : and, inasmuch as there is no registered instrument in this case, that contract must be treated as an invalid contract and as not existing. Therefore, I am forced to the conclusion that this case does come within sec. 106 because there is an absence of a contract to the contrary, inasmuch as the contract which was in fact made and was in fact held to exist by the Court of first instance was not put into writing and was not registered. Therefore, there being no contract to the contrary, and inasmuch as this was a lease of immoveable

(1) 19 C. W. N. 525 : s. c. 20 C. L. J. 448 at p 454 (1914).
(2) [1837] 3 Bing. N. C. 508.
(3) [1841] 10 L. J. C. P. 115.
(4) [1824] 3 B. & C. 88.

property and not for agricultural or manufacturing purposes but for some other purposes, it must be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy; and, inasmuch as fifteen days' notice was admittedly given in this case, a sufficient notice under the statute was given, and the Plaintiff consequently is entitled to obtain a decree for possession of the land, for arrears of rent and for damages for holding over after the notice to quit.

For these reasons the appeal must be dismissed with costs.

I should like to say as this is one of the first cases that I have heard argued by the learned Vakils of this Court, that in my opinion it has been very well argued on both sides.

MOOKERJEE, J.—I agree.

N. G. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 28 OF 1916.

D. CHATTERJEE, J.
BEACHCROFT, J.
1916,
2, February.

ASADALI CHOWDHURY and ors., Petitioners,
v.
SYED MOHAMMED HOSSAIN CHOWDHURY and ors., Opposite Party.

Civil Procedure Code (Act V of 1908), Or 40, r. (1)—Receiver, if may be appointed in proceeding to appoint common manager—Bengal Tenancy Act (VIII of 1885), sec. 93—Sec. 141, C. P. C.—Ex parte order, appointing Receiver, if necessarily bad—Remedy of aggrieved party.

Or. 40, r. 1, of the Civil Procedure Code does not provide that the appointment of a Receiver should be confined to a suit.

A proceeding for the appointment of a common manager is a proceeding in the nature of a suit within the meaning of sec. 141 of the Civil Procedure Code, and a Receiver can be appointed during the pendency of such a proceeding, if it should appear to the Court to be just and convenient to appoint a Receiver.

In cases of emergency, when the issue of notice to other parties may so delay the proceedings as to defeat the object of the order, the Court has to pass such order ex parte *leaving the party aggrieved to object to it either in the Court making the order or by way of an appeal to a higher Court.*

This was a Rule granted on the 10th January 1916 against an order of P. E. Cumming, Esq., District Judge of Backergunge, dated the 4th January 1916 passed in the case No. 1 of 1916, appointing a pleader of the Court as Receiver of the properties in dispute pending the disposal of a miscellaneous case.

On the 4th January 1916 the Opposite Party made an application to the District Judge of Backergunge for the appointment of a common manager under sec. 93 of the Bengal Tenancy Act and prayed that pending the disposal of the application a Receiver might be appointed. Thereupon the District Judge without any notice to the Petitioner made an order appointing Moulavi Ashgarali, a pleader of his Court, as a Receiver pending the disposal of the application.

Against that order the Petitioner moved the High Court and obtained the present Rule on the 10th January 1916.

Babu Jogendra Nath Mukherjee in showing cause submitted that the order of the District Judge was right. In the present Civil Procedure Code the words the " subject-matter of the suit " have been omitted from r. 1 of Or. 40 which corresponds to sec. 503 of the Code of 1882. That shows the legislature intended to widen the scope of the section and include

also a proceeding. *Jibanessa Khatun* v. *Majidunessa Khatun* (2) relied on.

Moulvi Nuruddin Ahmad in reply submitted that the order was without jurisdiction and should be set aside. Receiver can be appointed only in a suit. Sec. 647 of the Code of 1882 which corresponds to sec. 141 of the Code of 1908 includes original matter in the nature of suits and does not include a miscellaneous proceeding like this, for instance, sec. 647 of the old Code does not apply to execution proceedings. *Thakur Prasad* v. *Fakirullah* (1) relied on.

Proceeding under sec. 93 of the Bengal Tenancy Act being not a suit, Receiver cannot be appointed in the course of that proceeding.

Again we are 14 annas co-sharers and have been in possession of the profits for 40 years and the existing state of things should not be disturbed.

The learned Judge also acted illegally and with material irregularity in making an *ex parte* order without notice to my clients.

The JUDGMENT OF THE COURT was as follows :—

Pending an application for the appointment of a common manager under the Bengal Tenancy Act the learned District Judge appointed a Receiver. This Rule was issued upon an application by the Petitioner that the order made by the learned District Judge was without jurisdiction in that it was made not in the course of a suit and *secondly*, it was irregular because it was made without notice to the Petitioner. We have heard the learned vakils on both sides and we think that the Rule must be discharged.

With regard to the first ground, it is contended that a Receiver can be appointed only in a suit and not in a proceeding of this kind. Or. 40, r. 1, however, does not provide that the appointment of a Receiver should be confined to a suit. The old sec. 503 of the Civil Procedure Code, 1882, did certainly speak of the appointment of a Receiver in a suit, but r. 1 of Or. 40 of the present Code has left out the words " subject-matter of a suit," and is very general.

Then sec. 141 is also very general and does seem to apply the procedure under Or. 40, r. 1, to proceedings of this kind. That section provides " The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction." It has been held in the case of *Thakur Prasad* v. *Fakirullah* (1), by their Lordships of the Judicial Committee, that the old sec. 647 in place of which stands the present sec. 141 was applicable to original proceedings in the nature of suits such as guardianship, probate, etc. The present proceeding is an original proceeding which may be said to be in the nature of a suit because it is initiated by an application by one party, is opposed by another and is determined by a final order. The proceedings, therefore, being proceedings in a case which may be said to be in the nature of a suit are such as evidently attract the application of Or. 40, r. 1. We think that under Or. 40, r. 1, the Court has a jurisdiction to appoint a Receiver in a case of this kind if upon the facts before it, it thinks that it is just and convenient that it should make an order under that Rule.

Then as regards the question of notice, although an order is generally made by a Civil Court upon notice to the parties concerned, there may be cases in which the

(1) I. L. R. 17 All. 106 (1894).
(2) 17 C. W. N. 581 (1913).

(1) I. L. R. 17 All. 106 (1894).

issue of notice may so delay the proceedings as to defeat the object of the order made, and the Court has to pass an order without previous notice in cases of emergency, leaving the party aggrieved to object to it either in the Court making the order or by way of an appeal to a higher Court. These two grounds therefore fail. We find that the proceedings for the appointment of a common manager have been postponed pending the decision of this Rule. It was not meant that this should be so.

The Petitioner, it seems, upon the view we take of Or. 40, r. 1, misconceived his remedy as he should have come to this Court by way of an appeal against the order appointing the Receiver.

We discharge this Rule with costs—hearing fee, two gold mohurs, and direct that the record be sent down at once so that the proceedings for the appointment of a common manager may be continued without further delay.

N. G.

J. M. C. *Rule discharged.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1264 OF 1914.

N. R. CHATTERJEA, J.
MULLICK, J.
1915,
23, March.

SURADHANI DEBYA, Plaintiff, Petitioner,
v.
CHANDRA NATH PRAMANICK and ors., Defendants, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 23, r. 1 (2)—Application to withdraw from suit with liberty to sue again—Court if may grant application but without liberty.

Where the trial Court, being of opinion that no sufficient ground had been made out for allowing the Plaintiff to withdraw from the suit with liberty to institute a fresh suit in the same cause of action, passed order allowing him to withdraw without such leave:

Held—*That the suit was not disposed of by the order.*

Where a Plaintiff does not desire to withdraw from the suit unless with liberty to bring a fresh suit, and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application.

MOHANT BIHARIDASJI GURU GOVINDDASJI *v.* PARSHOTAMDAS RAMDAS (1) *followed.*

This was a Rule granted on the 13th December 1914 against an order of B. C. Kundu, Esq., Subordinate Judge of Zillah Rajshahye, dated the 18th September 1914.

Plaintiff instituted a suit for declaration of title and recovery of possession against the Defendants on the 8th October 1912. Defendants contested the suit.

On the 22nd of August 1913, the Plaintiff applied under Or. 23, r. 1, cl. 2, for withdrawing the suit with permission to bring a fresh suit on the same subject-matter, but the Subordinate Judge by an order, dated the same day, permitted the Plaintiff to withdraw but refused permission to institute a fresh suit as applied for. The Plaintiff took no further steps and the said order was embodied in a decree which was signed by the Subordinate Judge on the 6th November 1913.

The Plaintiff thereupon applied for review on the 4th February 1914 and the application was rejected on the 30th of May 1914.

The Plaintiff then on the 20th August 1914 put in an application before the Subordinate Judge praying for process against witnesses and also for local investigation,

(1) I. L. R. 32 Bom. 345 (1908).

which application was rejected on the 18th September 1914.

The order was in the following terms :—

"This is an application by the Plaintiff for the revival of the suit and restoring it to the file of this Court on the ground that by the Order No. 19, dated 22nd August 1913 permitting the Plaintiff to withdraw from the suit, the suit has not been disposed of but it is still pending. The law on the subject of withdrawal is embodied in Or. 23, r. 1, C. P. C. It is said that under cl. 1 of that rule the Plaintiff may withdraw his suit and under cl. 3 where the Plaintiff withdraws from a suit without the permission of the Court referred to in sub-r. 2 he shall be precluded from instituting any fresh suit in respect of the same subject-matter. The Petitioner urges that the application made for withdrawal was not unconditional as contemplated in sub-r. 1 but a conditional one as provided in sub-r. 2, *i.e.*, with liberty to bring a fresh suit in respect of the subject-matter of the suit in question. If not disposed to accord permission to withdraw from the suit with such liberty, the only course left for the Court was to dismiss the application. The Court was not however competent under the law as embodied in the rule to allow the Plaintiff to withdraw from the suit without liberty to bring a fresh suit. An order to that effect as passed on 22nd August 1913 was without jurisdiction and is a nullity and so the Court has power to set aside the order and treat the suit as still pending. It is contended that the Court has such powers to revise its order under the new provision embodied in sec. 151. It has then inherent power to rectify its error for the ends of justice. The learned Pleader of the Plaintiff referred me to the case of *Mohant Biharidasji Guru Govinddasji* v. *Parshotamdas Ramdas* (1) which holds 'that where a Plaintiff does not desire to withdraw from the suit, unless with liberty to bring a fresh suit, and the Court considers that such liberty ought not to be granted, the proper course is only to dismiss the application.' Apparently that case and this are on all fours, but there are certain distinguishing features in this case which I must notice. Here the Plaintiff made an application for the postponement on the very day, there was then further application for withdrawal. The application for postponement was rejected on the grounds stated in the Order No. 18, dated the same day, 22nd August 1913. The suit was about to be dismissed and so there was the further application made for withdrawal with liberty to bring a fresh suit on the same subject-matter knowing it for certain that the permission on such condition would not be granted. The only course left to the Court was either to dismiss the suit or allow the Plaintiff to withdraw from the suit which she had every right to do. So that it is not a case in which if the Court had dismissed the latter application the Plaintiff would have prosecuted the case on that very day. She had no witnesses ready, her documents were not produced in time, there was no step taken for having the necessary local investigation. Under such circumstances I think the order permitting the Plaintiff to withdraw without liberty to bring a fresh suit was the only legal order that could be passed, when in the face of the subsequent application for withdrawal the suit could not be dismissed as the Court was disposed to do. Then again if the order is illegal I do not think this Court has jurisdiction to revise its own order under any inherent power vested in

(1) I. L. R. 32 Bom. 345 (1908).

the Court as provided in sec. 151, C. P. Code. That would be usurping the power of the superior Court which alone can revise or set aside the order of the Subordinate Court. The Plaintiff's remedy therefore lies in preferring an appeal against the order of this Court. There had been an application for review of the order in this Court. That petition was duly heard and rejected. The result is that this petition cannot be granted and it is therefore rejected for the grounds stated above."

The Plaintiff thereupon made an application to the Hon'ble High Court on the 11th December 1914 for a rule on the Opposite Party to show cause why the aforesaid orders, dated the 22nd August and 6th November 1913 and of the 18th September 1914 should not be set aside for want of jurisdiction.

This Rule came on for hearing on the 23rd March 1915.

Babus Sasadhar Roy (Jr.) and *Surendra Mohan Ghose* for the Petitioner.

Babu Ramakanta Bhattacharyya for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner was the Plaintiff in a suit in the Court of the Subordinate Judge of Rajshahye. It appears that, on the date finally fixed for the hearing, the Plaintiff applied for postponement on several grounds. That application was rejected. Then the Plaintiff applied for leave to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. The learned Subordinate Judge held that there were no sufficient grounds for allowing the Plaintiff to withdraw from the suit with liberty to bring a fresh suit and he made an order allowing the application for withdrawal without permission to institute a fresh suit. It appears that subsequently several applications were made by the Plaintiff for setting aside that order, the last application being dated the 10th of August 1914 by which he treated the suit as not being disposed of by the previous order and prayed the Court to proceed with the suit. That was rejected. Now the Court having been of opinion that leave should not be granted to the Plaintiff to withdraw from the suit with liberty to bring a fresh suit, it ought to have dismissed the application for withdrawal. As pointed out by Sir Lawrence Jenkins, Chief Justice, in the case of *Mohant Biharidasji Guru Govinddasji* v. *Parshotamdas Ramdas* (1) "where a Plaintiff does not desire to withdraw from the suit, unless with liberty to bring a fresh suit, and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application." And as the Court had disallowed the applications for adjournment it ought to have dismissed the suit. Had that course been followed, the Plaintiff would have had a right of appeal, and, if there were sufficient grounds, the Appellate Court might have allowed the appeal and directed a trial of the case. The order, however, which was passed was not a proper one and, under the circumstances, we think that that order should be set aside and the suit proceeded with from the stage where it was on the 22nd August. But this must be conditional upon the Plaintiff paying to the Opposite Party the sum of Rs. 170 as costs incurred by the latter up to date within one month of the arrival of the record in the lower Court. This amount will not be considered as costs in the cause. In default of payment of the said amount within the time specified, this Rule will

(1) I. L. R. 32 Bom. 344 (1908).

stand discharged with costs, three gold mohurs.

S. C. G. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 359 OF 1916.

CHITTY, J.
WALMSLEY, J.
1916,
28, April.

SATYENDRA NATH BANERJEE and others, 2nd Party, Petitioners,
v.
KRISHNADHAN ADHIKARY and others, 1st Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 145, 146—Disputed land under water rendering act of possession by either party impossible—Order in favour of one party on the ground of his possession in the previous year—Substitution by High Court of order under sec. 146 for order under sec 145.

Where in a proceeding under sec. 145, Cr. P. C., the Magistrate made the final order in favour of one party, finding that as there could not be any act of peaceful possession within two months of the date of the proceeding owing to the land being under water, the possession of the current year was to be presumed in favour of the man who was in possession during the previous years:

Held—*That the order was in direct contravention of sec. 145, cl. (4), and the Magistrate should have passed an order under sec. 146, Cr. P. C.*

The High Court substituted an order under sec. 146, Cr. P. C., for the order under sec. 145 made by the Magistrate.

This was a Rule granted on the 27th March 1916 against an order of Babu Jatindra Mohan Banerjee, Sub-divisional Magistrate of Kutwa, dated the 27th January 1916, declaring, under sec. 145, Cr. P. C., the first party to be entitled to possession of the land in dispute.

The order of the Magistrate was as follows:—

"The present dispute is about the possession of about 24 bighas of *boro* lands in the *beel* of village Mutli. Krishnadhan Adhikari claims the land as within his boundary *jama* and Satyendra Nath Banerjee who is the zemindar of the land claims it to be *utbandi* land, liable to settlement from year to year. His contention is that he has let out the disputed land this year to Golam Mondal and Dedar Mondal.

"Nobody has been in undisturbed possession of the land this year, the land remained under water till the beginning of Assin. As soon as it rose above water, the first party went to cultivate it when the second party went to oppose the cultivation and as there was an apprehension of a breach of the peace, the Police went upon the scene and submitted proceeding under sec. 145, Cr. P. C., which was accordingly drawn up.

"As there could not be any act of peaceful possession within two months of the date of the proceeding, this being impossible owing to the land remaining under water, the possession of this year is to be presumed of the man who was in possession during the previous years.

"Both parties have adduced evidence on this point. From a careful consideration of it, I am satisfied that the land has all along remained in possession of the first party. The decree, old rent receipts and registered and unregistered *kabuliyats* filed by the first party all satisfactorily prove this. The evidence adduced by the second party is meagre and cannot be relied on.

"Accordingly I find the land in possession of the first party and declare them to be entitled to this possession until evicted from it in due course of law. The zemindar second party must pay Rs. 25 as costs of the first party."

SATYENDRA NATH BANERJEE *v.* KRISHNADHAN ADHIKARY.

Babu Jogendra Nath Mukherjee for the Petitioners.

Babus Atulya Churn Bose and *Satis Chunder Munshi* for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

In this case we think that the Rule must be made absolute. The order of the Magistrate, as it stands, cannot possibly be supported on the evidence on the record and on his own findings. He states distinctly that nobody has been in undisturbed possession of the land this year. That must mean from the previous Bysakh. Later on, he says "As there could not be any act of peaceful possession within two months of the date of the proceeding, this being impossible owing to the land remaining under water, the possession of this year is to be presumed of the man who was in possession during the previous years." This is in direct contravention of sec. 145 (4), Cr. P. C. We think, therefore, that the proper order which the Magistrate should have made in this case was one under sec. 146, Cr. P. C., and we accordingly substitute such an order for the order now complained of. We hold that it was impossible for the Magistrate to satisfy himself as to which of the parties was in possession of the land in dispute; and the land must, therefore, be attached until a competent Court has determined the rights of the parties thereto or the persons entitled to possession thereof. The Magistrate will issue the necessary attachment on receipt of this order.

S. C. M. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION]

No. 442 OF 1916.

CHITTY, J.
WALMSLEY, J.
1916,
18, May.

PUTI KABARINI, Petitioner,
v.
VICE-CHAIRMAN, BERHUMPUR MUNICIPALITY, Opposite Party.

Bengal Municipal Act (III, B. C., of 1884), sec. 345.

It is necessary for a conviction under sec. 345 of the Bengal Municipal Act to prove that the Magistrate on the application of the Commissioners had ordered the land to be closed as a market-place and had taken order to prevent such land being so used.

This was a Rule granted on the 24th April 1916 against an order of H. M. Mullik, Esq., Sub-divisional Magistrate of Bishnupur, dated 19th January 1916, convicting the Petitioner under sec. 345, Bengal Municipal Act and sentencing her to pay a fine of Rs. 10, an application for a reference of which order to the High Court for revision was rejected by C. Tindall, Esq., Sessions Judge of Bankura, on the 25th February 1916.

The facts will appear from the order of the Magistrate.

"Accused sold vegetables on a *patit* land (near Madan Mohan temple) called Madhabganj within Bishnupur Municipality on 10th November 1915. The accused admits this fact and the evidence proves it. She has been prosecuted under sec. 345, Bengal Municipal Act. Defence pleader contends that this section will not apply as in view of definition of market under sec. 336 of that Act, there were not 30 shops on the land on which accused sold vegetables. He also draws my attention to ruling *Queen-Empress v. Mukunda Chandra* (1). This ruling is not

(1) I. L. R. 20 Cal. 824 (1893).

applicable to facts in the present case. In the case mentioned in the ruling, the Municipal Commissioners extended the provision of sec. 337 of the Act. In the present case by resolution Ex. I the Municipal Commissioners promulgated an order under sec. 337 prohibiting sale on all lands without license. It is clear that all lands included Madhabganj. This is made still clearer from another resolution Ex. 3 granting license to managers of Madhabgunj Hat who had applied for it. But the Divisional Commissioner having disapproved of this, the Municipal Commissioners by resolution Ex. 4 cancelled the license and issued a notice Ex. 5 in terms mentioned in sec. 344 of the Act. In the circumstances I find that sec. 345 applies in the present case. The question of 30 shops raised by the defence pleader refers to licensing and can have no application to sec. 345 of the Act.

"I find accused guilty. Her refusal to leave the place when warned places her out of a compassionate consideration so far as sentence is concerned."

Mr. K. N. Chaudhuri and *Babu Probodh Ch. Chatterji* for the Petitioner.

Babus Manindra Nath Banerjee and *Bejoy Kumar Bhuttacharjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

In this case before there could be a conviction under sec. 345 of the Bengal Municipal Act (III of 1884) the prosecution would have to prove that the Magistrate on an application of the Commissioners had ordered the land to be closed as a market-place and had taken order to prevent such land being so used. This, it is conceded for the Municipality, was not shown in this case. The conviction and sentence passed on the Petitioner must be set aside and the fine, if paid, will be refunded.

S. C. M. *Rule made absolute.*

PATNA HIGH COURT.

[CIVIL REFERENCE.]

REF. No. 3 OF 1916.

CHAMIER, C. J.
SHARFUDDIN, J.
ATKINSON, J.
1916,
1, June.

In the matter of BABU JUGAL CHANDRA MAZUMDAR, Pleader.

Legal Practitioners Act (XVIII of 1879), secs. 13 and 14—Specific charge under sec. 13 (b), necessary—Taking instructions from unauthorised persons—Conduct improper.

In a reference under the Legal Practitioners Act, the High Court confines itself to the charge framed by the Primary Court. The finding that the pleader was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty within the meaning of sec. 13 (b) of the Legal Practitioners Act was disregarded as the pleader was not charged with that.

Where a pleader was found to have received instructions from a person about whom he made no enquiries as to his right to instruct him on behalf of certain minors or their mother and also that he filed a written statement which was not prepared by him and that he accepted the vakalatnama at the instance of another party in the suit and that he filed a receipt which on the face of it was not genuine without even examining it, it was held that his conduct was most improper, although no injury resulted from it.

The pleader was suspended for nine months.

This was a reference under the Legal Practitioners Act by G. H. Reid, Esq.,

District Judge of Manbhum, dated 1st May 1916, on the recommendation of Babu Pranindra Lal Sen, Munsif of Purulia, dated 9th April 1916.

The facts out of which this reference arises are shortly as follows :—

One Kedar Nath Moduk, his brother Bishanath Moduk and the latter's son Mahendro were members of a joint Hindu family. A mortgage-bond was executed by one Ban Bhuiyan in favour of Mahendro alone. Both Kedar and Ban Bhuiyan died. Kedar's heirs instituted a suit in the Court of the Munsif at Purulia upon the mortgage against the infant sons of Ban Bhuiyan who were described as being under the guardianship of their mother. Mahendro and his father Bishanath were impleaded as *pro forma* Defendants. The Plaintiff's case was that the mortgage money was advanced out of the funds of the joint family of which Kedar was a member. The Munsif issued a notice to the mother of the infant Defendants with the object of appointing her to be their guardian *ad litem* and fixed 22nd May 1915 as the date for her appearance. On that day Bishanath and Mahendro filed a written statement in which they pleaded that the Plaintiffs had no interest in the mortgage money and further that the mortgage-bond had been discharged by the payment of the money due in the bond by Ban Bhuiyan to Mahendro. On the same day a written statement very much like that filed by the *pro forma* Defendants was filed on behalf of the infant Defendants by the pleader Babu Jugal Chandra Majumdar, who signed his name on the written statement, on the back of the vakalatnama and on a list of documents with which was produced a receipt, dated 5th March 1907, purporting to have been granted to Ban Bhuiyan for the mortgage money. On 21st December 1915 another written statement was filed by the mother of the minor Defendants through another pleader in which she said that the money had been advanced by the joint family and that it was repaid to Mahendro alone and that the Plaintiffs should have sued Mahendro. Along with this written statement, she filed an affidavit and a petition in which she stated that Baishnab Bhuiyan who had signed the vakalatnama in favour of the pleader Babu Jugal Chandra was not authorized to act on her behalf. The Plaintiffs thereupon withdrew their suit saying that they would sue Mahendro.

It appears that a petition was filed before the higher authorities containing some allegations against the conduct of the pleader, and the District Judge went to make an enquiry on 23rd February 1916. On 29th February the Munsif took up the inquiry against the pleaders who filed the conflicting written statements and a few days later he framed a charge against Babu Jugal Chandra. Jugal Chandra appeared and stated that he was retained in the case by Baishnab Bhuiyan who had told him that he was a relative of the minors and that he produced a Court summons, a copy of the plaint in the case, and a receipt supporting his statement that the mortgage money had been paid up and he urged that there was nothing in the conduct or behaviour of Baishnab to lead him to think that he was not a relative of the minors or was not authorized to act on their behalf. Baishnab was examined and he denied that he ever came to the pleader. The Munsif held that the pleader was guilty of grossly improper conduct and that Baishnab never came to him. The District Judge in his report said that Baishnab went to the pleader, but he was not authorized by the mother of the infants. In his reference he also found that the pleader was guilty of taking instructions

IN THE MATTER OF BABU JUGAL CHANDRA MAZUMDAR.

from a person who was never authorized to instruct him.

Messrs. Pugh, K. P. Jayaswal and *P. R. Dass* (with *Messrs. Sishir Kumar Mitra, Hari Bhushon Mukerjee, Abani Bhushon Mukerjee* and *Gour Ch. Paul*) for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

Jugal Chandra Mazumdar a pleader practising in the Manbhum District was charged under secs. 13 and 14 of the Legal Practitioners Act, 1879 with having taken instructions in a case from one Baishnab Bhuiyan who was neither the recognised agent of the parties for whom he was retained, nor their guardian, servant, relative, or friend, authorised to give instructions on their behalf. The Munsif after enquiry found that the charge was proved and he has reported the case to this Court through the District Judge of Manbhum with a recommendation that the pleader should be dismissed. The learned District Judge supported this recommendation being of opinion that the facts not only establish the charge which was drawn up by the Munsif, but justify a finding that the pleader was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty within the meaning of sec. 13 (*b*) of the Act. We may say at once that inasmuch as the pleader was not charged with fraudulent or grossly improper conduct this finding must be disregarded. At the same time we may say that having examined the evidence we should not have been prepared to find that charge proved. We shall confine ourselves to the charge framed by the Munsif. The facts are shortly as follows :—One Kedar Nath Moduk, his brother Bishanath Moduk and the latter's son Mahendro were members of a joint family. A mortgage was made by one Ban Bhuiyan in favour of Mahendro alone. After the death of Kedar a suit was brought by his heirs upon the mortgage against the sons of Ban Bhuiyan who were infants and were described as being under the guardianship of their mother. Mahendro and his father Bishanath were impleaded as *pro forma* Defendants. Before calling upon the Defendants to file written statements the Munsif issued a notice to the mother of the infant Defendants presumably with the object of appointing her to be their guardian *ad litem* and May 22nd, 1915, was filed for her appearance. On that date the *pro forma* Defendants Bishanath and his son Mahendro filed a written statement in which they pleaded that the Plaintiffs had no interest in the mortgage money and further that the mortgage-bond had been discharged. The Plaintiffs' case as set out in the plaint was that the mortgage money had been advanced out of the funds of the joint family of which the father had been a member. On the same day a written statement very much like that filed by the *pro forma* Defendants was filed on behalf of the infant Defendants Nos. 1 and 2 by Jugal Chandra who signed his name on the back of the vakalatnama, on the written statement, and a list of documents with which was produced a receipt purporting to have been granted by Ban Bhuiyan for the mortgage money. On December 21st, 1915, a written statement was filed through another pleader on behalf of the minors by their mother in which she said that the money had been advanced by the joint family and that it had been repaid to Mahendro alone and she contended that the Plaintiffs should have sued Mahendro. Along with her written statement she filed an affidavit and a petition in which she stated that Baishnab who had signed the

vakalatnama in favour of the pleader Jugal Chandra was not authorised to act on her behalf. The Plaintiffs shortly after that withdrew their suit saying that they would sue Mahendro. On February 29th, 1916 (it does not appear why there was a delay of two months) the Munsif called for an explanation from the pleaders who had filed the conflicting written statements and a few days later he framed a charge against Jugal Chandra as stated above. Upon that Jugal Chandra put in a petition in which he stated that he had been retained in the case by Baishnab Bhuiyan who had told him that he was a relative of the minors and had produced a Court summons, a copy of the plaint in the case and a receipt supporting his statement that the mortgage money had been repaid, and he (the pleader) urged that there was nothing in the conduct or behaviour of Baishnab to lead him to think that he was not a relative of the minors or was not authorised to act on their behalf. A few days later Jugal Chandra was examined at length by the Munsif. He said that he had obtained the vakalatnama from Baishnab Bhuiyan, that the latter had told him that he was a relation of the minors, that he had made enquiries of Mahendro one of the Defendants to the case, and that Mahendro also had told him that Baishnab was a relative of the minors. He described the circumstances in which Baishnab had come to retain him at the Court house and he alleged that acting on the instructions of Baishnab he had drawn up a written statement on behalf of the minors, and had filed it in Court on their behalf, and that throughout he had acted in good faith relying on the statements of Baishnab and Mahendro. We are unable to accept the statements of the pleader as true. Baishnab appears to be a cartman who was driving a cart for Mahendro on the day on which the written statement was filed. He may have gone with Mahendro to the pleader but he is practically speaking illiterate. He can with great difficulty sign his name. Mahendro is a literate man and there can be no doubt that it was at the instance of Mahendro that the pleader accepted the vakalatnama and that Mahendro used Baishnab for his own purposes. The pleader's statement that he drafted the written statement in the case is evidently untrue. His clerks know nothing about the matter at all. The bulk of the written statement is in the handwriting of a man whose identity has not been disclosed and the opening words of the written statement have been proved to be in the handwriting of the man who faired out the written statement filed on behalf of Mahendro and who is a relation of Mahendro's pleader. There can be little doubt that the written statement had been prepared before Mahendro and Baishnab went to Jugal Chandra and all that the latter did was to sign his name on it and on the vakalatnama and the list of documents. He took no trouble whatever to ascertain who Baishnab was and whether he was authorised to give instructions in the case. On his own showing he enquired of no one but Mahendro. In fact his own statement shews that he neglected his duty and disregarded the instructions issued by the High Court on the subject. It has been proved that the mother of the minors was not in the village when the summons to her was taken there. She left it five or six years ago and is living in a village some eight miles away. She says she gave no instructions to Baishnab and Baishnab says that he received no instructions from her. Baishnab says that he signed the paper at the instance of his landlord Mahendro and gave no instructions to the pleader.

Both the District Judge and the Munsif held that Baishnab did not receive instructions from the mother of the minors and we agree with the finding. It is clear that the pleader not only did not take any pains to ascertain whether Baishnab was authorised to retain him but he did not even examine the receipt produced in support of the written statement. The receipt purports to have been signed on March 5th, 1907, but it bears a one anna stamp of the time of the present King. It does not appear to be a document nine years old, and there was much in the affair which would have excited the suspicion of any man who had acted with ordinary care. In our opinion there can be no doubt that Jugal Chandra Mazumdar made no enquiries as to the right of Baishnab to instruct him on behalf of the minors or their mother, that he did not prepare the written statement and that he accepted the vakalatnama at the instance of Mahendro. Mr. Pugh who has appeared on his behalf has urged us to treat him leniently on account of his youth and inexperience. We have given due weight to these considerations. But we regret to say that the papers before us shew that the pleader's conduct in the enquiry held by the Munsif disentitle him to any special consideration at our hands. When he was called upon to answer the charge he put in a false statement. Not content with this he actively obstructed the Munsif in the enquiry. It appears that at the outset he said that he would not appear and would take no part in it. Later, when the Munsif wished to shew him to one of the witnesses he declined to come into Court and the witness had to be taken out of the Court to him. It was suggested that the pleader did in this case no more or less than is commonly done in similar circumstances in the Mofussil. We trust that the conduct of this pleader do not represent the standard of care exercised by pleaders in such cases. It is unnecessary to enlarge upon the danger of pleaders taking instructions from unauthorised persons. Pleaders who do not take care to ascertain that the persons instructing them are entitled to do so must understand that such conduct is most improper and that they expose themselves to severe punishment. In the present case it is not proved that any injury resulted from the conduct of the pleader but conduct of this kind must be stopped. The order of the Court is that Jugal Chandra Mazumdar be suspended from practice for nine months from this date.

A. K. R.

PATNA HIGH COURT.

[CIVIL REVISIONAL JURISDICTION.]

No. 1206 OF 1915.

ROE, J.
JWALA PRASAD, J.
1916,
22, May.

BHARAT MAHTO and others, Plaintiffs,
v.
NISARALI SHEIKH and ors., Defendants.

Suit for delivery of cattle, specific performance of the contract or compensation—Alternative relief—Sec. 12, Specific Relief Act (I of 1877)—Non-maintainability of the suit—Art. 15, second schedule, Provincial Small Cause Courts Act (IX of 1887)—Substantial justice—Sec. 25, Provincial Small Cause Courts Act.

The mortgagors entered into a contract with their mortgagees whereby, in consideration of the latter making an endorsement on the back of the mortgage-bond crediting Rs. 215 to the mortgagors' account, the mortgagors agreed to deliver to the mortgagees certain heads of cattle. The mortgagees performed their part of the contract and then sued the mortgagors in the Small Cause Court for delivery of the cattle promised, and in the alternative for

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Improper question by Advocate.

In a recent case (*Wright* v. *Hewson*, before Avory and Rowlett, JJ., King's Bench Division, 17th May last) the propriety of counsel's putting irrelevant questions in cross-examination with a view to prejudice a jury elicited some observations from the Bench which public prosecutors as also counsel for the defence will do well to note. In this country civil actions are not tried with the aid of jury but the principle noted below are with greater force applicable to criminal cases. In the case in question, which was one for recovery of damages from defendant for negligent driving of his motor-car, the plaintiff's counsel asked the defendant whether his car was insured. The defendant did not answer the question and the County Court Judge ruled the question as irrelevant. In defendant's appeal for a new trial, Avory and Rowlatt, JJ., upheld the view of the trial Judge and Rowlatt, J., observed "It should be stated emphatically that counsel are not entitled to do such a thing in order to prejudice the minds of the jury. It is the duty of counsel to know and observe the rules governing what they may and what they may not do in the conduct of cases; they may not disregard those rules and trust to not being checked in time. I wish to say that in proportion that counsel voluntarily observe those rules so will their standing and reputation grow. When this question was put to the defendant the Judge might justifiably, in my opinion, have discharged the jury and ordered the plaintiff to pay the costs of the action. The Judge did not, however, adopt that course; he was satisfied that his remarks nullified the effect of the question on the minds of the jury, but those who make suggestions such as those now complained of must face the possibility of such an order being made."

Viscount Reading and Birthday honours.

On the Lord Chief Justice of England, the dignity of Viscountcy was conferred on the last King's Birthday and this is said to be the first time that such a high dignity has been conferred on any sitting member of the Bench. The conferment of this singular honour is all the more remarkable because the fact of his being a member of the Jewish community has not stood in the way of this unique preferment. Before him Lord Esher and Lord Alverstone were made Viscounts but only after their retirement from their respective positions of the Master of Rolls and the Lord Chief Justice of England. With regard to the honours conferred on the members of the English Bar, we notice that the recipients of such honours are men who have distinguished themselves not merely at the Bar but also in other spheres such as public service, politics or literature.

Jury if justified in interfering with Counsel during trial.

In another recent case (*Hulton's* case) before Mr. Justice Lush the question of the propriety of a juryman making observations from the jury-box regarding the cross-examination by counsel came up. The juryman in question accused the leading counsel in the case of cross-examining the plaintiff in a bullying style. The counsel thereupon protested against such observations being made by a juryman regarding his mode of conducting his case. Mr. Justice Lush thereupon ordered the juryman to withdraw from the trial. The proper function of the jury is to follow the facts of a case and to come to a conclusion with regard to them, and it is for the Judge to see that the trial is properly conducted and to protect the witnesses when necessary. For a member of the jury to interfere with counsel in the course of a case can only introduce confusion into it and is

disrespectful to the Judge. It also may go to disclose a bias for or aganist a party and consequently the proper order to make in such cases is to discharge him. As such a course may require the empanelling of a new jury, a new trial and expense to the accused, jurymen will be wise to confine themselves to the functions assigned to them by law and not go out of their way to criticise the conduct of the counsel in the course of a case. He can expect a reciprocal courtesy from counsel and any disrespectful criticism by counsel regarding any juryman during the trial is as much a contempt of Court as any similar observation regarding the judge and is punishable as such.

ATTACHMENT BEFORE JUDGMENT OF IMMOVEABLE PROPERTY BY A COURT OF SMALL CAUSES—IF VALID?

The question of the validity of an attachment before judgment of immoveable property by a Court of Small Causes is almost a matter of every-day occurrence in the Mofussil Courts, but unfortunately our reports do not furnish any recent authority to help us in arriving at a satisfactory conclusion. Under the Civil Procedure Code of 1882, a Court of Small Causes could not attach any immoveable property before judgment. Sec. 5 of the old Code (1882) provided that certain chapters and sections of that Code (all specified in its second schedule) only were to extend to Courts of Small Causes. From this schedule it will appear that the provisions regarding arrest and attachment before judgment (Ch. XXXIV), though made applicable to Small Cause Courts, still did not apply to such Courts when they related to immoveable property. Consequently under the old Code a Small Cause Court could not attach any immoveable property before judgment.

Now, the question is, whether the law on this subject has been altered by the Code of 1908. It is worth our while to notice that the old Code specified the particular chapters and sections applicable to Small Cause Courts, and declared all other provisions of the Code as non-applicable to them; (see sec. 5, C. P. C., 1882). But sec. 7 and Or. L of the present Code, which may be looked upon as the counterparts of sec. 5 of the Code of 1882, do not say which particular provisions of the Code are to apply to the Provincial Small Cause Courts, but simply lay down that certain provisions are not applicable to such Courts. So, in order to determine the applicability of the provisions of the Civil Procedure Code to Provincial Small Cause Courts, as to which the Code itself is silent, we must turn to the Provincial Small Cause Courts Act, 1887. Sec. 17 of this latter Act recommends the adoption by a Provincial Small Cause Court of the procedure prescribed in the chapters and sections mentioned in the second schedule of the Code of 1882; but that Code now having been repealed, it now follows under sec. 8 of the General Clauses Act that the provisions of the present Code corresponding to the said chapters and sections should control the procedure in Provincial Small Cause Courts. Therefore though the present Civil Procedure Code is silent as to the applicability of its provisions to the Provincial Small Cause Courts still such of its provisions as correspond with the second schedule of the old Code will apply to such Courts, if they do not fall within the limitations of the aforesaid sec. 7 and Or. L. The provisions for attachment before judgment have been made in Or. XXXVIII, rr. 5-12. These rules correspond with the sections of Ch. XXXIV of the old Code which extended to Provincial Small Cause Courts; consequently they will apply to such Courts, if not falling within the limitation of sec. 7 and Or. L. On examining sec. 7 it will be found that it speaks of only certain provisions of the *body of the Code* as contrasted with the "Code" which includes rules as well. Now, Or. XXXVIII, rr. 5-12, though falling within the "Code," do not fall within the *body* of the Code; so naturally these rules do not come within the purview of the limitation of sec. 7. If, however, this summary dismissal of sec. 7 be taken exception to, let us follow its provsions clause after clause: This section has two main clauses (*a*) and (*b*). Cl. (*a*) declares inapplicable the provisions of the *body* of the Code that relate to (*i*) suits excepted from the cognizance of a Small Cause Court; (*ii*) the execution of decrees in such suits; (*iii*) *the execution of decrees against immoveable property*. Of these three sub-rr. (*i*), (*ii*) and (*iii*), the first two require no comment. As to sub-cl. (*iii*) it should be noticed that it speaks of *execution of decrees*, which necessarily comes *after* judgment. So we may pass over even sub-cl. (*iii*). We are however sensible that this disregard of sub-cl. (*iii*) may give rise to a legal paradox because it gives a Small Cause Court greater power to deal with immoveable property *before* judgment than *after* judgment. But as a matter of fact, the peculiar circumstances that call for an attachment before judgment necessitate that such should be the case. Moreover it should

be observed that the provisions in the *body* of the Code that relate to the *execution of decrees against immoveable property* contemplated by the aforesaid sub-cl. (*iii*), are the secs. 68-72 (all about delegation of the power of execution to Collector), which evidently cannot apply to the case under discussion.

As to cl. (*b*) of sec. 7, it simply specifies certain sections of the *body* of the Code and prohibits their extension to Provincial Small Cause Courts, namely, secs. 9, 91, 92, 94 and 95 (so far as they relate to injunctions and interlocutory orders), and secs. 96 to 112 and 115. From a reference to secs. 9, 91 and 92 it will necessarily appear that they are inapplicable to Small Cause Courts. Secs. 94 and 95 are not altogether inapplicable to Small Cause Courts. Sec. 94 has five sub-cls. (*a*), (*b*), (*c*), (*d*) and (*e*). Of these sub-cl. (*c*) deals with injunctions and sub-cl. (*e*) with interlocutory orders. Under sec. 7 only the two sub-cl. (*c*) and (*e*) will not extend to Small Cause Courts. The other sub-cls. (*a*), (*b*) and (*d*) dealing respectively with arrest, attachment and receiver matters, will therefore necessarily apply to Small Cause Courts. Moreover it is worth our while to notice that sub-cl. (*b*) sanctions the attachment of *any* property. The word *any* implies both moveable and immoveable. So it will not be wrong to maintain that not only the old law, prohibiting the attachment of immoveable property by a Small Cause Court before judgment, has been repealed, but there are distinct provisions in the present Code which positively permit such attachment. As regards secs. 96 to 112 they deal with appeals, and therefore they have no application to small causes. Sec. 115 gives the High Court a revisional jurisdiction, so there is no harm if it is not extended to Small Cause Courts inasmuch as the Provincial Small Cause Courts Act has made a similar provision in its sec. 25. From a reference to Or. I, we find that Or. XXXVIII does not come within the purview of that order, and such omission, if not accidental, is very significant because it makes all the provisions relating to attachment before judgment applicable to Small Cause Courts irrespective of any consideration for the different kinds of property. So we may safely take it that though attachment before judgment of immoveable property by a Small Cause Court was not permissible under the old Code, the law in this respect has been amended by the present Code.

Attachment before judgment is allowed *quia timet*, because the attaching party fears lest in case of his eventual success his decree should prove infructuous. In our practical experience we have often seen that as soon as a suit is brought in a Small Cause Court, the Defendant attempts to put his properties beyond the reach of the Plaintiff by means of a transfer. So it will cause much hardship to the latter if such a Court be not permitted to attach immoveable property. It is a common notion with many practitioners that a Small Cause Court has no jurisdiction over immoveable property, and consequently such a Court cannot at all attach immoveable property whether before or after judgment. Supposing that a Small Cause Court has no such jurisdiction—a view which itself is subject to much comment—it does not affect the question of attachment before judgment. It will be seen that under Or. XXXVIII, r. 6, question of jurisdiction cannot arise, because from the old sec. 483 the Select Commitee have omitted the words "property within the jurisdiction of the Court" with a view to removing the restriction suggested by their presence. The very circumstances that necessitate an attachment before judgment justify such an extensive power for attaching any property whether within or beyond the jurisdiction of a Court. In this sense an attachment before judgment is rather wider in scope than at attachment after judgment. In the case of an attachment in execution of a decree, the decree-holder can select the particular Court which can conveniently deal with the properties of his judgment-debtor. But before judgment, a Plaintiff may not have this freedom of choice about his forum for the purpose of easy manipulation of the said properties, because his forum may be determined by other conditions than the situation of the Defendant's properties. Consequently, the Legislature thought it advisable to remove the jurisdictional restrictions in the case of attachment before judgment. It is worthy of notice that in Or. XXI, r. 82, a Small Cause Court has been distictly prohibited from ordering sale of immoveable property; if it were the intention of the legislature not to permit a Small Cause Court to attach immoveable property, the Code would have certainly made a similar provision fettering a Small Cause Court's power of attaching immoveable property just as it has done in the case of sales of immoveable property by such a Court. So we think we can maintain that the old law forbidding an attachment of immoveable property before judgment by a Small Cause Court has positively been altered by the present Code.

The only valid objection against such an attachment is that it may lead to investigation of title to immoveable property when a claim is preferred to the property attached before judgment under Or. XXXIII, r. 8. It may plausibly be argued that investigation of such claim may completely frustrate the whole object of the law relating to the Small Cause Court suits which is to provide for a speedy and summary disposal of cases; moreover, it may also be urged than an investigation of title by a Court, against whose decision there is no appeal, may seriously affect the rights of the litigants. In answer to these contentions we have simply to point out that the procedure laid down by the Code for such investigations, is itself of a summary character, and that such an investigation of title cannot prejudice any one inasmuch as it does not debar the affected party from establishing his right by a fresh suit, [see Or. XXI, r. 63; also *Sundar Singh* v. *Ghasi*, (1896) I. L. R. 18 All. 410; *Krishnabhupati* v. *Vikrama*, (1895) I. L. R. 18 Mad. 13, 17; *Raghunath* v. *Sarosh Kama*, I. L. R. 23 Bom. 266]. Consequently it is no difficult matter to meet the aforesaid objections. In short, if we were to exclude ante-judgment attachment of immoveable property from the procedure of Small Cause Courts, it would amount to reading in sub-cl. (*b*) of Or. L, r. 1, the words—" Or. XXXVIII, rr. 5 to 12, so far as they relate to immoveable property," which are however so conspicuously wanting therein.

A. C. Ghose, M.A., B.L.,
Vakil.

Reviews.

The Provincial Insolvency Act (III of 1907) with the case-law thereon. *By S. Venkoba Rau, B.A., B.L. Second Edition. The Law Printing House, Madras. 1916.*

It goes almost without saying that whatever is to be expected in a case-noted edition of the Act will not be missed from this work. The profusion of reference to English cases goes indeed to show that the performance is even better than the promise. In the present edition the case-law has been brought up to the end of 1915. The Rules of the Calcutta, Bombay and Madras High Courts have been set out in appendices, as also the texts of the English Bankruptcy Acts of 1883 and 1890, and of the Presidency Towns Insolvency Act of 1909. A full subject-index and the usual tables of cases and a well-written introduction make the book as complete a hand-book upon the Act as one might wish it to be.

The Court Fees and Suits Valuation Acts. *By A. K. Nanniah, B.A., B.L. Third edition. The Law Printing House, Madras. 1916.*

It is unnecessary to deal in detail with this third edition of a book which has already established itself as one of the indispensable works of reference to legal practitioners. The case-law is brought up to the end of 1915 and is quite exhaustive. No notice (we would like to add) of a book issued from the Law Printing House does full justice to that office which does not duly recognise the excellence of its printing and general get-up.

A treatise on the Law of Easements. *By Charles James Bale, Esq. Ninth Edition, by Thomas H. Carson. London: Sweet and Maxwell, Ltd., 3, Chancery Lane. 1916.*

When this work first appeared in 1839, the field of law with which it purported to deal was in a large measure unfraversed even by judicial decisions. This cannot be said of the present edition for the main principles underlying the law and many of its details have been defined in leading judgments; not often, be it noted, without the material assistance afforded by previous editions of this treatise, some of which are referred to in terms of high commendation. Not that the field has been wholly mapped out yet, for there are points on which no definite decision has yet been reached, for instance, the question whether it is open to the Courts to recognise a new form of easement or the still vexed problem concerning the position of licensees who have paid for their privilege, raised by *Wood* v. *Leadbitter*, 67 R. R. 831.

The present edition has made wider departures from the original text than its predecessors in which the matter of the original text had been left almost entirely unaltered, and it was time. But the feature which will commend itself most to legal practitioners in this country, namely, the long extracts from leading judgments of English Courts, has been preserved.

The present editor has performed his task conscientiously and the book, besides being the leading text-book on the subject, will in its present shape, be prized as the most up-to-date treatment of a branch of the law which is none too easy to grasp even by practitioners conversant with that law.

BHARAT MAHTO *v.* NISARALI SHEIKH.

damages. The Court having dismissed the suit as being a suit for specific performance of a contract and thus beyond its competence as a Small Cause Court,

Held—*That under sec. 12 of the Specific Relief Act no suit for specific performance would lie as, unless there was something remarkable about the cattle, it was obvious that adequate compensation for the breach of the contract could be given in money.*

Substantial justice was done by the High Court in the exercise of the powers under sec. 25, Provincial Small Cause Courts Act, by directing that the plaint be amended by striking out the clause demanding specific performance and the suit dealt with solely as a suit for damages occasioned by a breach of the contract.

This Rule was issued against a decision of Babu A. C. Ghosh, Small Cause Court Judge of Manbhum, dated 17th September 1915, in Small Cause Court Suit No. 122 of 1915.

The facts out of which the case arose are briefly as follows :

The Defendants executed a mortgage-deed in favour of the Plaintiff on receipt of Rs. 200 as consideration-money on 10th Bysack 1315 B. S. In Bysack 1321 an agreement was entered into by the parties, by which the mortgagors agreed to hand over to the mortgagees a number of cattle, bullocks and buffaloes in consideration of the mortgagees making an endorsement on the back of the mortgage-deed crediting Rs. 215 to the mortgagors' account. The Plaintiffs mortgagees performed their part of the contract, that is, they made an endorsement on the back of the mortgage-bond as stipulated, but the Defendants did not deliver the cattle to the Plaintiffs. The Plaintiffs thereupon instituted the present suit in the Court of Small Causes praying in the alternative for delivery to them of the cattle or for damages to the extent of Rs. 215 and interest for their non-delivery. The Small Cause Court Judge dismissed the Plaintiffs' suit as he was of opinion that the suit was in essence a suit for recovery of money due on the mortgage-debt. Thereupon the Plaintiffs moved the High Court and obtained this Rule.

Mr. Sishir Kumar Mitra for the Plaintiffs-Petitioners.

Mr. Abani Bhusan Mukerjee for the Defendants, Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The facts of this case briefly are, that the applicants before us were mortgagees, and the Opposite Party mortgagors, under a deed securing the sum of Rs. 200 to the applicants. In Bysack 1321 a contract was entered into, whereby, in consideration of the making of an endorsement on the back of the mortgage deed crediting Rs. 215 to the mortgagors' account under that deed, a number of cattle, bullocks and buffaloes, should be handed over to the mortgagees.

The mortgagors having failed to carry out their part of the contract, the mortgagees instituted a suit in the Court of Small Causes praying in the alternative for delivery to them of the cattle, or for damages to the extent of Rs. 215 and interest for their non-delivery. The learned Subordinate Judge was of opinion that the suit was in essence a suit for recovery of money due on the mortgage-debt; he therefore dismissed the Plaintiffs' suit, and ordered the Defendants to pay the Plaintiffs' costs.

The matter now comes before us under sec. 25 of the Small Cause Courts Act

at the instance of the mortgagee Plaintiffs. It seems to us that the position throughout has been misconceived. The suit is in effect a suit upon a contract. The consideration on one side was the writing of certain words upon a piece of paper. That part of the contract has been performed by the Plaintiffs. It is therefore necessary that the Defendants should perform their part of the contract, or pay damages for its breach. Unless there is something remarkable about the bullocks and buffaloes, it is obvious that adequate compensation for the breach of the contract can be given in money. Therefore under the Specific Relief Act, sec. 12, no suit for specific performance would lie. But the Plaintiffs have asked for that specific performance, and under sec. 35, Second Schedule, Provisional Small Cause Courts Act, cl. 15, a suit for specific performance is not cognizable by a Small Cause Court. The question before us is, the Plaintiffs having asked for two reliefs in the alternative in the Small Cause Court, and one of these reliefs not being cognizable by that Court, but on the face of it, a relief which cannot be given in law, what action the Small Cause Court should have taken with regard to the plaint. We are of opinion that in the exercise of the discretion vested in us under sec. 25, substantial justice will be done if we direct that the plaint be amended by the striking out of the clause or clauses demanding specific performance of the contract. The suit will then be dealt with solely as a suit for damages occasioned by a breach of the contract. Let the learned Subordinate Judge be directed to assess those damages and to make a decree accordingly. In view of the mismanagement of this case by the Plaintiffs' legal advisers, we think it fair that they should pay the costs of the hearing of this rule, hearing fee 1 gold mohur. The costs of the Small Cause Court will of course follow the result of the action.

A. K. R. *Rule made absolute.*

[PRIVY COUNCIL.]

[Appeal from Bengal.]

Lord Shaw.
Lord Sumner.
Lord Parmoor.
Sir John Edge.
Mr. Ameer Ali.
with
*Nautical Assessors.**
1916,
Heard, 27, 28 and 29, March.
Judgment, 5, May.

The Rivers Steam Navigation Company (Limited), Appellants,
v.
The Hathor Steamship Company (Limited), Respondents.

Admiralty jurisdiction—Collision case—Decision of trial Judge, weight to be attached to—Trial with aid of Nautical Assessors

In collision cases, no rule is better established than this, that, when questions of fact alone arise, a Court of Appeal should be most chary of interfering with the decision of a trial Judge who has seen the witnesses and had the opportunity of forming his estimate of them by their demeanour. Only in exceptional cases and for special reasons should a Court which has not had this advantage reverse the judgment of the trial Judge on questions of fact.

Appeal from a judgment and decree of the Calcutta High Court (Sir L. Jenkins, C. J., and Woodroffe, J.) which reversed a decree made by Fletcher, J. The appeal raised pure questions of fact and they are fully stated in their Lordships' judgment.

Messrs. B. Aspinall, K. C. and *Dumas* for the Appellants.

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* Vice Admiral Robert N. Ommanney, C. B, Commander W. F. Caborne, C.B., R.N.R

THE RIVERS STEAM NAVIGATION CO., LD. *v.* THE HATHOR STEAMSHIP CO., LD.

Messrs. A. Roche, K.C. and *L. Noad* for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—The Respondents, owners of the steamship "Hatumet," sued the Appellants, owners of the paddle-steamer "Punjab," in the High Court of Judicature at Fort William in Bengal, in the Ordinary Original Civil Jurisdiction of the Court, for negligent navigation in the Hooghly on the 27th December, 1911. Fletcher, J., who tried the case, decided against them. The Court of Appeal (Sir Lawrence Jenkins, C. J., and Woodroffe, J.) having reversed the judgment of Fletcher, J., the owners of the "Punjab" have brought the present appeal. The case was such as is regularly tried in Courts of Admiralty, and the practical rules of Admiralty Courts are applicable. The only material difference arising from the fact that the action was brought in the Ordinary Original Civil Jurisdiction of the Court is that neither Fletcher, J., nor the Court of Appeal enjoyed, as their Lordships have done, the benefit of the advice of Nautical Assessors.

In collision cases, no rule is better established than this that, where questions of fact alone arise, a Court of Appeal should be most chary of interfering with the decision of trial Judge, who has seen the witnesses and had the opportunity of forming his estimate of them by their demeanour. Only in exceptional cases and for special reasons should a Court which has not had this advantage reverse the judgment of the trial Judge on questions of fact. This rule has long been observed and often laid down. It is unnecessary to cite authorities in which it has been formulated.

The Appellate Court, in effect, treated the appeal as a re-hearing of the whole case. Presumably, therefore, their opinion was (though they do not so say in terms) that Fletcher, J., had not rightly addressed himself to the questions before him, so that there had been a mistrial; if they merely differed from Fletcher, J., as to the effect of the evidence, they would not have thought themselves justified in allowing the appeal. Before their Lordships, counsel for the Respondents submitted that Fletcher, J., had failed to appreciate the relative importance of the different incidents, and in a question of seamanlike navigation, had allowed his judgment to be influenced, if not determined, by tests inapplicable to two vessels approaching one another so as to involve risk of collision. Accordingly, it becomes necessary to consider the facts, not in order to see how their Lordships would have decided at the trial, but in order to see whether Fletcher, J., so misapplied his mind to the incidents proved before him as to warrant the reversal of his judgment on what, after all, are exclusively questions of fact.

The scene of the occurrence was the reach of the Hooghly a little below Calcutta opposite the Sibpur College. Here the river runs about east and west, and the deep-water channel is on the south side of the river. On its north side there is an extensive bank called the Sibpur College Sand, where the water is shallow over a considerable distance outwards from the north bank. As the sands rise steeply from the deep channel, their edge, constituting its northern limit, is marked by a line of three buoys: the Upper, Central, and Lower College Sand buoys.

It was already daylight, the morning was clear and still, and the "Hatumet," which had left the Kidderpore Dock a little earlier, was proceeding down to sea

drawing 23 ft. 2 in. forward and 24 ft. 4 in. aft, in charge of a Hooghly pilot named Wheeler. There is no reasonable doubt that some obstruction or appearance of obstruction ahead caused this pilot to shift her helm and to handle her engines in a series of rapid manœuvres, the result of which was that she took the College Sand with her stem at a point afterwards fixed by compass bearings as about 400 ft. below the Central College Sand buoy, where she remained fast for some hours and sustained considerable damage. The natural course for an ocean steamer proceeding down this reach would be to keep in mid-channel or a little to the northward of mid-channel, but, on perceiving any vessel coming up-stream, to close somewhat on the line of the buoys under a port helm so as to pass her port to port. The Plaintiffs' case was that the "Hatumet," coming down mid-channel at half speed, saw the "Punjab" at a considerable distance coming up-river, exchanged port-helm whistle signals with her, edged to the north side of the deep-water channel under a slight port helm, and was about to pass her port to port, when she saw the "Punjab" suddenly take a sheer to the northward, as if acting under a starboard helm (truly a most astonishing and almost suicidal thing to do), so that she began to cross the "Hatumet's" bows at a distance of only 300 feet. The "Hatumet" is about 350 feet long. Thereupon the "Hatumet's" engines were put at slow and her helm was hard-a-starboarded. Then, after an interval, according to her engine-room log, of one minute, her engines were put full speed ahead for another minute in order to cant her bow to port, but, as she did not cant, they were then put full speed astern. The "Punjab" passed the "Hatumet," apparently at this juncture, starboard to starboard, but the "Hatumet," with a right-handed screw going astern, took a sheer to starboard about three points off her course, grounded, and remained fast. It may be observed that although the "Punjab" had passed by at a distance of only a few yards, those on board the "Hatumet" did not hail her. They "refrained even from good words."

Now it is common ground that the "Punjab," a shallow-draught river paddle-steamer, actually was coming up at this time with two lighters lashed on her port side and one on her starboard. She did sight the "Hatumet" coming down at a considerable distance; she did starboard her helm; and she did pass the "Hatumet" starboard to starboard, and, what is more, the serang, who was directing the navigation at the time, said that, as he understood, when a big ship gave one short blast to a small ship it meant "get out of my way." That way danger lies.

Fletcher, J., rejected the "Hatumet's" story, and, as their Lordships think, must have meant that he believed the "Punjab's" serang, though he did not expressly say so. He said in terms that he was unfavourably impressed by the manner of the "Hatumet's" pilot and his assistant, who were called as witnesses, and that he would feel great difficulty in accepting their evidence standing alone. It is true that he attributed to the pilot a suppression of fact, of which he was not guilty; but their Lordships do not think that this was his only or indeed his main reason for doubting his veracity. He certainly was greatly and unfavourably impressed by the fact that, according to the "Hatumet's" case, the "Punjab" was fine on her port bow, only about 300 feet away, when

she was seen to be starboarding. To this all the "Hatumet's" witnesses quite unequivocally pledged themselves from the first. On finding that the "Hatumet" was hard and fast aground the pilot sat down and wrote a report then and there, in which he made that statement. The captain signed it as correct. A similar account was entered in the log. The captain and mate were examined on commission in England and adhered to this story, and so did the pilot at the trial. It was so manifest that the "Hatumet's" manœuvres after perceiving the "Punjab's" alteration of course up to the time when the two vessels passed starboard to starboard, could not have been crowded into the short time in which the two ships, after being only about 300 feet apart, would meet and pass, that, at the end of a very long and full trial, the Plaintiffs' counsel admitted collision to have been inevitable if the vessels were anything like so near to one another as 300 feet. It is doubtful whether the Appellate Court appreciated that the Plaintiffs had been driven to abandon this most important feature of their case.

The Respondents' very forcible argument was this: If the "Hatumet" gave a port-helm signal it could only have been for some vessel on her port hand; vessels on her starboard hand were out of her way on the shoals, where she could not follow them. The rapid and unsuccessful manœuvres, to which she had resort, must have been taken in view of some vessel navigating so near to her as to involve risk of collision, and that risk could only arise, in the case of vessels about to pass port side to port side, if the approaching vessel suddenly directed her course to port, and appeared to be crossing the "Hatumet's" bows. No steamer but the "Punjab" was in sight, so the thing speaks for itself. To distrust, and still more to reject, the "Hatumet's" case because her pilot misjudged her distance from the "Punjab," showed on the part of Fletcher, J., a lack of nautical judgment. The distance between two vessels approaching one another in a river is peculiarly difficult to estimate with precision. Even at a distance of 1,000 feet (and so their Lordships are advised is the case) such a manœuvre was unseamanlike and involved risk of collision.

This argument, though strong, falls short of being convincing. If there was no other vessel in the neighbourhood of the "Hatumet" except the "Punjab," whose presence, or supposed presence, at close quarters more or less on the port bow could have led to the "Hatumet's" manœuvres, it might well have been inferred that the "Punjab" was the cause of them and that they would never have been resorted to if the "Punjab" had kept her course so as to pass port side to port side. It is not to be supposed that the "Hatumet" would have been handled in such an urgent manner in order to avoid the imaginary encounter of a non-existent vessel. Accordingly, though it was enough for the "Punjab" to show that "Hatumet's" witnesses failed to prove their case without herself accounting for the "Hatumet's" manœuvres, it was evidently important for her to suggest some explanation of those manœuvres. One suggestion was that the "Hatumet" had approached close to the steep southern edge of the College Sand, and, as seamen say, "smelt the ground," so that she took a sheer to starboard. Their Lordships are advised that in the position and in the depth of water in which the "Hatumet" must have been at the time this could not have happened.

The other suggestion is that the manœuvres are explained by the presence of a country boat somewhere ahead of the "Hatumet." Such a boat there was, and somehow the "Hatumet's" pilot failed to appreciate its presence and position. Eventually he came into collision with it on his starboard bow, though no damage was done. Where this country boat was just previously and how she shaped her course is not known, but, without assuming to decide anything about her movements, their Lordships think that her presence so close to the "Hatumet" at the critical time provides a possible explanation of the "Hatumet's" manœuvres which is consistent with an acquittal of the "Punjab," if the "Hatumet's" witnesses are once discredited in their story.

Their Lordships think, further, that Fletcher, J., was entitled to attach great weight to the fact that from the first the "Hatumet's" witnesses placed the occurrence of the "Punjab's" sudden change of course at a distance from the "Hatumet" of only about 300 feet. The Plaintiffs' error was not inconsiderable. The estimate was far from being substantially exact. A distance apart of as much as 1,000 feet at the critical time has now been suggested. Whoever was responsible for the original estimate, it was one to which three persons, all well qualified to judge, made themselves parties within a few hours of the event. They must at least have known whether they felt sure of their estimate or not. It is a grave matter for a litigant in such cases to shift his ground from that taken up in his Preliminary Act or in such contemporary documents as came into existence in this case and correspond to a Preliminary Act. When it comes to trebling the distance in question, the position of the Defendants is materially prejudiced. Their Lordships are advised that the manœuvre with which the "Punjab" is charged would be dangerous and likely to involve risk of collision, even at a distance of 1,000 feet; but if that distance were accepted, the Appellants might have raised, with some prospect of success, the answer that within a distance of 1,000 feet the "Hatumet" ought to have eluded in safety the consequences of the initial negligence, if any, of the "Punjab." As it was, Fletcher, J., considered that he need not decide this issue; it was but lightly touched upon in the Court of Appeal; and the Appellants' counsel, at their Lordships' bar, assuming that the Plaintiffs would adhere to their original case, elected not to press it. No further opinion need be expressed on this point beyond saying that, on the course which the "Punjab" admittedly took, so slight an alteration of the "Hatumet's" helm, if promptly made, would have prevented both collision and grounding, that it would not have been right to view such a shifting of their ground as anything but a grave blow to the credit of the "Hatumet's" witnesses.

It is on these witnesses that the Plaintiffs had to rely for the alleged interchange of port-helm signals. The "Punjab's" serang said that he heard no such signal from the "Hatumet," and Fuller, a so-called independent witness, who did hear her whistle, was not prepared to distinguish between a mere warning blast and a signal meaning "I am directing my course to starboard." So far as he goes, Fuller appears to negative any port-helm signal from the "Hatumet," and he certainly said that the "Punjab" did not whistle at all.

A judgment for the Defendants might well be affirmed on the simple ground that

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Fletcher, J., considering the evidence with proper appreciation of its bearing and without misconception as to the law, found as a fact that he could not rely on the "Hatumet's" witnesses sufficiently to hold that she had made out her case. Certain considerations, however, have been pointed out, which carry the matter a good deal further. A strong attempt was made at the trial to show that, under the Hoogly Rules, it was the duty of both vessels in that part of the river to pass port side to port side, but it was shown eventually that the rule relied on did not apply to the position in question. A practice was proved for shallow-draft river vessels to cross the College Sand to the northward of the line of buoys, and of this practice the pilot of the "Hatumet" was aware. Certain factors governing the positions of the vessels are sufficiently known to make an arithmetical calculation profitable. The "Hatumet's" pilot was well acquainted with the river and well able to estimate distances on it. At a Marine Enquiry into the conduct of the "Punjab's" serang, held about a month after the incident, this pilot gave evidence that, when he first sighted the "Punjab," she was about 1,000 feet below the Lower College Sand buoy, and the "Hatumet" was then 650 to 700 feet above the Upper buoy. To this evidence he eventually elected to adhere at the trial, and this part of his evidence was accepted by Fletcher, J. From this finding their Lordships think that the Plaintiffs cannot now escape. The distance between the Upper and the Lower College Sands buoys is accurately known. It is 2,450 feet. The tide was the last of the flood, running up about 1 knot. This is given by the "Hatumet's" assistant pilot. The "Punjab's" serang gave her speed as 5 or 6 knots, and this was not challenged in cross-examination. The "Hatumet's" pilot put her speed somewhat variously, but in substance at about 4½ knots. Her engines were at half-speed ahead. Without tying the Respondents to unreasonably precise figures, it is easily demonstrable that at these speeds the "Punjab" could not have been still approaching the "Hatumet," where the latter must have been when those manœuvres began, which shortly afterwards brought her up at the observed point of her stranding. At that time the "Punjab," according to her witnesses, was actually astern of the "Hatumet" in the shoal water to the northward of the buoys. According to Fuller, she could not have been so far upstream, but still she was to the northward of the buoys and not in the position in which the "Hatumet" must needs place her. As a witness, Fuller must be admitted only under very considerable reserve. Of his evidence at the Marine Enquiry, only a brief and obscure report is to be found in the Record. Whatever it meant, it did not agree with what he said at the trial. All the explanation of this disagreement that he could give was that he was called at the enquiry on his subpœna, apparently without having given a proof of his evidence, and, having said what he had to say, was not cross-examined so as to have the opportunity of altering it. The Respondents argued that his evidence at the enquiry placed the "Punjab" on the "Hatumet's" port bow in the act of starboarding across it so as to disappear gradually on her starboard hand till she was shut out altogether. Their Lordships find Fuller's evidence too obscure to support this view. If this was really what he saw, he must have said much more or much less than he did. His statement is not inconsistent with the "Punjab's" case, but it is sufficient

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ground for saying that the "Hatumet's" case ought to have been accepted.

One point remains: the "Punjab's" natural course would have been to have gained the shoal water on the north side of the reach before passing the Lower College Sand buoy, but the presence of country boats at anchor near that buoy obliged her to keep in the deep-water channel until she was able to round it and begin to cross the sands by passing between it and the Central College Sand buoy. Calculations were made by the "Punjab's" superintending engineer at the instance of cross-examining counsel, which were used to show that her turning circle was such as to prevent her from getting across the line between the Lower and the Central buoys till she had advanced within a few feet of the spot where the "Hatumet" grounded. Their Lordships have given careful attention to these calculations, but find them inconclusive. They depend on factors as to the precise position of the country boats and of the "Punjab" relatively to the Lower buoy, both laterally and downstream, at the moment of starboarding, which cannot exactly be ascertained. The sharp zigzag tacks imputed to the "Punjab" seem inexplicable, while apparently she might have made her in-and-out course round the Lower buoy on curves so flat that she would never appear to be on the "Hatumet's" port bow at any material time or even seem to be crossing her course so as to involve risk of collision. Here again the Respondents fail to carry their argument far enough to warrant interference with the decision of Fletcher, J.

Perhaps the Defendants were lucky at the trial, but in the result their Lordships think that the judgment given for them should stand. The learned Judge tried the case at great length, and was assisted by able counsel. He examined the evidence with care and none the less thoroughly because, as he himself observes, he spoke with considerable diffidence on matters of navigation. The judgment of the Court of Appeal does not point out such errors of apprehension on his part or such want of experience as justified them in reversing his decision, and their Lordships have been unable to discover sufficient ground for doing so. They will accordingly humbly advise His Majesty that the appeal should be allowed with costs here and below, and that the judgment for the Defendants should be restored.

Solicitors: *Messrs. Waltons & Co.* for the Appellants.

Solicitors: *Messrs. William A. Crump & Son* for the Respondents.

B. D. *Appeal allowed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES

No. 534 OF 1909

AND

No. 44 OF 1910.

N. R. CHATTERJEA, J.
ROE, J.
1915,
Heard, 21, 22, 27 and 29, July, and 3, 4 and 5, August.
Judgment, 27, August.

SM. KRISHNA KALYANI DASI, Appellant,
v.
MR. R. BRAUNFIELD and others, Respondents.

Thak maps of 1852, if to be presumed as unreliable—Value of thak maps as evidence—Land acquisition proceedings—Claim to compensation by zemindar as against person holding under a lakhiraj title—Onus of proof—Purchaser at revenue sale, if may eject lakhirajdar from land which has been planted or built on—Act XI of 1859, sec. 37 (4)—Encumbrance, how annulled—Assignee from auction-purchaser, position of—Land Acquisition Court if may determine conflict of title.

Thak maps have always been considered

SM. KRISHNA KALYANI DASI *v.* MR. R. BRAUNFIELD.

by Courts as good evidence, and although the value of a Thak map depends upon its accuracy there is no presumption that Thak maps must be inaccurate.

Opinion of Captain Hirst in his "Notes on the old Revenue Surveys" *and* JAGADINDRA NATH ROY *v.* SECRETARY OF STATE FOR INDIA (1) *referred to.*

A purchaser of an entire estate sold for arrears of revenue suing to recover land claimed by the Defendant as lakhiraj *must prove a* primâ facie *case that his* mal *land has, since 1790, been converted into* lakhiraj. *The fact that the lands are within the ambit of the estate is not sufficient to meet this burden.*

Whether in a particular case, the Plaintiff has been able to prove such a primâ facie *case would depend upon its own circumstances.*

Where the question of title to a plot of land arose between claimants to compensation money paid by Government on acquisition thereof under the Land Acquisition Act, one being the purchaser of the estate at a sale for arrears of land revenue, whilst the other was holding it as lakhiraj: Held—*That the former was in the position of the Plaintiff and the burden of proof as stated above was on him.*

HARIHAR MOOKERJEE *v.* MADAB CHANDRA BABU (2) *relied on.*

Sec. 37 of the Revenue Sale Law does not protect land held without payment of rent upon which dwelling-houses, manufactories or other permanent buildings have been erected or whereon gardens, plantations, etc., have been made.

The assignee or transferee of the auction purchaser at a Revenue sale is entitled to exercise the rights of a purchaser.

(1) L. R. 30 I. A. 44 : 5 C. W. N. 80 Cal. 281 ; 3 C. L. J. 449 (1902).

(2) 14 Moo. A. 152 (1871).

It is not essential on the part of the auction purchaser or his assignee who seeks to annul an incumbrance to give a formal written notice to avoid it.

All that is necessary is to notify to the incumbrancer by some unequivocal act the intention to annul.

A Land Acquisition Court has jurisdiction to determine a conflict of title between rival claimants.

This was an appeal preferred on the 6th December 1909, against the decree of Arthur Goodeve, Esq., Special Land Acquisition Judge of Zillah 24-Perganas, dated 16th August 1909.

The facts of the case fully appear from the judgment.

Messrs. Pugh, Caspersz and *Babus Basanta K. Bose, Ambica Pada Chaudhuri* and *Sarosi Charan Mitter* for the Appellant in No. 534 of 1909.

Babus Sarat Ch. Roy Chowdhuri, Satis Ch. Mookerjee, Kherode Gopal Mookerjee and *Bimal Ch. Deb* for the Appellants in No. 44 of 1910.

Messrs. Donough and *Remfry* and *Babus Jati Prosad Sarbadhicari, Sarat Ch. Roy Chowdhuri, Atul Krishna Roy, Surendra Nath Roy, Satyendra Nath Roy* and *Shib Chandra Palit* for the Respondent in No. 534 of 1909.

Mr. Remfry and *Babu Jati Prosad Sarbadhicari* for the Respondents in No. 44 of 1910.

The JUDGMENT OF THE COURT was as follows:—

N. R. CHATTERJEA, J.—This appeal arises out of a reference made by the Collector of the 24-Perganas under sec. 30 of the Land Acquisition Act. The reference was made as there were disputes about title between the parties

claiming the compensation awarded by the Collector.

The land acquired was about 37 bighas, and is situated in Mouza Majerhat which consists of Estates Nos. 167, 53 and several other estates which are referred to as *ejmali* estates which have no concern with the case.

The claimant No. 4, Mr. Braunfield, was at the time of the acquisition admittedly in possession of all the lands with the exception of those purchased by the Banerjees or Prince Kamar Kader (the claimants Nos. 5 and 6). He asserted that the greater portion of the lands were *lakhiraj* and claimed the whole of the compensation.

The claimant No. 2, Krishna Kalyani, claims about 17 bighas as appertaining to Taluk No. 167 purchased by her from one Charu Chandra Bose, who purchased the taluk at a sale for arrears of Government revenue on the 21st June 1900.

The claimants No. 1 (Abdul Matlab and others) claim an interest in more than 10 bighas and the claimant No. 7, Apurva Kumari, also claims an interest in more than 10 bighas. The claimants, Nos. 5 and 6, *viz.*, the Banerjee brothers and Prince Kamar Kader, claim more than 13 bighas, and there is a question as between them as to who is entitled to receive the compensation for the lands.

The following issues were framed for trial :—

(1) Does any portion of the land in suit fall within Taluk No. 167 and if so, which? As regards such land, is the interest of Mr. Braunfield or Prince Kamar Kader protected under sec. 37 of Act XI of 1859?

(2) If so, who is entitled to the compensation for such land?

(3) Did or did not Mani Lal Banerjee claimant No. 5 as agent of Prince Kamar Kader purchase the portion of the land in suit from Gopi Krishna Mandal and others?

(4) Who is entitled to the compensation therefor? Whether Prince Kamar Kader or Moni Lal Banerjee?

(5) For what land is Mr. Braunfield entitled to receive compensation?

(6) Has claimant No. 7, Apurva Kumari Dasi, a mortgage lien on some portion of the acquired land?

(7) Is any portion of the acquired land included in Estate No. 53? If so, who is entitled to the compensation for it? and

(8) How should the compensation money be apportioned amongst the claimants?

In order to determine whether the lands claimed by the claimant No. 2 fall within Taluk No. 167 a pleader Babu Chandra Kumar Das was appointed Commissioner to relay the Thak Map of Mouza Majerhat. He found that about 17 bighas of land (being portions of the different premises acquired) fell within plots 1, 4 and 6 of the Thak Map of Taluk No. 167.

The case was tried in the first instance by Mr. Goodeve, who held that no reliance could be placed upon the Thak Map or on the relaying thereof by the Commissioner Babu Chandra Kumar, and accordingly held that claimant No. 2 had failed to establish that any of the lands fell within Taluk No. 167. He also held that the claimants No. 1 failed to show that the lands claimed by them fall within Taluk No. 53, or were in the possession of Mr. Braunfield but as the latter admitted that he held two *mokarari jamas*, the claimants No. 1 were entitled to receive the value of the rentals payable for them capitalized at 20 years' purchase.

As to claimant No. 7, Mr. Goodeve held that the claimant No. 7 is entitled to the whole of the compensation awarded

for 10 bighas after deducting the amount which he found was payable to the claimants No. 1.

As to the land purchased by the claimants No. 5 from the Mandals, the learned Judge found that it was approximately 12 bighas, but he found that the Banerjees purchased the land for the claimant No. 7 Prince Kamar Kader as his agent, and the latter was the true owner of the property, and entitled to the whole of the compensation money awarded for the same.

In the result Mr. Goodeve held that the claimant No. 2 Krishna Kalyani and the claimants No. 5 the Banerjees were not entitled to anything and apportioned the compensation among the other claimants according to the findings arrived at by him. The claimant No. 2 appealed to this Court in Appeal No. 534 of 1909 and the claimants No. 5 the Banerjees appealed in No. 44 of 1910.

Appeal No. 534 of 1909 came on for hearing on the 7th March 1912 before Chitty and Teunon, JJ., who were of opinion that there was considerable doubt as to the correctness of the pleader Commissioner's survey and its results, and remanded the case to the Court below for findings on the first and second issues after having a fresh local investigation and survey made by a competent officer of the Court.

As no Surveyor from the Surveyor General's Office was available Babu Dwijendra Nath Mukherjee, a pleader, was appointed Commissioner by the Court below, none of the parties objecting to the appointment. He held a fresh local investigation and submitted his plan and report. The case then came on for hearing before Mr. Chotzner the Land Acquisition Judge, and he was of opinion that Dwijendra Nath had been no more successful than his predecessor in his relay of the Thak Map, and doubted whether with the extremely inadequate materials available it is possible to relay it at all. He accordingly held that the claimant No. 2 had failed to show that any portion of the acquired land fell within Taluk No. 167, and in that view did not consider it necessary to decide the latter portion of the issue No. 1 or issue No. 2.

It appears that a large number of documents which had been tendered in the Court below on behalf of the claimant No. 2 were rejected by Mr. Goodeve and when they were tendered before Mr. Chotzner the latter also rejected them on the ground that "The High Court did not take in these documents."

The appeal came on for hearing before Fletcher and Richardson, JJ., on the 19th May 1914 with the findings of Mr. Chotzner. The learned Judges held that the previous order of remand did not in any way preclude the Court below from admitting the documentary evidence tendered before it, and again remanded it to the lower Court. Richardson, J., added that "the evidence already on the record will be receivable subject to any just exceptions, and the parties will be at liberty to produce any further evidence which they may desire to produce."

When the case went back on remand for the second time, it was heard by Mr. Cuming. The claimant No. 2 again tendered the documentary evidence before him, but he rejected them on the ground that "all these documents had been tendered when the case was originally heard by Mr. Goodeve and Mr. Goodeve rejected them. This evidence is not therefore on the record and it cannot be considered as further evidence. Mr. Goodeve's order rejecting the evidence still stands. It has not been set aside

and therefore it is not open to me to admit this evidence which Mr. Goodeve rejected."

Mr. Cuming however came to the conclusion that the findings of the second pleader Commissioner (Babu Dwijendra Nath Mukherjee) were correct, and accordingly found the first part of issue No. 1 in the terms of the Commissioner's report. With respect to the second portion of issue No. 1 the learned Judge was of opinion that the only clause of sec. 37 of Act XI of 1859 under which the present case could come would be the clause beginning "fourthly" and held that the interest of Mr. Braunfield or Prince Kamar Kader was not protected interest within the meaning of sec. 37; and that the claimant No. 2 was entitled to the whole of the compensation for the lands falling within Taluk No. 167.

Objections were filed on behalf of the claimant No. 2 against the order of Mr. Cuming rejecting the documentary evidence tendered on her behalf and objections were filed against his findings on behalf of the claimants Nos. 4 and 6 and the representative of claimant No. 7.

The first question for our consideration is whether the result of the local investigation made by Babu Dwijendra Nath Mukherjee is correct.

There was a plan (Land Acquisition Plan) prepared by Mr. Smart but the Commissioner was directed by the Court below to make an independent survey and he accordingly made an independent survey in order to find out whether the portions of the acquired lands claimed by the claimant No. 2 fall within plots 1, 4 and 6 of the Thak Map of Mouza Majerhat.

The main point in connection with the relaying of the Thak Map is whether the trijunction point has been correctly found by the Commissioner. He found that out of the trijunctions shown in the *thak* plan, section No. 28 is the nearest of the disputed lands. It is the only trijunction with which the Chuks in the interior are connected and is the trijunction point of the three Mouzas Majerhat, Durgapur and Shahpur. He says—"If the points be satisfactorily identified at the locale, the Chuks Nos. 1, 4 and 6 can be easily relaid as the stations on the boundaries of those Chuks are connected with this point and the distance and the directions of the connecting lines are recorded in the field-book given in the margin of the *thak* plan."

The starting point which was pointed out on behalf of the claimant No. 2 is the north-east corner point of the junction between Diamond Harbour Road and Goragacha and Shahpur Road. The other claimants stated that it was not possible to locate Mouza Majerhat or any trijunction point; and did not show any point from which any enquiry could be made.

The Revenue Survey Map shows the Diamond Harbour Road to the east of Mouza Majerhat, and to the west of Durgapur and the Garden Reach, Tollygunge Road to the south of the Majerhat and Durgapur and to the north of Shahpur.

It appears from the Thak Map of Majerhat that the station Nos. 28, 27, 21, etc., are to the east of a road, and stations Nos. 30 to 33, etc., are to the south of another road and station No. 29 lies to the east of the junction.

The statement of boundary pillars of Mouza Majerhat, dated the 6th January 1848 (Ex. III) describes pillar No. 28 east of the village at a distance of 33 rods towards south from pillar 27 east of the road. East of Gopal Barik's shop, up to this point, is Durgapur and then the boundary of Shahpur begins.

This would go to show that the Diamond Harbour Road in so far as it lies between Majerhat and Durgapur, and the western portion of Garden Reach, Tollygunge Road now called Goragacha Road are included within Mouza Majerhat.

The *khusra* map of Durgapur, dated 1849 (Ex. VI) supports the above. The map shows that Majerhat lies to its immediate west and Shahpur to its immediate south, and no portion of the road to its west or south is shown as included within any of the *dags* of the Mouza, though the map describes all the *dags* in the Mouza.

The map of Shahpur, dated 1847, describes the road to the west of the junction as the road of Mouza Majerhat. The eastern portion of the road is marked *dag* 521 to the north, and *dag* 61 to the south, the former being described as road *patit* and the latter as the *khas patit* metalled road from Behala to Durgapur and Kidderpur, and on the south of the Majerhat Road, whereas the road to the west does not bear any *dag* number which indicates that it was not included within Shahpur. The field-book of the map of Shahpur shows that stations Nos. 5, 4, 3 and 2 are to the north of the Mouza situated to the south of the road, and the stations Nos. 7, 8 and 9, etc., to the east are to the north of the road. From what is stated above it will appear that the roads to the south and east of Mouza Majerhat are included within that Mouza, and the eastern portion of the Garden Reach, Tollygunge Road to the north of Shahpur is included within Mouza Shahpur and that the meeting point of the three Mouzas is at the north-eastern corner of the junction. The Commissioner in his report has shown that the description of stations Nos. 28 and 29 of the field-book of the Majerhat Thak Map, those of stations Nos. 6 and 7 of Shahpur plan and station No. 52 of the Durgapur plan support the above conclusion and we think that he has given good ground for the same. Then the question is whether the trijunction point can be identified on the spot.

The Revenue Survey Map Ex. VIII shows the meeting points of two roads and they appear to be similarly situated as shown in the case map. The other claimants however do not admit that the road from Garden Reach to Tollygunge as shown in the Revenue Survey Map are the present Goragacha and Shahpur Roads but they could not point out the junction of the roads in the Revenue Survey Map when asked by the Commissioner to do so. The Commissioner found that the identity of the roads in the Revenue Survey Map with the present Diamond Harbour Road, Goragacha and Shahpur Roads in the locality to have been established, and the north-eastern corner of the junction having been found to be the trijunction point of the three Mouzas, held that the position of the trijunction station No. 28 of the Majerhat Thak Map to be identified in the locality. This however involved one assumption, *viz.*, that the roads have been in the same position all along. There is a bend in the present Goragacha Road and the bend is also shown in the Revenue Survey Map. There is some evidence to show that these roads have been in the same position all along (see witness No. 2 for claimant No. 1). The breadth of Shahpur Road according to the Shahpur Chita would be 57 feet, and the breadth of Diamond Harbour Road would be 63½ feet. The distance between stations Nos. 28 and 29 (S and B in the report of the Commissioner at p. 19 of the paper-book) is 62 feet, and the distance a few feet away from the junction (between S

and B in the said plan) is 57 feet, the difference being only five feet.

As the Commissioner points out "it is unreasonable to expect that the exact mathematical point could be fixed with precision after such a lapse of time. It is impossible to avoid small errors in survey works and in attempting to relay an old plan like the *thak*, small errors would inevitably creep in. A work may be relied on when the errors are reduced to the lowest practical limits. Here the errors in fixing the position of the trijunction point, if any, may be but a few feet only and may be left out of consideration as it would not lead to any appreciable difference in the practical results."

Having fixed the position of the starting point in his plan after survey the Commissioner relaid the Chuks 1, 4 and 5 according to the field-book given in the Thak Map of Majerhat, and found that the evidence on the record corroborated the description of some of the lands mentioned in the field-book which he detailed in his report.

A good deal of argument was addressed to us as to the exact position of Gopal Barik's shop. In the statement of boundary pillars of Mouza Majerhat (Ex. III) pillar No. 28 is described as east of the village at a distance of 33 rods towards south from pillar 27 east of the road, east of Gopal Barik's shop. Up to this point is Durgapur and then the boundary of Shahpur begins; and pillar No. 29 south-eastern corner of the village at a distance of 7 rods towards south from pillar No. 28 between north-western corner of Gopal Barik's shop and east of the junction of four roads falls Shahpur. The Commissioner has shown two shops of Gopal Barik in his report, one at the north-west corner of the junction of the roads and the other at the south. It is pointed out on behalf of the Respondents that the evidence shows the existence of only one shop of Gopal Barik and that there was no evidence to show that there were two shops.

On behalf of the Appellant we were referred to the *khusra chitta* of Shahpur (Ex. B) of 1847 which shows that *dag* 446 was the "*brohmottar* of Gopal Barik, *jote* of Bhandra potter." In 1848 it is described as Gopal Barik's shop in the *stambha sumari* of Shahpur (see Ex. XXII) and it is suggested that the shop of Gopal was on the north and the shop in the possession of the potter in 1847 came into the possession of Gopal Barik in 1848 and probably became known as his shop. This may or may not be a possible explanation but the question as to the exact situation of Gopal Barik's shop is not very material inasmuch as an error of a few feet in ascertaining its position does not affect the general accuracy of the map.

It is contended on behalf of the Respondents that Thak Maps are not reliable and reference is made to certain passages in "Notes on the old Revenue Surveys" by Captain Hirst at pp. 9 to 14 of that book.

The learned author states that generally speaking there are three kinds of Thak Maps to be considered, *viz.*, (*a*) eye sketches in which no actual measurements were made, (*b*) maps in which rough magnetic bearings were used and rough lineal measurements made, (*c*) maps made from careful magnetic bearings and careful lineal measurement, and states his opinion that the vast majority of Thak Maps made before 1852 are eye sketches and that some maps made after 1852 are little better. He also gives various reasons to show why Thak Maps are generally unreliable in determining the boundaries of villages and specially of boundaries of

isolated estates within a village, except when they come under class (*c*) as stated above.

It is pointed out on behalf of the Respondents that the Thak Maps relied upon on behalf of the claimant No. 2 were made before 1852, and are therefore unreliable. But although the maps were made before 1852, the Thak Map of Majerhat is certainly not an eye sketch. It is stated on the map that it was "made after measurements by compass." The scale is given. There is the field-book which gives the bearings and distances. The map was prepared in the presence of the agents of the owners of the various estates in the villages, and bear their signatures.

It appears therefore that the Thak Map in the present case cannot be rejected as unreliable. Thak Maps have always been considered by Courts as good evidence, and although the value of a Thak Map depends upon its accuracy, we do not think that there is any presumption that Thak Maps must be inaccurate. The Judicial Committee in the case of *Jagadindra Nath Roy* v. *Secretary of State for India* (1) observed "Maps and Surveys made in India for Revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct when made." These observations were made in connection with *thak* as well as Revenue Survey Maps as a reference to the case in their Lordships' judgment will show.

(1) L. R. 30 I. A. 44 : s. c. I. L. R. 30 Cal 291 ; 7 C. W. N. 193 (1902).

In the present case we do not see sufficient reasons to reject the Thak Map of Majerhat as unreliable. The Thak Plans of Durgapur and Shahpur are not of the same class as the Thak Map of Majerhat but they can be relied upon, as they agree with the Thak Map of Majerhat.

It appears that Dwijendra Mohan had only copies of the Thak Map of Majerhat and not the original map, when he made the measurements, but he says that he subsequently compared the copies with the original and it appears that he gave notice on the 30th April 1913 to all the parties to attend on the 1st May when the original map would be produced before him. The original map was sent for by this Court, and the parties have not shown any difference in the copies.

Some arguments were addressed to us upon the question of magnetic variation. But Dwijendra Mohan appeared to have allowed the magnetic variation in accordance with the letter from the Director of Survey about the variation in the magnetic north at the time of the Thak Map and at the present time.

Then as to the allowances for closing circuits, Dwijendra Mohan says "In plotting the Chuks I had to make small allowances ranging from 2 to 5 feet in the length of some lines in order to close the circuit according to the accepted Rules of Survey." He was cross-examined with regard to the distances between points 3 to 4, 5 to 8, 6 to 7 and 10 to 11. The figures given in the Schedule to his report show that the limits allowed for closing circuits were not exceeded except perhaps in one case in which it was seven feet. It is to be noticed that the claimants did not set up any substantive case of their own as to the trijunction point or as to any matter in connection with the relaying of the map, and their criticisms are

directed to showing inaccuracies. But as already pointed out mathematical accuracy is hardly to be expected in relaying ancient maps, substantial accuracy being all that is necessary for practical purposes.

On the whole I do not see sufficient reasons for differing from the conclusions arrived by Babu Dwijendra Mohan which have been accepted by Mr. Cuming and I hold that the lands claimed by the claimant No. 2, Krishna Kalyani Dasi, lie within the ambit of Taluk No. 167. My learned brother also has arrived at the same conclusion considering the matter from other points of view.

With respect to the documents tendered on behalf of the claimant No. 2 and rejected by the Courts below it appears that some of them, Nos. 5 and 6, are copies of papers which are part of the record of the present case as to which of course no question could arise of their admissibility. For the purpose of the present appeal, the rest of the papers are unnecessary in the view we take of the case.

The next question, *viz.*, that covered by the second portion of the first issue is "as regards such land is the interest of Mr. Braunfield or Prince Kamar Kader protected under sec. 37 of Act XI of 1859."

Mr. Cuming, as stated above, was of opinion that the only clause of sec. 37 of Act XI of 1859 under which the present case could come would be the clause beginning with "fourthly." That clause relates to leases of lands whereon dwelling-house, manufactories or other permanent buildings have been erected or whereon gardens, plantations, etc., have been made. It is true Mr. Braunfield had arrowroot plantation and buildings on a portion of the land but with the exception of six cottas of land it is not alleged or proved that there was any lease in respect of the other lands. That being so, he can claim protection under the 4th clause of sec. 37 only in respect of the six cottas and four chittaks of land covered by *kobala* Ex. V (from Munshi Abdul Basat to Mr. Braunfield). With respect to the remaining lands his case as well as that of Prince Kamar Kader as stated in their petitions of claim was that they were *lakhiraj*. Mr. Goodeve who tried the case in the first instance did not come to a definite finding on the point. Mr. Chotzner who heard the case on the first remand did not think it necessary to decide the point having regard to his finding that the lands did not fall within Taluk No. 167 at all, and Mr. Cuming on the second remand considered that Mr. Braunfield or Prince Kamar Kader could claim protection only under the fourth clause of sec. 37. So that the question whether the lands were *mal* or *lakhiraj* up to this time has not been decided.

No doubt under sec. 37 of Act XI of 1859 the purchaser of an entire estate sold for arrears of revenue acquired the estate free from all incumbrances which may have been imposed upon it after the time of the settlement. But the *lakhiraj* rights set up by Mr. Braunfield or Prince Kamar Kader must be shown to be incumbrances which had been imposed upon the estate since the permanent settlement, in other words that the lands formed part of the *mal* assets of the estate at the decennial settlement. Unless that is shown, Mr. Braunfield and Prince Kamar Kader would be protected and apparently that is the protection which was claimed by them in their petitions of claim. Some arguments were addressed to us upon the question of proof in such cases, and also upon the evidence such as is there on the record. As laid down in the case of *Harihar Mookerjee* v. *Madhab Chandra Babu*

(2) "it lies upon the Plaintiff to prove a *prima facie* case. His case is that his *mal* land has, since 1790, been converted into a *lakhiraj*. He is surely bound to give some evidence that his land was once *mal*. The High Court in the judgment already considered has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790 or by documentary or other proof that the land in question formed part of the *mal* assets at the Decennial Settlement. His *primâ facie* case once proved, the burden of proof is shifted on the Defendant, who must make out that his tenure existed before December 1790." It was also laid down in that case that the fact that the lands were within the ambit of the estate is not sufficient to meet the burden of proof thrown upon the Plaintiff.

The principles laid down above are applicable to cases of ordinary nature as well as to cases of auction-purchases at sales for arrears of Government revenue [see *Arfunnessa* v. *Peary Mohan Mookerjee* (3)] and even to the case of very small estates such as consisting of five bighas of land see *Koylashbashiny Dossee* v. *Gocoolmoni Dossee* (4). Whether in a particular case the Plaintiff has been able to prove a *primâ facie* case would depend upon its own circumstances.

It may be pointed out that although the lands have been acquired, the claimant No. 2 must be treated as if she is in the position of the Plaintiff, as the rights of the parties have to be considered with reference to the state of affairs before the lands were acquired.

I do not express my opinion as to whether there is *primâ facie* proof on the part of the claimant No. 2 in the present case, or whether the other claimants have been able to rebut it. The attention of the parties does not appear to have been directed to the questions and the materials on the record are not sufficient for coming to a decision on the points. Under the circumstances although the case has already been twice remanded before, I think that for the ends of justice the case should go back to the Court below again for decision of the question whether the lands which have been found to lie within Taluk No. 167 were *mal* or *lakhiraj* at the time of Permanent Settlement.

It is contended by Mr. Donough on behalf of Braunfield that the purchase of the estate (Taluk No. 167) by the claimant No. 2, the wife of Lal Behary, for Rs. 500 from Charu Chander Bose and the purchase at the Revenue sale by the latter for Rs. 13 were really purchases made by Lal Behary Mitter and are merely speculative ones. The purchases appear to be speculative, but neither that fact nor the fact that Lal Behary was the real purchaser (assuming it to be so as to which, however, there is no direct evidence) affects the legal rights of the parties or the merits of the case. It is next contended that the letters by Lal Behary Mitter to Mr. Braunfield show that the former offered to confirm the rights of the latter. But he offered to do so on certain terms which Mr. Braunfield did not accept and the attempted settlement fell through. It appears on the other hand that Charu Chander the purchaser at the Revenue sale gave notice on the 29th November 1900 to Mr. Braunfield to vacate the lands in his possession (although with respect to only 5 bighas) and the claimant No. 2, on the 17th October 1906, gave a notice to him to vacate all the lands.

It cannot be said therefore that the purchaser or his transferee did not signify

(2) 14 M. I. A. 152 (1871).
(3) I. L. R. 1 Cal. 97*, 380 (1876).
(4) I. L. R. [illegible] (1881).

their intention to annul the incumbrance of Mr. Braunfield.

Mr. Remfry on behalf of Prince Kamar Kader contends that his client was not served with any notice and that the purchaser ought to have taken steps to annul incumbrances before the lands were acquired. It is said that in 1900 the Prince advanced money in the name of the Banerjees to the Mandals for the purchase of the lands (claimed by him in these proceedings), a suit for specific performance had to be brought and ultimately the conveyance was executed by the Court in pursuance of the decree passed in the suit, and although the Revenue sale took place in 1900 the purchaser or his transferee never gave any notice of any intention to annul the incumbrance. It is urged that a person having a right to avoid an incumbrance, must do so within a reasonable time and before he transfers his rights, and neither the purchaser nor his transferee can wait until third persons have acquired rights or dealt with the property in the meantime.

It cannot, however, be held that the purchaser at a Revenue sale must exercise his right to avoid an incumbrance before proceedings are taken under the Land Acquisition Act. Such proceedings may be taken immediately after a Revenue sale takes place and it cannot be said that in such a case the rights of the incumbrancer hold good against the purchaser although he had no time to take steps for setting aside the incumbrance. In the second place the assignee or transferee of the auction purchaser is entitled to exercise the rights of the purchaser. In the third place it is not essential to give a formal written notice to avoid an incumbrance. All that is necessary is to notify to the incumbrancer by some unequivocal act the intention to annul the incumbrance. It is unnecessary to consider whether delay in signifying intention to annul an under-tenure may lead to any inference that the purchaser is willing to continue the tenancy, and I express no opinion on the point. No such inference however can be drawn in a case where the incumbrance set up is a *lakhiraj* right—a right to hold the land without payment of rent. Lastly the law gives the purchaser a period of 12 years within which to bring a suit to set aside incumbrances. No question of estoppel appears to have been raised in the case, and under the circumstances, I am unable to give effect to the above contentions.

We have next to deal with the questions covered by the 3rd and 4th issues, *viz.*, "Did or did not Moni Lal Banerjee, claimant No. 5 as agent of Prince Kamar Kader, purchase the portion of the land in suit from Gopi Krishna Mandal and others? Who is entitled to the compensation therefor? Whether Prince Kamar Kader or Moni Lal Banerjee?" The questions were decided by the Court below against the claimant No. 5 and he has appealed to this Court in Appeal from Original Decree No. 44 of 1910.

[Upon these issues His Lordship, after discussing the evidence, came to the following conclusion :—]

On a consideration of the evidence as a whole I agree with the Court below in holding that the purchase, made by the Banerjees was on behalf of the Prince, that the latter is the true owner of the property, and is entitled to such compensation as may be paid for the 12 bighas.

It was contended on behalf of Mani Lal that as the conveyance stood in his name and as he was in possession, the Prince could not claim any compensation in the present proceedings so long as he did not establish his title by a regular

suit. But the Court in a Land Acquisition case can go into the question of title for the purpose of determining which of the contending parties is entitled to the compensation. If his contention were well-founded, the jurisdiction of the Land Acquisition Court may be ousted merely by raising a question of title: we are accordingly of opinion that this contention must be overruled.

The result is that the first portion of the first issue, *viz.*, "Does any portion of the land in suit fall within Taluk No. 167, and if so, which," is decided in favour of the claimant No. 2 in accordance with the finding of Mr. Cuming and the finding of the pleader Commissioner Babu Dwijendra Nath Mukherjee and with the exception of the second part of the first issue and the second, fifth and eighth issues, the findings arrived at by Mr. Goodeve are confirmed. The case will therefore go back to the Court below for decision only of the second portion of the 1st issue, *viz.*, "As regards such lands is the interest of Mr. Braunfield or Prince Kamar Kader protected under sec. 37 of Act XI of 1859," in other words whether the lands were *mal* lands of Taluk No. 167 or were *lakhiraj* at the time of the Permanent Settlement, and for decision of the second, fifth and eighth issues, *viz.*, "If so, who is entitled to the compensation for such land. For what land is Mr. Braunfield entitled to receive compensation" and "How should the compensation money be apportioned among the claimants" in so far as they depend upon the result of the enquiry on the 2nd part of the first issue as stated above. The parties will be entitled to adduce evidence on the 2nd part of the first issue, it being understood that the claimant No. 2 will be entitled to prove and adduce in evidence any of the documents which were tendered and rejected, provided of course that they are relevant.

Appeal No. 44 of 1910 is dismissed with costs, 10 gold mohurs to be paid to Prince Kamar Kader. Costs in Appeal No. 534 of 1909 as between the other parties including costs incurred in the Court below will abide the result, the hearing fee of this Court for the three hearings being assessed at Rs. 500.

Having regard to all the circumstances surrounding the previous trials, we are of opinion that this case should be tried by Mr. Chotzner or his successor in office at Alipore (other than Mr. Cuming or Mr. Duval) and the Local Government may be moved to vest him with the powers necessary for trying the particular case.

ROE, J.—The main facts of this case and the claims and issues involved have been clearly set forth by my learned brother.

The first point for consideration is whether the claimant Kalyani Dasi has successfully demonstrated that the lands in dispute fall within the lands measured in the Thak Map of 1851 as lands of Touzi No. 167. Before discussing this point in detail it is necessary to consider the probative force of Thak Maps and field-books. For this purpose it is necessary to consider the accuracy with which the theodolyte can be worked. The first process in taking a bearing by a theodolyte is to set your needle to the north as taken by the Thak Surveyor. Having ascertained the degree at which the compass needle is to be set the first thing to be done is to get the compass needle to point exactly to this degree. Any one conversant with the use of the theodolyte is aware that with an ordinary instrument it is extremely difficult to set the compass needle with exact accuracy.

The Thak Survey before us does not attempt to deal with angles more accurately measured than to half a degree. An error of a quarter of a degree will clearly throw the station many feet out of the line at the end of a long distance. The first distance dealt with by the map relied on in this suit is 221 feet and the third is 475 feet. We may expect at the end of lines of this length errors of 2 or 3 feet, even in a bearing taken with the greatest accuracy possible. For this reason it is necessary in making a map to effect what is called the closing of the circuit, and instructions as to the closing of the circuit are given in the High Court Rules for surveys by Pleader Commissioners. The present Pleader Commissioner Babu D. M. Mukherjee has made in closing his circuit allowance amounting in some cases to 5 feet, and it follows that even on a survey as accurate as that made by the present Commissioner the line drawn by him may well fall 5 feet on either side of the true line at the end of the first circuit from the trijunction point and there may be further errors of 5 feet for every circuit that is closed.

Comparing the maps of Babu Chandra Kumar Das Gupta and Babu Dwijendra Mohon Mukherjee it will be observed that many of the stations have been fixed by each at a spot considerably distant from that fixed by the other. We must not look for greater accuracy in the relaying of the Thak Survey than 5 or 10 feet in the earlier stages of the survey and as each subsequent error, unless it accidentally corrects itself, accentuates the inaccuracy of the line, the farther we get from the first trijunction point the greater is the possible error in the relaying of the map. It is for this reason that Major Hirst says that it is impossible to relay a Thak Survey unless you have two trijunction points one at each corner of the map for the correction of the errors which must arise from the impossibility of taking the bearing with absolute accuracy.

The first process by which in my view, these maps should be tested is—Do the stations found by the two Commissioners coincide with any degree of accuracy with the places in which on a general consideration we should expect to find them. Taking first the Thak Map itself we know that many of the stations are at the corners of tanks. In each case in which on the Thak Map we should expect to find the station in a certain position relative to a tank or pond we find that station in that position in relation to an existing tank or pond.

Another point which as a coincidence appears to me of considerable importance is this that Babu Chandra Kumar brings his station 44 exactly at the south-east corner of plot No. 36/6 of the Topographical Survey of 1901 to 1906. Babu Dwijendra on an entirely independent measurement fixed his station 44 in almost the identical spot in which Babu Chandra Kumar fixed it; we have valuable evidence on the record to indicate that No. 36/6 of the Topographical Survey once belonged to Bistu Hazra. Turning to the Thak Map we see that station 44 is at the south-east corner of Bistu Hazra's Jote.

The general accuracy of the relay may be tested also from the point of view of the existing drains and roads. We have before us a copy of the Topographical Survey of 1881. This is Ex. 27. This map is on the same scale as the Thak Map, 16 inches to a mile. On a comparison between this map and the Thak Map we are at once struck with the extreme similarity of the shape of the *thak* boundary line to the shape of the angles

formed by the roads and drains at the south-east corner of the angle made by the Shahpur and Diamond Harbour Roads in the Topographical Map of 1881. From the description given of the *thak* trijunction point 28 and its position relative to station 29 of the Thak Boundary Survey, we know for certain that mehal 167 lies in this south-east corner. It does not require a long step in deduction to be satisfied that the drains and roads existent in 1881 were existent in 1851 and that they were the boundaries of the plots depicted in the Thak Map.

Comparing again the Topographical Survey of 1881 and the Thak Map, it is obvious that station 35 must be half way up the west bank of the long narrow tank shown in the Topographical Survey in a Mahomedan graveyard. Babu Chandra Kumar and Babu Dwijendra both set station 35 exactly in the position in which we should expect to find it.

To sum up we know from the evidence on the record that station 28 of the Boundary Survey is within 15 feet of the corner made by the Diamond Harbour Road and Shahpur Road. We know where station 35 of the plot survey ought to be. We know that station 44 is probably correctly found if it is placed at the corner of 36/6, Sonadanga Road. From these three points we can check the relay made by Babu Dwijendra Mohon Mukherjee.

After an exhaustive check of which I have been given the general result, I am completely satisfied that the relay made by that Commissioner may be relied upon with confidence as showing within a few feet the position of the boundaries of the plots comprising Mehal No. 167.

That confidence has in no way been shaken by the criticisms made upon the relay by Counsel and Vakils on behalf of those claiming adversely to Kalyani Dasi. These are all based upon the cross-examination of Babu Dwijendra Mohon Mukherjee before Mr. Chotzner. They relate to the exact position of Gopal Barik's shop—the exact change in the width of the Diamond Harbour Road between 1851 and the present day, the exact method of taking the bearing, the exact position of the holding of the chain. They all fail to impress me. They are based on the fallacy that before a *thak* relay can be accepted as evidence it must be shown to be absolutely exact. It cannot be more exact than to an error of five or even fifteen feet. That the relay under consideration is to that extent accurate I am satisfied.

From a comparison of the Topographical Survey of 1881 with the Topographical Survey of 1901-1905 it is clear that the boundaries of present-day holdings lie along the drains and roads existent in 1881.

I have already shown that these drains and roads must have been existent in 1851 and that they were the boundaries of the plots comprising Taluk No. 167. The relaid line lies very nearly along the boundaries shown in the Topographical Survey of 1901. These boundaries should in my view be taken, where they have not been destroyed by Mr. Braunfield, as the true boundaries of Taluk 167.

The boundary of plot No. 6 of that taluk follows the drains running from 64 to 63 and then westward. The whole of plot 36/4, 1, 2, 3, 4/1, and 4 (1) *a*, and a strip of land to the east of the tank in that plot form part of the old Taluk 167.

The drains shown following stations 3 to 1, 1 to 18, and 18 to 13 is the boundary of plot 1 of the old Thak Map. 27 Diamond Harbour Road falls entirely within Taluk 167.

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In dealing with plot 4 we have very little to go on in the nature of existing boundaries, inasmuch as the old drains have been filled in by Mr. Braunfield in the construction of his arrowroot fields. From the fact that station 35 is obviously in exactly its right position we may accept the conclusion of the Commissioner as to the extent of premises No. 30 Diamond Harbour Road which fell in the Taluk No. 167.

The next question for consideration is whether Mr. Braunfield is protected in his plea that he holds rent-free lands within this taluk. We regret that we have been unable to follow Mr. Donough's arguments on this point. As far as we understand his argument it is that he is tenant without a landlord. This of course is a contradiction in terms. There can be no tenancy without the relationship of landlord and tenant, and to constitute the relation of landlord and tenant there must be one party landlord and the other party tenant. Mr. Donough, to use his own words, has another string to his bow. He contends that these lands are rent-free by virtue of some ancient grant dating back from before the Permanent Settlement. Mr. Remfry has developed this argument and we must apply the arguments advanced by Mr. Remfry for Prince Kader to the legal position of Mr. Braunfield for the legal position of the Prince and Mr. Braunfield are identical. The sole question here is on which side is the burden of proof. The case of *Harihar Mookerjee* v. *Madhab Chandra Babu* (2) has been quoted to us as indicating that the burden of proof is on the claimant Kalyani Dasi. Even supposing for the sake of argument that burden of proof is primarily on those asserting that the lands shown as now representing Taluk No. 167 are not *mal* lands, there is on the record evidence which it is urged would shift this burden.

Ex. 26 (at page 74) shows that the raiyati land of the taluk measured in 1190 B. S. 66 bighas 7 cottas carrying a rent of Rs. 103, of which Rs. 24-4-10 consisted of *abwabs*. The assets of the estate in that year were Rs. 88-0-16 gds. The revenue now payable for this estate as shown in Ex. 16 at p. 61 is Rs. 7-2 as. The question naturally arises what happened between 1190 B. S. (which is 1783 A. D.) and 1793 A. D. which is the date of the Permanent Settlement to reduce the assets of the estate from over Rs. 100 to under Rs. 10. In *Graham* v. *Phanindra Nath* (5), we have it taken as well known that in Kidderpur a suburb adjacent to the lands in dispute, roads were made at about this date by taking free of compensation a larger area than the lands required for the road itself, and restoring under rent-free grants—the surplus lands. We are asked to presume that between 1783 and 1793 there must have been numerous rent-free grants of land bordering on the Diamond Harbour Road and a large reduction in the revenue in consequence of these grants.

We are next referred to Ex. B from which we see (pp. 2, 3 and 4 to Book D) on the other side of the road in positions corresponding with the greater portion of the land now occupied by premises No. 27, Diamond Harbour Road, eight out of ten of the holdings measured in the *chittas* of village Shahpur as *brohmottar* or rent-free.

Further we have the fact that never in the memory of man have the lands in dispute paid rent, and that all the various plots of land purchased by Mr. Braunfield were purchased as rent-free holdings save one plot of six cottas paying rent to Mehar

(2) 14 M. I. A. 152 (1871).

(5) 19 C. W. N. 1038 (1915).

Ali Khan the proprietor of Touzi No. 53, which a comparison of the Thak Map with the Topographical Map of 1881 will show to be a plot of land covered by the letters of M a h of the words Mohammedan graveyard in the Topographical Map of 1881. On the probative value of these facts I do not now feel it necessary to express any opinion for the reason that my learned brother is of opinion that there should be a remand for the purpose of giving the Appellant an opportunity of showing that the lands are in fact *mal* lands. I agree that if indeed she is in a position to support this burden she should be given an opportunity of doing so for both Mr. Goodeve and Mr. Chotzner declined to discuss the question and before Mr. Cuming it was not apparently rightly appreciated.

The interests claimed by the Prince and Mr. Braunfield could not possibly be interests protected under Act XI of 1859, and I cannot conceive why such an argument was ever seriously advanced. The land was held without payment of rent and without grant by lease from any proprietor, save in respect to the six cottas held in Touzi No. 53.

The occupiers were either trespassers or holders under a rent-free title. The Prince and Mr. Braunfield claimed rent-free titles. They now explain that by rent-free they meant revenue-free. In Bengali the terms rent-free and revenue-free are synonymous. In English the distinction between them is extremely small. Lands held rent-free before the Permanent Settlement were not assessed to revenue and so became by the Permanent Settlement revenue-free. The question in issue in this case was in my view, from the outset, have the lands in dispute been held rent-free from the date of the Permanent Settlement? If so, they cannot have been assessed to Revenue at the Permanent Settlement. If they were not assessed to Revenue at the Permanent Settlement, they were not the *mal* lands of the taluk. If they were not *mal* lands of the taluk, title in them does not pass to an auction-purchaser at a sale for arrears of Revenue.

The issue, in its true significance, has clearly not been appreciated, or determined. Therefore to my very great regret, I must agree that a further remand is necessary. Appeal No. 531 should be remanded in the terms of my learned brother's judgment.

The claimant Kalyani Dasi is required to prove that the lands in suit were assessed to Revenue in 1793. On the record as it now stands the burden of proof is on her to show that the lands in suit were not held rent-free in 1793.

She must be permitted to adduce any evidence relevant to the determination of this issue. All orders made by Mr. Goodeve, Mr. Chotzner and Mr. Cuming refusing to admit documents tendered in evidence on either side, are to be regarded as set aside, and each document now tendered, whether or not previously tendered and rejected, shall be, if relevant and admissible in evidence, admitted and considered.

As regards Mani Lal Banerjee's case, I am of opinion that it is absurd to accuse Braunfield and the Prince Kader of falsehood on the meticulous criticisms of their evidence made by the *vakil* for the Banerjees. The Banerjees are obviously afraid to enter the witness-box in support of their case. Braunfield's evidence shows clearly that the Banerjees admitted up to 1904 that the Prince was the owner. There is nothing on the record to show that ownership changed between 1904 and 1906, the date of the acquisition.

I agree that the appeal of the Banerjees

must be dismissed with costs to Prince Kamar Kader.

N. G.

[CIVIL APPELLATE JURISDICTION.]

Appeal from Order

No. 56 of 1915.

Woodroffe, J.	Satish Chandra Mitra, Plaintiff, Appellant, v. Jogendra Nath Mohalanabis and others, Defendants, Respondents.
1916,	
Heard, 22, May.	
Judgment, 26, May.	
D. Chatterjee, J.	
Newbould, J.	
1916,	
5, May.	

Indian Evidence Act (I of 1872), secs. 70, 68, 69—Suit on a mortgage-bond—Admission of mortgagee if sufficient to make mortgage admissible against other parties not admitting execution, without proof by attesting witnesses—Sec. 70, effect of.

Per Woodroffe *and* D. Chatterjee, JJ. (Newbould, J., differing).—*In a suit on a mortgage bond the admission of execution by the sole mortgagor does not under sec. 70 of the Evidence Act dispense with the necessity of complying with the provisions of sec. 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution. The document must be proved as against them in accordance with the provisions of secs. 68, 69 and 70 of the Act.*

The effect of sec. 70 is that the proof by calling attesting witnesses is dispensed with, when the party executant admits execution, only as against him.

Jogendra Nath Mukhopadhya v. Nitai Churn Bundopadhya (1) *commented on.*

This was an appeal from an order of Babu D. P. Bagchi, Subordinate Judge of Zillah Faridpur, dated the 14th January 1915 reversing an order of Babu Mon Mohan Neogi, Munsif of Faridpur, dated the 18th March 1914.

This appeal came on for hearing before D. Chatterjee and Newbould, JJ., on the 5th May 1916 who having differed in opinion the same was laid before Woodroffe, J., for disposal.

The facts of the case will appear from the judgments.

Babu Surendra Kumar Bose for the Appellant.

Babu Asita Ranjan Ghose for the Respondent.

The dissentient judgments were as follows :—

Chatterjee, J.—This was a suit upon a mortgage-bond. The Defendant No. 1 was the executant of the mortgage and the other Defendants derived title to the mortgaged property subsequently by execution and certificate sales. The Defendant No. 1, executant of the document, admitted the mortgage-deed and the first Court gave a decree on the basis of the mortgage.

It appears that Defendants Nos. 3 to 5 made an attempt to have the case postponed for the purpose of getting an order of transfer of the case to the Court of the Subordinate Judge for trial with another suit in the same matter. Before the order of the District Judge on the application for transfer was received the case was disposed of by the learned Munsif. Upon appeal, the learned Subordinate Judge remanded the case holding that the document, that is, the mortgage-deed, had not been proved by the examination of any of the attesting witnesses as required by section 68 of the Evidence Act.

On appeal, it is contended before us that the order of the learned Judge below is wrong, in that sec. 70 of the Evidence

(1) 7 C. W. N. 384 (1903).

Act provides that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested and that therefore it was not necessary to prove the attestation of the document.

It is contended by the learned Vakil for the Respondents, however, that an admission of the execution by the executant has the effect of proving the document as against the party making the admission and not as against them; and as they stated in the written statement that the document was not executed in accordance with law, the document ought to have been proved, so far as they are concerned, in accordance with the general provisions of sec. 68.

Sec. 68 provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. Sec. 69 provides for cases where no attesting witness can be found. Sec. 70 says that if a person who has executed a document admits the execution, then that will be taken as sufficient proof of its execution as against him, *i.e.*, the person making the admission. Sec. 70, therefore, seems to be an exception to the general rule contained in sec. 68. This exception must be read by the light of the words used in it and, so reading the section, the meaning seems to be that an examination of an attesting witness will not be necessary for the purpose of proving the execution if the executant admits that he has executed the document; but this proof must be considered as confined in its operation only to the person making the admission. If that be so, the Defendants Nos. 3, 4 and 5 who do not admit the execution of the document, cannot be said to be bound by the sufficiency of the proof of the execution supplied by the admission of the executant. This contention of the learned Vakil for the Respondent seems to be supported by principle also. The Defendant No. 1, I take it, executed the mortgage and thereafter he made sales in favour of the Respondents, or the Respondents derived title to his right, title and interest existing after the execution of the mortgage. If it were to be held that the Respondents were bound by the admission made by the executant subsequent to their acquisition of title, it would be sinning against the law of admissions; because in that case, the executant of the document would be making a derogation from his own grant by making an admission to the detriment of persons deriving title from, or through, him before the admission.

In this view of the case, I think that the lower Appellate Court was right in sending the case back for the formal proof of the document as against Defendants Nos. 3, 4 and 5 who did not admit the execution of the document. I would, therefore, dismiss this appeal with costs.

As there has been a difference of opinion in this case, it will be placed before the Hon'ble the Chief Justice so that it may be referred to a third Judge. The point on which the Court has differed, is whether in a suit on a mortgage-bond, the admission of execution by the sole mortgagor is sufficient to render it unnecessary for the mortgagee to comply with the provisions of sec. 68 of the Evidence Act in order to prove the execution of the document as against subsequent transferees of the mortgaged property who do not admit

the execution; or, must the execution be formally proved against them.

Newbould, J.—In this case, I regret that I am unable to agree with my learned brother. We are, I think, agreed that sec. 70 of the Evidence Act must be read by way of proviso to sec. 68. From this it appears to me to follow that an admission by the sole executant of an attested document of its execution by himself dispenses with the necessity to call an attesting witness under sec. 68 for the purpose of proving its execution. There is a marked difference in the language used in the two secs. 68 and 70. Sec. 68 speaks of the document being "used as evidence," sec. 70 of its being "proved." Under sec. 70, and even apart from it, the admission of a party to an attested document cannot prove it against a person who is not a party to it. But I see no reason why such admission should not render the document admissible in evidence against him. The admission does not prove the document against him; but it is sufficient to prevent his taking the technical plea that the provisions of sec. 68 have not been complied with.

I am aware that a contrary view was expressed by a Divisional Bench of this Court in *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya* (1). But this is only an *obiter dictum* as the document there in question was held to have been proved to be duly attested on other grounds. The correctness of the view taken by the learned Judges who decided this case has been doubted in Ameer Ali and Woodroffe's "Law of Evidence," 5th Edition, p. 506, where it is stated "if the admission of the executant has not the effect of dispensing with proof of attestation, there was no necessity for the section at all, as recourse may be had to the general provisions of the Act relating to admissions if the admission of execution is to be used only in the sense of an admission of signing only."

It therefore seems to me that sec. 68 must be read subject to the provisions of subsequent sections; and where an executant admits execution of an attested document, the document can be used as evidence against other parties to the suit and proved in the ordinary way without it being necessary to call, or prove the handwriting of, an attesting witness.

I would, therefore, decree the appeal and set aside the order of the learned Subordinate Judge remanding the case for a fresh trial and direct him to dispose of the appeal on the evidence on the record.

[The appeal was placed before Woodroffe, J., for disposal.]

Babus Bepin Behari Ghosh and *Surendra Kumar Bose* for the Appellant.

Dr. Sarat Ch. Bysack and *Babu Asita Ranjan Ghosh* for the Respondent.

The Judgment of the Court was as follows:—

Woodroffe, J.— In the case of a document required by law to be attested the admission of a party to it of its execution by himself is under sec. 70 of the Evidence Act sufficient proof of its execution as against him. If therefore the question had arisen solely between the Plaintiff and the mortgagor in this case it would not have been necessary to have called any attesting witnesses or other evidence. The admission by the party to the document would have dispensed with the necessity of all further proof. In the present case, however, there are other Defendants than the mortgagor. The learned Pleader who appears on behalf of the Plaintiff admits that the admission of the

(1) 7 C. W. N. 381 (1903).

mortgagor is not evidence against his co-Defendants and that it will therefore be necessary for him to prove by evidence affecting those co-Defendants that the mortgage was executed and operative. He however contends that the effect of the admission by the executant is to dispense him from proof in a particular form, namely, by calling an attesting witness. He contends that the effect of secs. 68 to 70 of the Evidence Act is that where there are several Defendants against whom a mortgage is sought to be proved and one of the Defendants being the executant of the document admits execution, that admission whilst not dispensing with the necessity of proof of the mortgage as against the Defendants other than the executant, does dispense with the necessity of calling an attesting witness. I am however unable to agree with this contention. The effect of sec. 70 is in my opinion that the proof by calling attesting witnesses is dispensed with when the party executant admits execution only as against him and that when there are other Defendants than the party making such admission the document is not admissible in evidence as against them until it has been proved by attesting witnesses in the manner prescribed by the Act. It is the common practice that a document is admitted against a particular party only or for a particular purpose and not as against other parties or for other purposes. In the case before me it is in my opinion necessary not only to prove the document as against the Defendants other than the admitting executant but to prove it in the way required by secs. 68 and 69, namely, the production of an attesting witness. The admission of the executing party has no effect at all except as regards the party himself. As regards others, the position is just the same as if there had been no such admission, that is, the case must be proved against them in the way required by those sections. The decision in the case of *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya* (1) does not touch the matter before us, for there the question was not as to the effect of an admission by an executant upon the question of the proof required against parties other than the executant; nor does the passage cited from the text-book quoted in Mr. Justice Newbould's judgment refer to the matter now in issue, but to the point which appears to have been raised by the decision in *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya* (1). That decision is open to this construction that even when the executant admits execution, his admission or proof of execution or signing only does not dispense with proof of attestation. If this be the meaning of that judgment I am unable to agree with it as I think that the admission of the executant has the effect of dispensing with the proof of attestation as against him. For if the admission of execution is to be understood only in the sense of an admission of signing then there was no necessity of sec. 70 at all, regard being had to the general provisions of the Evidence Act relating to admission. This is also indicated by the last words of sec. 70 "though it be a document required by law to be attested." I therefore agree with the conclusion of Mr. Justice Chatterjee that in a suit on a mortgage bond the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of sec. 68 of the Evidence Act, in order to prove the execution of the document as against other parties in the suit who do not admit such execution. I think that a document must be proved as against

(1) 7 C. W. N. 384 (1903).

them in accordance with the provisions of secs. 68, 69 and 71 of the Evidence Act.

I therefore dismiss this appeal with costs, three gold mohurs each hearing.

S. C. M. *Appeal dismissed.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2360 OF 1913.

MULLICK, J.
ROE, J.
1916,
Heard, 28 and 29, March.
Judgment, 26, April.

KHEYALI PROSAD *alias* JAGDIP NARAIN, Plaintiff, Appellant,
v.
MULLICK NAZARUL ALUM and ors., Defendants, 1st and 2nd Parties, Respondents.

Pre-emption suit by Hindu—Mahomedan law of sale, whether applicable—Sale complete, when—Ceremonies necessary before pre-emption, compliance with—Sec. 37, Act XII of 1887.

Per MULLICK, J.—*There being no special custom pleaded, a case where pre-emption is claimed by a Hindu must be tried on the principles of justice, equity and good conscience under sec. 37, Act XII of 1887.*

As a sale is not complete till legal ownership passes, no matter whether there has been payment and delivery, the pre-emptor's title in the case of a property worth more than Rs. 100 does not accrue till after registration. It would be against equity, justice and good conscience to apply in such a case the Mahomedan law of sale which is no longer in force and to attach to a mere contract for sale an incident which the Mahomedan lawyers intended to attach only to an actual sale.

The performance of the two formalities talabi mawasibat *and* talabi ishtishad *can be combined, but it is essential that the* talabi ishtishad *should refer expressly to the* talabi mawasibat *as having been duly made.*

NAJMUNNESSA *v.* AJAIB ALI KHAN (1), JANKI *v.* GIRJADAT (2), BEGUM *v.* MUHAMMED YAKUB (3), JADU LAL SAHU *v.* JANKI KOER (4) *and* BUDHAI SARDAR *v.* SONAULLAH MIRDHA (5) *referred to.*

ROE, J.—*The test to apply in these cases is, was the sale, in the eyes of the contracting parties and the pre-emptor, complete. If it was, it was not necessary for the pre-emptor to wait till registration before performing the ceremony of* mawasibat.

This appeal was against the decision of R. L. Dutt, Esq., District Judge of Monghyr, dated 24th June 1913, reversing the judgment of Moulvi Abdul Jubbar, Officiating Subordinate Judge of Monghyr, dated the 22nd February 1913.

The facts appear fully from the judgment.

Mr. Sivanandan Ray for the Appellants.

Messrs. Debendra Nath Das and *Chandrashekhar Prosad Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MULLICK, J.—The Plaintiff, the pre-emptor, is a Hindu. The first party Defendants are the vendees and Defendant No. 4 the second party Defendant is the vendor. The Plaintiff sues to enforce his right of pre-emption in an estate of which he and the Defendant No. 4 are co-sharers and in which Defendant No. 4 has sold his share to the first party Defendants.

(1) I. L. R. 22 All. 348 (1900).
(2) I. L. R. 7 All. 482 (1885).
(3) I. L. R. 16 All. 344 (1894).
(4) I. L. R. 35 Cal. 575 (1908).
(5) 19 C. L. J. 601 : s. c. 18 C. W. N. 490 (1914).

That the Plaintiff, though a Hindu, is entitled to pre-empt has not been disputed. The learned District Judge finds that the sale was complete under the Muhammadan law on the 14th of July 1911 on which day the *kobala* was executed. The Plaintiff's story is that he came to hear of the sale at 6 A.M. on the 17th of July 1911, and that he immediately performed the *talabi mawasibat*; that he then went with the witnesses to the houses of the vendee and the vendor, and also to the land sold and performed the *talabi ishtishad*: and that about 3 P.M. he went to the Registry Office and put in a petition before the Sub-Registrar praying that the registration of the sale deed might be stayed. The learned District Judge does not find when the Plaintiff came to know of the sale, but he finds as a fact that the Plaintiff never made either the *talabi mawasibat* or the *talabi ishtishad*, and disagreeing with the Subordinate Judge he has dismissed the suit. Hence this second appeal by the Plaintiff.

The contention of the learned Vakil for the Appellant is that the sale was not complete till registration of the sale deed and that the petition made to the Registrar constitutes a sufficient performance of both demands.

Now under sec. 37, Act XII, 1887, it is clear that there being no special custom pleaded the case must be tried on the principles of justice, equity and good conscience. According to the Allahabad High Court these principles require that not only the Muhammadan law of pre-emption should be applied but also the Muhammadan law of sale which has confessedly been altered by sec. 54 of the Transfer of Property Act. Therefore it has been held by that Court that the right of pre-emption arises as soon as there has been a complete sale by unconditional offer and acceptance, and that if consideration has been paid and possession transferred, registration of the sale-deed is not necessary; at all events if the formality was intentionally omitted in order to defeat pre-emption and if the circumstances are such that the purchaser could have obtained the legal ownership by means of a suit for specific performance, *Najmunnessa* v. *Ajaib Ali Khan* (1), *Janki* v. *Girjadat* (2) (Mahmud, J., dissenting) and *Begum* v. *Muhammed Yakub* (3) (Banerji, J., dissenting).

The Calcutta High Court have, however, expressed doubts as to the soundness of these decisions. In *Jadu Lal* v. *Janki Koer* (4), though not definitely deciding whether the sale became complete on the execution of the sale-deed or upon registration, a Bench of two Judges of that Court were of opinion that there were difficulties in applying the Muhammadan law of sale strictly and that the real solution depended in each case on the intention of the parties. The objection to this test is that it seems inequitable that the rights of the pre-emptor should depend on his ability to discover what the vendor and vendee had in their minds at the time of the execution of a conveyance to which he was not a party.

In *Budhai* v. *Sonaullah* (5), however, Carnduff, J., expressed a more decided view. He was of opinion that sec. 54, Transfer of Property Act, had abrogated the Muhammadan law of sale, and that the pre-emption right did not accrue till after registration. He dissented from the decision of the Allahabad Court in *Janki's*

(1) I. L. R. 22 All. 313 (1900).
(2) I. L. R. 7 All. 482 (1885).
(3) I. L. R. 16 All. 344 (1894).
(4) I. L. R. 35 Cal. 575 (1908).
(5) 19 C. L. J. 601 : s. c. 18 C. W. N. 890 (1914).

and *Begam's* cases so far as they decided that the Muhammadan law of sale should be strictly applied. In the case before him there was neither payment of consideration nor delivery of possession till registration and he was satisfied that it was in accord with the spirit of the Muhammadan law to hold that the sale became complete for the purposes or pre-emption only upon registration. In the same case Richardson, J., while agreeing with the decree of Carnduff, J., expressed the view that the application of the Muhammadan law of sale presented great if not insuperable difficulties and he was inclined to accept the test suggested by Brett, J., in *Jadulal's* case (4) with the addition that the intention of the parties must be manifested in some unequivocal way such as delivery of possession or registration.

Adopting the reasoning of Carnduff, J., and of Sir Roland Wilson at page 412 of the 4th Edition of his 'Digest of Anglo-Muhammadan law,' I would hold that as the sale is not complete till legal ownership passes, no matter whether there has been payment and delivery, the pre-emptor's title in the case of a property worth more than Rs. 100 does not accrue till after registration. It seems to me that it would be against equity, justice and good conscience to apply in the case before us the Muhammadan law of sale which is no longer in force and to attach to a mere contract for sale an incident which the Muhammadan lawyers intended to attach only to an actual sale.

Turning now to the facts before us it would seem from the pleadings that the parties were agreed that payment of consideration and delivery of possession had taken place before the 17th July, which was the date of registration. The case made by the Plaintiff in the Court of first instance was that the sale was complete on the 14th July and that he performed the *talabi mawasibat* as soon as he learnt of the sale at 6 A.M. on the 17th July in the shop of a sweet seller. That case has been found to be false.

The learned Vakil for the appellant cannot challenge that finding but he now makes a new case. He contends that as the sale only became complete upon registration the petition which the Plaintiff made in person to the Sub-Registrar was a sufficient compliance with the law in the matter of the performance of the *talabi mawasibat* and *talabi ishtishad*.

Now what is that petition? It does not make any reference to the *talabi mawasibat*. No doubt the two formalities can be combined, but it is essential that the *talabi ishtishad* should refer expressly to the *talabi mawasibat* as having been duly made. This the Plaintiff did not do. There is not a word in the petition about any *talabi mawasibat*. I cannot admit that the petition complies with the requirements of the Muhammadan law in the matter of the two *talabis*, although it was made in the presence of witnesses and in the presence of the vendor. That being so, the Plaintiff has no right to pre-empt and the suit has been rightly dismissed.

Roe, J.—I agree that the appeal should be dismissed. In my view there is not that divergence in the rulings quoted in this case, which it has been suggested by the learned Vakils on either side exists. The test in each case should be, *firstly*, has there been a real sale; *secondly*, at what date had the pre-emptor knowledge that the sale was complete. In the case of *Budhai Sardar* v. *Sonaullah* (5), it was clear that the sale

(4) I. L. R. 35 Cal. 575 (1908).

(5) 19 C. L. J. 601 : s. c. 18 C. W. N. 890 (1914).

was not complete at the time when the pre-emptor performed the ceremonies of "*mawasibat*"; no consideration had passed, and the vendor was, in spite of the sale to Budhai, still negotiating for a sale to Sonaulla. In the case of *Jadu Lal Sahu* v. *Janki Koer* (4), the judgment of Mr. Justice Brett shows that what was weighing chiefly in his mind was the question of fact at what particular moment Mr. Lowis knew of a sale to Jadu Lal Sahu. This is clear from pages 586 to 589 of the judgment. It will appear that in that case also Amirul Hussain, the agent of the vendor, was, in spite of the intended sale to Jadu Lal Sahu, negotiating through Mr. Irwin with Mr. Lowis for a sale to the Bettiah Raj. In these two cases the pre-emptor could not be certain that the sale was complete until registration had actually been effected. In the case of *Begum* v. *Muhammed Yakub* (3), there had been a complete sale within the meaning usually attached to a sale by Muhammadans. It was held in that case that the sale, in the eyes of the contracting parties and of the pre-emptor, being complete, it was not necessary for the pre-emptor to wait till registration before performing the ceremony of *mawasibat*.

That is the test that I would apply to the present case. Was the sale in the eyes of the parties complete? In para. 7 of the plaint we find the following sentence:— "on that very day (the 17th July) while he was at Sheikhpura he all of a sudden learnt that the Defendant, second party, had really sold, by a deed of sale dated the 14th July, his shares in mauzas Belchhi and etcetera."

The Plaintiff's case, therefore, as set forth in the pleadings, was that he knew that there had been a sale which was in his eyes complete, and that this knowledge came to him on the 17th July while he was at Sheikhpura. He was, therefore, required by the law of pre-emption to perform the ceremonies of *mawasibat* immediately. The case is that he did so perform those ceremonies immediately. He cannot now change the nature of his case. It has been found as a fact by the learned Subordinate Judge that he did not perform *mawasibat* immediately upon obtaining knowledge of the sale. He cannot be permitted to argue that he was not aware that the sale was complete until after registration was effected. I agree that the appeal should be dismissed with costs.

A. K. R. *Appeal dismissed.*

(3) I. L. R. 16 All. 344 (1894).
(4) I. L. R. 35 Cal. 575 (1908).

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER No. 16 OF 1916.

CHAMIER, C. J. JWALA PRASAD, J. 1916, 29, May.	TRIBIKRAM DEO NARAYAN SINGH, Judgment-debtor, Appellant, *v.* BADRI MISSER, Decree-holder, Respondent.

Application to enforce Privy Council order—Art. 183, Sch. I, of Limitation Act (IX of 1908)—Revivor, meaning of.

On 22nd January 1915 an application for execution of an Order of Her late Majesty in Council dated the 28th November 1899 was made to a Subordinate Judge to whom the execution proceedings were transferred:

Held, *that the application was governed by Art. 183 of the 1st Schedule of the Limitation Act, 1908, according to which an application to enforce an Order of the*

TRIBIKRAM DEO NARAYAN SINGH *v.* BADRI MISSIR.

Sovereign in Council must be made within 12 years from the date on which a present right to enforce the order accrued to some person capable of releasing the right, provided inter alia *that where the Order has been revived, 12 years shall be computed from the date of such revivor.*

Where on an application for execution notice is issued under sec. 216 of the Code of Civil Procedure, 1877, or sec. 248 of the Code of Civil Procedure, 1882, and the Court has decided that the decree is still capable of execution and makes an order for execution, there has been a revivor within the meaning of the article.

Where an Order in Council is transmitted to a subordinate Court for execution without any notice being given to the judgment-debtors, it would not be a revivor of the Order.

This is an appeal against the decision of Babu Gagan Behari Chaudhuri, Second Subordinate Judge of Chapra, dated 18th December 1915.

The facts out of which the appeal arises are briefly as follows :—

The judgment-debtors instituted a suit No. 12 of 1889 in the first Court of the Subordinate Judge of Mozufferpore against the vendors of the present decree-holders. It was dismissed with costs on 2nd August 1890. This judgment was upheld by the High Court on 2nd June 1892 and by the Privy Council on 28th November 1899. A petition for execution of costs was put in on 25th November 1902 and it was registered as Ex. case No. 22 of 1902 but it was dismissed on 1st August 1903. Then an application for execution was filed on 18th August 1903 and was registered as Ex. case No. 17 of 1903. On an objection filed on behalf of one Dalip Singh, the said objector was released from liability by an order dated 11th December 1903. The other judgment-debtors filed an objection on 27th May 1904 and it was decided in favour of the judgment-debtor by the District Judge of Mozufferpore on 22nd September 1904. Thereupon the decree-holders preferred an appeal to the Calcutta High Court against the said decision and the appeal was registered as M. A. No. 547 of 1904. The High Court by its judgment dated 18th November 1906 held that the decrees of the first Court and of the High Court were merged in the Privy Council decree and are not barred, but as the execution petition was filed without the permission of the High Court, it was dismissed. Then an application was filed on 2nd December 1907, in the Calcutta High Court on behalf of the Petitioner Badri Missir, the assignee of the decree, under sec. 610 of the Code of Civil Procedure, 1882, for execution of the decree. On 4th February 1908 the High Court ordered notices to be issued to all the Opposite Parties. On 15th August 1910, the High Court passed an order transmitting the Privy Council order to the District Judge for execution. On 21st November 1911 the assignee decree-holder applied for execution against Mussammat Radha Dulari Koer, widow of one of the judgment-debtors. On the objection of the said widow the application for execution was dismissed on 8th April 1913. Then the decree was transfererd from the Court of the District Judge of Mozufferpore to the Subordinate Judge of Chapra for the realisation of the decretal amount.

On 22nd January 1915 an application for execution of the Privy Council decree was filed in the Court of the Subordinate Judge at Chapra. The judgment-debtors objected that the application for execution was barred by limitation but the Subordinate Judge overruled the objection and directed that the execution should

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Court of Appeal and finding of facts.

The pronouncement of the Judicial Committee in the recent case of *The Rivers Steam Navigation Co., Ld.* v. *The Hathor Steamship Co., Ld.*, reported in our last issue (20 C. W. N. 1023) that "a Court of Appeal should be most chary of interfering with the decision of trial Judge, who has seen the witnesses and had the opportunity of forming his estimate of them by their demeanour," is, as their Lordships expressly say, a rule well-established in "collision cases." Although, in appeal cases generally the finding of facts by trial Judge are not to be lightly set aside, yet the Judges of the Appeal Court are not precluded by the findings of the trial Judge from coming to a contrary or a different finding. Sir George Farwell in delivering the judgment of the Judicial Committee in the recent case of *Bombay Cotton Manufacturing Co.* v. *Motilal Shivlal* (19 C. W. N. 617 at p. 620: s. c. I. L. R. 39 Bom. 386) expressly said that the Board had no desire to fetter the discretionary powers of the Appellate Courts in India in this respect. All that their Lordships desired to say in that case was that when the issue was simple and the question for decision was whether some of the witnesses were to be believed rather than others, the opinion of the trial Judge, who had an opportunity of noting the demeanour, regarding the credibility of witnesses should not be lightly set aside.

In the more recent Original Side Appeal, *Lalji Mahammad* v. *Jivanji Gazdar* (20 C. W. N. 335) their Lordships the Chief Justice and two of the seniormost Judges of the Calcutta High Court (Sir John Woodroffe and Sir Asutosh Mookerjee) held that it was always open to them to reverse the findings of fact of the trial Judge. But whether they would or would not in any particular case all depended upon their estimate of the evidence. (See 20 C. W. N. liii.) The opinion of the Judicial Committee expressed by Sir George Farwell, which is practically the same as is followed by the Court of Appeal in England, furnishes a safe guide for the Indian Appellate Courts to follow. The practice hitherto followed by the High Courts in India is, as we shall show below, in no way different from that followed by the Court of Appeal in England in cases which are decided by a Judge or Judges sitting without a jury. As in India all civil cases are tried without a jury, the discretionary powers of the Appellate Court to reverse the findings of fact of the Court below should not be restricted in any way.

The practice followed in the English Court of Appeal in appeals preferred from the decision of a Judge sitting without a jury, where the appeal turns on a question of fact, has been very clearly explained by Lord Lindley (then Lindley, M. R.) with the concurrence of Rigby and Collins, L. J. J., in the appeal from the Chancery Division in *Coghlan* v. *Camberland* [(1898) 1 Ch. 704: s. c. 78 L. T. R. 540]. There the simple question for the consideration of the Appellate Court was whether there was misrepresentation to justify a rescission of a contract. The trial Judge had found that the plaintiff had failed to prove that the representations made to him by the defendants were untrue. His Lordship Lindley, M. R., in delivering a written judgment on behalf of the Court observed:—"The case was not tried with a jury, and the appeal from the Judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even when, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind

that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in hearing and seeing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witness. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

With these observations their Lordships went through the evidence, allowed the appeal and reversed the judgment of the trial Judge. It was only recently that the present Master of Rolls, Lord Cozens Hardy sitting with Lord Justice Warrington and Mr. Justice Bray in the Court of Appeal quoted the above dictum with approval, as laying down the rule to be observed by Appeal Courts, in the *Slingsby* case and reversed the judgment of Mr. Justice Bargrave Deane declaring on the facts of the case that the infant was not the legitimate heir.

Review of Judgment of High Court passed in a Criminal case.

The decision of a Full Bench of the Calcutta High Court in *In the matter of the petition of F. W. Gibbons*, I. L. R. 14 Cal. 42 may fairly be said to be the leading case on the point whether the High Court has any power to review its own judgment passed in a criminal case. Since the year 1886, when the aforesaid ruling of the Full Bench was pronounced, all the High Courts in India have followed the rule laid down therein. Quite recently the question arose in the Allahabad High Court in connection with an application for review presented by an accused person whose application in revision against the order of a Magistrate binding him down to be of good behaviour under sec. 110 Cr. P. C., was rejected by Banerjee, J. As appears from the report the application for review was filed before the Chief Justice who ordered it to be placed before Banerjee, J., who again referred it to a Bench of two Judges (Tudball and Walsh, JJ.). Their Lordships followed the ruling of the Calcutta High Court in the case of *Gibbons* referred to above. That case laid down that the verdict and judgment of a Divisional Bench of a High Court complex with the sentence in a criminal case are absolutely final and as soon as they have been pronounced and signed by the Judges, the High Court is *functus officio* and neither the Court itself not any Bench thereof has any power to revise that decision or interfere with it in any way. Sir Comer Petheram who delivered the governing judgment in the case pointed out that he had expressed the same view while at Allahabad (*Queen-Empress* v. *Durga Charan*, I. L. R. 7 All. 672) and the High Court at Bombay was of the same opinion (*Queen-Empress* v. *Fox*, I. L. R. 10 Bom. 176).

The case of *Gibbons* was argued before the Full Bench by Messrs. Pugh and Evans and the question was considered from every point of view. The real controversy seems to centre round the interpretation of sec. 369 of the Code of Criminal Procedure which for the present purpose is the same in the Code now in force as in the Code of 1882 under which the Full Bench case of *Gibbons* was decided. Sec. 369 provides that no Court *other than a High Court* when it has signed its judgment shall alter or review the same except to correct *a clerical error or as provided* in secs. 395 and 484, which it is not necessary for our present purpose to consider. Mr. Pugh contended before the Full Bench that sec. 369, Cr. P. C., in limiting the power of Courts other than a High Court to alter or review its judgment after it has been signed by implication shows that a High Court has the power to review its judgments. The section is an enabling one and should receive a liberal interpretation. The same argument was advanced before the learned Judges of the Allahabad High Court in the recent case under notice and further their Lordships' attention was drawn to the noteworthy fact that sec. 369 as originally introduced in the Criminal Procedure Code Bill of 1881 read as follows:— No Court when it has signed its judgment shall

lter or review the same, etc., but when the Bill vas passed into law an exception was made in he case of High Courts. Their Lordships Tudball and Walsh, JJ., followed the ruling of he Calcutta High Court in the case of *Gibbons* ut on a reference to two decisions of the Allahabad High Court *Queen-Empress* v. *Lalit Tewari*, I. L. R. 21 All. 177 and *Empress* v. *Kallu*, I. L. R. 27 All. 92, they held that the order of the learned Judge who disposed of the application in revision in the first instance not having been sealed although signed by the learned Judge the application for revision must be deemed to be still pending and any further arguments which the accused might think it necessary to advance must be before the same learned Judge. In the Calcutta case no question about sealing arose nor does sec. 369 say anything about it and as we have said above the decision of the Calcutta High Court in the case of *Gibbons* may well be said to have settled the controversy.

Reviews.

CURIOUS CASES AND AMUSING ACTIONS AT LAW. *London: Sweet and Maxwell, Ld. 3, Chancery Lane. 1916. Price 4s. 6d. net.*

The Birmingham Court of Requests was established in 1725 and is stated to have been "the only Court in the English Constitution conducted without a lawyer." It dealt with causes under forty shillings, was presided over by three Commissioners, men in business who performed a more or less thankless public service for love. The jurisdiction was limited by one of two conditions, *viz.*, Defendant being a resident of Birmingham, or having been personally served within the town, so that if a race between the beadle and a defendant ended in the latter getting beyond the post which divides Deritend from Bordesly, the two, though within a few inches of each other, like Pyramus and Thisbe, could neither part nor unite.

A good half of the book professes to be an account of forty-three cases tried before this Court from the pen of a Mr. Hutton, who was a Commissioner of the Court, more than a hundred years ago. Whether the Court survives to this day, we are not in a position to say, but even if it be a thing of the past, its memory and that of Mr. Hutton should be kept green, if justice is to be done to the record left by Mr. Hutton. Mr. Hutton appears to have been a "man of infinite humour" and withal a philosopher. Four-fifths of this record is philosophy, very quaintly and humorously expressed. We extract below case No. 8 as a none too typical example, but because being short it admits of reproduction:

[Two females appear before the bench. The Plaintiff demands the return of a black silk coat, the loan of which the Defendant admits, but which she says she cannot return as she cannot spare it. She cannot say what it may be worth or what price it may sell for. Hence the following colloquy:]

Commissioners. As the Plaintiff, out of friendship, has favoured you with it so long, and as you find it so extremely useful, you would have no objection to purchase it at an easy price, and pay the money when you are able, fix upon it, if you please, that easy price.

Defendant. I cannot.

Court [to the Plaintiff].—We are sory your honest property covered a cheat, and that means of redress are not with us. We are not authorised to go beyond matters of debt; this is an act of trover. The cloak is probably pawned or sold. Could we have drawn a price from her, we had stood upon firm ground, and could have reduced your antagonist; but like an old bird of prey, she is too cunning to be caught. You have lost your cloak, and she her character, if she had one to lose. You are defrauded under a mask of friendship. Of all the species of ill-treatment that against good nature is the least pardonable. By a wistful look, you seem still to wish our assistance. We would gladly give it. The case is well understood; but although it lies in a narrow compass, our powers are too circumscribed to reach it. We are obliged to dismiss the cause.

The record appears under the appropriate heading "Defective Powers."

Under the heading "The Power of Beauty" the Commissioner moralises on the various influences which go to warp the judgment of the Court.

An unaccountable prejudice will take possession of the heart of a Judge almost unobserved by himself and preponderate the scale in favour of one side. My dear reader, you never saw two people fight, but you threw your good wishes into the ring, upon one of the combatants, although equally a stranger to both and the merits of their quarrel . . . . .

The deficiency of human judgment is another fountain of error . . . . . .

False information is another force of evil; both parties equally treat him with deceit. The only people who *can* throw light upon the subject will not. As they keep him in the dark, if he blindly distributes the gifts of fortune, the fault is more theirs than his own.

It is difficult not to be won by the first speaker, if he carries the air of mildness and is master of his tale; or not to be biased in favour of infirmity, or of infancy. . . . . .

Nothing dissolves like tears. Though they arise from weakness, they are powerful advocates which instantly disarm, particularly those which the

afflicted wish to hide. . . . . The man who can repel fire and sword is reduced by a few drops of water.

Perhaps there never was a Judge, from seventeen to seventy, who could look with indifference upon beauty in distress. . . . . Though these masterly drawings of nature chiefly strike those in younger life, yet none are exempt. . . .

All these matters influence the man, and warp his judgment.

Elsewhere the Commissioner draws up a set of 14 " Maxims for the Bench "-of which the following will suffice as samples :—

1. Avoid hearing one party, except the other is by.

2. Beware of being biassed by the first speaker.

6. Never carry resentment to the Bench.

10. Give the loser a reason why he ought to lose, otherwise a decision will assume an arbitrary face.

The rest of the book is taken up by descriptions of witch trials taken from contemporary accounts and a few pages from old reports of libel actions and one, dated 1600, of the troubles of jurors who defied the Judge's charge notwithstanding that their own wits were proved to be lamentably deficient for the business they were called upon to perform. It is a little book to which busy lawyers will gladly turn for an occasional half-hour's entertainment.

CONFESSIONS AND THEIR RIGHT APPLICATION. *By Naging Singh, B.A., Government Advocate, Patiala State. Price Rs. 5.*

This is a volume of about 250 pages dealing with the law of confessions. The subject is undoubtedly a very important one and the present author is not the first on the field. The author has collected a considerable amount of important matter in his book which is likely to prove useful to lawyers. Apparently he has spent much time and energy over it, and is, indeed, sanguine enough to say that his book " will be found of immense use to the members of the bar whose function it is to conduct the defence " and " will be found exceedingly useful for the Judicial Officers who have to administer criminal justice in India." The law of confessions has always presented the greatest difficulties and any one bringing out a book which may be of some assistance to those who are connected with the administration of law deserves encouragement and support but it would be a bold statement to say that any particular work on the subject is perfect in itself and leaves nothing to be desired.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM CENTRAL PROVINCES.]

LORD ATKINSON.
LORD PARKER.
SIR JOHN EDGE.
MR. AMEER ALI.

DAL SINGH
v.
THE KING-EMPEROR.

1916, 7, June.

Special leave from a conviction for mur and sentence of death granted on the ground the improper and illegal use of the stateme recorded in police diaries.

The Petitioner Dal Singh was convicted murder and sentenced to death by the Sessi Judge of Jubbulpore and on appeal the c viction and sentence were affirmed by Judicial Commissioners of the Central Provin on the 19th April 1916. The case for prosecution was that the Appellant and servants had a quarrel with Mohan whose w Kalia went to her husband's assistance a that the Petitioner and his servant Bhoj killed her with axes. The Petitioner and four servants including Bhojraj were charg with offences under secs. 302 and 148 of Indian Penal Code. The defence called f witnesses to prove that, in fact, Mohan hims had killed his wife, and that the charge agai the accused was false. The Judicial Comm sioners, as well as the Sessions Judge, used t statements recorded in the police diaries statements alleged to have been made by t defence witnesses to the police, and held th the evidence of the defence witnesses was reliable because the statements made by th in Court were at variance with those recor in the police diaries.

Mr. L. DeGruyther, K. C. (with him *Mr. M. Parikh*) submitted that the conviction of t Petitioner was a miscarriage of justice, and w contrary to the provisions of the Code of Cri nal Procedure. There was no legal proof the statements alleged to have been made the police. The prosecution did not put the statements to the defence witnesses in th cross-examination. The use of the poli diaries was most improper, and prejudicial the accused, and was contrary to secs. 145 a 172 of the Code. There was practically no e dence on which the conviction of the Petition could be sustained.

Sir William Garth appeared for the Crown

Their LORDSHIPS granted special leave.

T. L. Wilson & Co. for the Petitioner.

B. D. *Leave granted.*

TRIBIKRAM DEO NARAYAN SINGH *v.* BADRI MISSER.

proceed. Thereupon the judgment-debtors preferred the present appeal to the High Court.

Messrs. Ganesh Dutt Singh, Rajendra Prasad and *Baidyanath Narayan Singh* for the Appellants.

Messrs. Saroshi Charan Mitter and *Awadh Behari Chandra* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHAMIER, C. J.—This appeal arises out of an application made to the Court to enforce an Order of Her late Majesty in Council dated the 28th November 1899. It appears that several applications for enforcement of the Order in Council were made in the years 1902, 1903, 1904 in disregard of the provisions of sec. 610 of the Code of Civil Procedure, 1882. The case came before the Calcutta High Court in November 1906 on appeal against an order made by a District Judge and the High Court then pointed out that an application under sec. 610 of the Code of Civil Procedure, 1882, was a necessary preliminary to the enforcement of the Order in Council. On December 2nd, 1907, the person in whose favour the Order in Council had been passed and whom we may refer to as the decree-holder, applied to the Calcutta High Court under sec. 610 of the Code of 1882. On February 4th, 1908, that Court ordered notices to be issued to all the opposite parties. The papers before us do not shew, and the learned Vakils on both sides have been unable to ascertain, whether in fact notices were issued and, if issued, were served upon the parties referred to. On August 15th, 1910, the High Court passed a formal order transmitting the Order in Council to the Court of the District Judge for execution. On November 21st, 1911, the decree-holder applied for execution against the widow of one of the judgment-debtors. Notices appear to have been issued to all the judgment-debtors. It does not appear whether they entered an appearance or not. All that is certain is that the objection put in by the widow was allowed and the application for execution was dismissed on April 18th, 1913. On January 22nd, 1915, an application for execution of the Order in Council was made to the Subordinate Judge to whom the execution proceedings had been transferred. The judgment-debtors objected that the application for execution was barred by limitation but the Subordinate Judge overruled the objection and directed that execution should proceed. The application for execution is admittedly governed by Art. 183 of the first Schedule of the Limitation Act, 1908, according to which an application to enforce an Order of the Sovereign in Council must be made within 12 years from the date on which a present right to enforce the order accrued to some person capable of releasing the right, provided *inter alia* that where the order has been revived 12 years shall be computed from the date of such revivor. The decree-holder in the present case contends, and the Court below has held, that the order of the Calcutta High Court dated August 15th, 1910, transmitting the Order in Council to the Court of the District Judge for execution revived the Order within the meaning of Art. 183. The meaning of revivor as used in this article and in the corresponding article of the Limitation Act of 1877 has been the subject of a number of decisions. The Courts seem to be generally agreed that in using the term revivor the Legislature had in view the procedure embodied in sec. 216 of the Code of Civil Procedure,

1859, and sec. 248 of the Code of Civil Procedure, 1877. The object of that procedure was to give notice so as to prevent undue surprise to a judgment-debtor where more than one year had elapsed between the date of the decree and the application for execution, or when it was sought to enforce the decree against the representative of a party against whom the decree was originally made. It has been held in several cases that where on an application for execution notice is issued under sec. 216 of the Code of Civil Procedure, 1877, or sec. 248 of the Code of Civil Procedure, 1882, and the Court has decided that the decree is still capable of execution and makes an order for execution there has been a revivor within the meaning of the article mentioned above. In my experience it has not been the practice to issue notice on an application made under sec. 610 of the Code of Civil Procedure, 1882, or Or. XLV, r. 15, of the present Code where no special directions are required. I have myself in many cases transmitted an order of the King in Council to a Subordinate Court for execution without giving any notice to the judgment-debtors. It appears to me that where an Order in Council is transmitted to a Subordinate Court for execution without any notice being given to the judgment-debtors it would be impossible to say that there has been a revivor of the Order. In such a case the Court does not consider whether the order is still capable of execution or not. It leaves all such matters to be determined by the Court to whom the Order in Council is transmitted. The only question to my mind is whether anything occurred in the present case to make the order of the Calcutta High Court dated the 15th August 1910 operate as a revivor of the Order in Council. The order on the face of it is a mere formality. It does not shew that any question was raised before or decided by the Court. It does not even shew that the judgment-debtors were present. The Court had no option but to transmit the Order in Council to the Subordinate Court for execution and as there is nothing to shew that it decided any question whatever in the case I am of opinion that the order of the Calcutta High Court did not operate as a revivor of the Order in Council within the meaning of Art. 183, Sch. I of the Limitation Act. It follows that in my opinion the application for execution was barred by limitation and should have been dismissed. I would allow this appeal, set aside the order of the Court below and dismiss the application for execution with costs. Hearing fee, four gold mohurs.

JWALA PROSAD, J.—I agree.

A. K. R. *Appeal allowed.*

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD SHAW.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

1916,

Heard, 8, 9, 23, 24, 29 and 30, March.

Judgment, 15, May.

SRI RAJAH MALRAJU LAKSHMI VENKAYYAMMA RAO BAHADUR, Appellant,

v.

SRI RAJAH VENKATA NARASIMHA APPA RAO BAHADUR, since deceased, and anr., Respondents.

Contract to settle property in consideration of donee coming and living with donor—Promise—Acceptance by word and conduct—Consideration—Part performance—Contract if may be repudiated—Locus penitentiæ—*Contract, if requires writing—Specific performance—Civil Procedure Code of 1882, sec. 544—Civil Procedure Code of 1908, Or. 41, r. 33—Suit in ejectment—Court in allowing a*

MALRAJU LAKSHMI VENKAYYAMMA RAO *v.* VENKATA NARASIMHA APPA RAO.

Defendant's appeal against decree of ejectment, if may decree it in favour of non-appealing Defendants—Appeal by Plaintiff by leave of High Court to His Majesty in Council—Defendant not made Respondent added and allowed to file cross-objection by Privy Council.

P, a childless widow, was greatly attached to her grandniece, the Plaintiff, and valued her companionship, and, on her marriage, was anxious that she and her husband, who was a man of independent means, should continue to live with her, and to this end offered to settle property on her. Plaintiff and her husband being thus induced to come and reside with her, remained with her from 1886 to 1893, between which dates P settled some small properties on Plaintiff. In 1893 she wished to settle property of a more substantial value, and with this object in view purchased a property worth Rs. 40,000, but in her own name. The Plaintiff's husband, not being satisfied with this arrangement, left P's house and went to reside on his own property. P, thereupon, in order to persuade Plaintiff to stay with her, wrote to her husband, pressing him to return, and she also gave Plaintiff herself her assurance in writing that the property in question was purchased for Plaintiff, that there were incumbrances on the property which were to be discharged, that P would retain the property so long as she was alive, and afterwards convey it to the Plaintiff. The Plaintiff as well as her husband agreed to this arrangement and, until P's death in 1899, Plaintiff and her husband lived with P.

Held—*That the letter was a promise quite definite as to its subject-matter, the person who was to be its owner (the Plaintiff) and with regard to the time she was to enter into possession, and the same was accepted, and P obtained the consideration she desired, inasmuch as in compliance with the stipulation made by her the Plaintiff and her husband went on living with her.*

That there was thus a concluded contract from which P could not resile and which was specifically enforcible, the law of India not requiring such a bargain to be in writing.

MAUNSELL *v.* HEDGES (1), MADDISON *v.* ALDERSON (2) *and* MAHOMED MUSA *v.* AGHORE KUMAR GANGULI (3) *referred to.*

That the dying declaration of P that the property in question had been given away to Plaintiff and that possession of the same should be delivered to her after her death, did not constitute a nuncupative will but a re-affirmation and confirmation of the previously concluded contract.

Upon appeal to the High Court by one of the Defendants, N, against a decree in ejectment passed in favour of the Plaintiff, another Defendant, S, who had been made a Respondent in the appeal, prayed that the Court, which proceeded to decree the appeal, should make a decree in favour of all the Defendants. The prayer was overruled and the decree was in respect of the appealing Defendant's unascertained share only. The Plaintiff having then obtained leave of the High Court to appeal to His Majesty in Council, S who was not made a Respondent in the appeal moved His Majesty in Council to be added as such and for leave to file cross-objections. This was allowed subject to all objections at the hearing. At the hearing it was urged that the cross-objections could not be entertained as (1) no leave had been obtained from the High Court; (2) S's application to His Majesty in Council was time-

(1) 4 H. L. C. 1039 (1854).
(2) 8 App. Cas. 467 (1883).
(3) L. R. 42 I. A. 1 : s. c. 18 C. W. N. 250 (1914).

barred; (3) under sec. 544 of the Civil Procedure Code of 1882 which applied when the appeal was lodged in the High Court (though it was not disposed of until Or. 41, r. 33 of Act V of 1908 had come into force), S was not entitled to the relief he asked for. These objections were overruled by the Privy Council.

Consolidated appeals from a judgment and decree of the High Court of Madras, dated the 26th November 1909, varying a decree of that Court, which had affirmed a decree of the District Judge of Godavari. The Appellant sued to recover a village called Repudi from the Defendants (1) Rajah Rangaya, (2) Rajah Venkata Narsimha, (3) Rajah Parthasaradhi and (4) the Receiver. The Plaintiff alleged that Rani Papamma had, during her life, contracted to give the village to the Plaintiff under the circumstances which are fully stated in their Lordships' judgment. The Receiver and Rajah Rangaya did not defend the suit but the remaining Defendants denied the Plaintiff's claim. The District Judge held that the Rani had purchased the village for the Plaintiff and that she had agreed to give it to the Plaintiff who was entitled to possession thereof. He further held that the weight of evidence was sufficient to establish an oral bequest of the village by Rani Papamma in favour of the Plaintiff if there were no resultant trust which he had found to exist. He accordingly made a decree for possession of the village. Rajah Venkata Narasimha alone appealed to the High Court. The statement in the memorandum of appeal was " second Defendant only appeals making Plaintiff, first Defendant, third and fourth Defendants, Respondents. Second Defendant's case is, that Plaintiff is not entitled to the village but that he, first and third Defendants are equally entitled to it. Hence the valuation of second Defendant's appeal is one-third of Rs. 40,000 which is the value of the village." The appeal was heard by Sankaran Nair, J. and Abdur Rahim, J. The first learned Judge held that Rani Papamma entered into an agreement with the Plaintiff to give the village to her, and that the Plaintiff was entitled to recover it from the Defendants. Further he considered that the evidence of what was said by the Rani some time before her death indicated that the Rani thought that the village had already become the property of the Plaintiff and that therefore there could be no oral bequest of it. The second learned Judge came to the conclusion that although the Rani had the intention of giving the village to the Plaintiff she had not done anything to effectuate that intention and that there was no binding contract and no bequest which entitled the Plaintiff to recover the village. The result of this difference of opinion was that the appeal was dismissed. Rajah Venkata Narasimha again appealed against the said decree of the High Court under Letters Patent and made the Plaintiff and the remaining Defendants Respondents in the appeal, and valued the appeal at one-third of the value of the village. The appeal was heard by Sir Arnold White, C. J., and Wallis and Miller, JJ. The Court allowed the appeal to the extent of Rajah Venkata Narasimha's share of the village, that is, one-third. The judgment concluded in these words.

" This ends the correspondence, and it is clear, we think, that no contract arises on it and we do not find any sufficient evidence of a subsequent contract by which the Plaintiff and her husband agreed to go on living with the old lady till her death in consideration

of her undertaking to leave the Plaintiff the village at her death. They did no doubt go on living with her, being maintained by her and drawing an allowance from her as it was clearly their interest to do, but this fact alone and there is nothing more, does not appear to us sufficient to raise the implication of a contract on either side. As regards the other points we agree with the learned Judges. The appeal must be allowed and the decree against the Appellant reversed with costs throughout.

The second Respondent who has not appealed asks the Court to set aside the decree against him also, but the old sec. 544 of the Civil Procedure Code, 1882, does not apply to the case, as the present appeal is not against the whole decree. Before the present Code came into force, the Plaintiff had become entitled to hold her decree against the Defendant undisturbed, and the provisions of the present Code cannot be applied retrospectively so as to deprive her of it—*Colonial Sugar Refining Co.* v. *Irving* (5)."

Against the said decree, the Plaintiff appealed to His Majesty in Council making Rajah Venkata Narasimha alone Respondent to the appeal. On the 20th May 1914, Rajah Parthasaradhi applied to His Majesty in Council praying for an order that he should be added as a Respondent to the said appeal, and for special leave to cross-appeal from that portion of the decree of the High Court which was against him. The Plaintiff opposed the petition. The Lords of the Judicial Committee ordered that Rajah Parthasaradhi be added as a Respondent to the said appeal, and that special leave be granted to him subject to all objections that may be taken at the hearing of the appeal. Hence these consolidated appeals.

Sir Erle Richards, *K. C.*, and *Mr. K. Brown* for the Appellant, took preliminary objections to the appearance of Rajah Parthasaradhi: (1) Parthasaradhi's application for leave to appeal was barred under Art. 179, Sch. 2, Indian Limitation Act, 1908, and r. 5 of the Consolidated Rules of the Judicial Committee, 1908. The decree of the District Judge was made on 3rd November 1904. The Defendant was in substance appealing from that decree. He was out of time for appealing to the High Court; (2) He did not apply to the High Court for leave to appeal to His Majesty in Council—the Judicial Committee Rules require that an Appellant must apply without the least possible delay. If the Defendant were appealing from the order of the High Court refusing to give him the benefit of sec. 544 of the Code of Civil Procedure, he was bound to apply to the High Court before applying to His Majesty in Council. That rule is well settled. *Mutusawmy Naiker* v. *Venkataswara* (6) and *Moti Chand* v. *Ganga Pershad* (7); sec. 598, C. P. C., 1882, and Or. 45, r. 2, C. P. S., 1908; (3) The law has vested in the Plaintiff an absolute right to the one-third share of the village originally claimed by the third Defendant. That Defendant not having appealed from the decree of the District Judge, it became final, and the Plaintiff thereafter acquired a vested right—*Karsondas* v. *Gungabai* (8). Sec. 544 of the Code of Civil Procedure, 1882, only applies where the appeal is from the whole decree and not a portion of it. It was inapplicable to the present case where the appeal throughout related to one-third

(5) [1905] App. Cas. 369.

(6) 10 M. I. A. 313 (1865).

(7) L. R. 29 I. A. 40; s. c. 6 C. W. N. 313 (1901).

(8) I. L. R. 30 Bom. 329 (1905).

share of the Defendant who appealed, as was clear from the valuation of the appeal. The powers of the Court have been extended by the new Code, Or. 41, r. 33. But the appeal to the High Court was under the old Code, and the High Court rightly held that the new Code did not apply. A law of procedure could not affect vested rights—[*Colonial Sugar Refining Co.* v. *Irving* (5)]. In any case, the provisions of Or. 11, r. 33, were discretionary, and the Court ought not to exercise its discretion in favour of the Defendant who had been silent for nearly ten years, without any reason.

Mr. P. O. Lawrence, K. C. (with him *Mr. J. M. Parikh*) for Rajah Parthasaradhi submitted that he had been made Respondent to the appeal unconditionally. It was an action in ejectment and the shares in which the village was held by the Defendants had not been determined prior to 1914. The claim for possession was in respect of the *entire* village and all the Defendants in possession thereof were properly added—the defence of all the contesting Defendants went to the root of the Plaintiff's title. The appeal of the second Defendant was not in respect of one-third of the village only, but in regard to the whole claim. The memo. of appeal shows that the Plaintiff's title was attacked on various grounds. The valuation of the appeal was for purposes of the payment of Court-fees only. That could not alter the nature of the appeal which entirely denied the Plaintiff's title. Similarly the Letters Patent appeal was directed against the *whole* decree. The decree appealed against proceeded on a ground common to all the Defendants, and sec. 544, C. P. C., 1882, applied—*Ram Kamal* v. *Ahmed Ali* (9) and *Dhuttaloor Subayya* v. *Paidigantam Subbayya* (10) The case of *Colonial Sugar Refining Co.* v. *Irving* (5) had no application In any case, the new Code of Civil Procedure came into force on the 1st January 1909 and the High Court ought to have applied it in disposing of the appeal on the 26th November 1909 It was undisputed that the new Code gave ample powers even where an appeal related to a portion of a decree. It was a joint and indivisible decree. The Board ought to be reluctant, as it always is, to do injustice—the Code of Civil Procedure and the Law of Limitations do not affect the powers of the Crown. The Crown can give leave at any time in the interest of justice—*nunc. pro. tunc.* Reference was made to the following authorities *Gajadhur Pershad* v. *Two Widows of Imam Ali* (11), *Cassim Ahmed Jewa* v. *Narainan Chetty* (12) and *Venkata Narasimha* v. *Parthasarathy* (13).

Sir Erle Richards replied.

[Their Lordships (LORD SHAW, SIR JOHN EDGE, and MR. AMEER ALI) intimated that in their opinion, the preliminary objection failed and that Rajah Partha saradhi would be heard in support of his cross-appeal.]

Sir Erle Richards then submitted that the oral and documentary evidence established that Rani Papamma entered into a contract with the Plaintiff to give her the village and that the Plaintiff was entitled to enforce the agreement. It was clear that the village was purchased for the Plaintiff and that the Rani was to hold it during her life and after her death Plaintiff was to take possession

(5) [1905] App. Cas. 369.
(9) I. L. R. 30 Cal. 499 (1903).
(10) I. L. R. 30 Mad. 470 (1907).
(11) L. R. 2 I. A. 205 (1875).
(12) L. R. 37 I. A. 133 (1910).
(13) L. R. 41 I. A. 51 : s. c. 18 C. W. N. 554 (1913).

of it in fulfilment of the agreement. There was not only an intention to give but a completed contract in pursuance of which the Plaintiff and her husband continued to reside with the Rani. What the Rani said on her death-bed strongly corroborated the fact that she regarded the contract as complete. A representation made by one party for the purpose of influencing the conduct of another and acted upon by the other, will be enforced. *Hammersley* v. *DeBiel* (14).

As to the doctrine of making representations good, reliance was placed on Pollock's Contract, 8th Edition, Appendix, p. 752. A contract to give will be specifically enforced against the person making it, and all persons claiming under him as volunteers—*Synge* v. *Synge* (15), approved by the Judicial Committee in *Central Trust and Safe Deposit Co.* v. *Snidar* (16). The present case falls within sec. 8 and sec. 2 (*d*) of the Indian Contract Act.

On the faith of the Rani's promise the Plaintiff had altered her position and the agreement so made is binding. *Maddison* v. *Alderson* (2) and *Mahomed Musa* v. *Aghore Kumar* (1). Reliance was also placed upon the oral Will made by the Rani.

Mr. L. DeGruyther, K. C. (with him *Mr. K. Brown*) followed.

Mr. Bhugwandin Dubé for Raja Venkata Narasimha submitted that the Plaintiff had failed to make out a binding contract. The Rani undoubtedly intended to give the village to the Plaintiff, but the Rani reserved all rights to herself, and she had never at any definite moment entered into a contract to give. The letter dated 12th October 1893 was either a declaration of trust or a contract to bequeath. In either case, if any title passed under that letter it could not be relied upon as, being unregistered, it was inadmissible under the Indian Registration Act (1877), sec. 17. *Thakur Umrao Singh* v. *Thakur Lachman Singh* (17). Sec. 5 of the Indian Trusts Act (1882). The story of the oral Will was disbelieved by five Judges out of six.

Mr. P. O. Lawrence (with him *Mr. J. M. Parikh*) for Rajah Parthasaradhi submitted that there was no binding contract —no agreement that the Plaintiff was bound to reside with the Rani. There was no bargain here, as in *Maddison* v. *Alderson* (2). There was nothing more proved than a representation of intention. The doctrine of making representations good had long been exploded as was clear from Pollock's note cited on behalf of the Appellant. There must be either a contract, or a representation of fact but not of intention. *Jordan* v. *Money* (3) and *Loffus* v. *Maw* (18), following *Hammersley* v. *DeBiel* (14), which was an instance of the doctrine of making representations good, was overruled in *Maddison* v. *Alderson* (2). The present case was similar to *Maunsell* v. *Hedges* (1), the Plaintiff's claim ought to be dismissed in its entirety. The High Court in Letters Patent Appeal was wrong in refusing to give relief to his client under sec. 544 of the old or Or. 41, rr. 4 and 33 of the new Code of Civil Procedure.

Sir Erle Richards in reply.—The Indian

(2) 8 App. Cas. 467 (1883).
(4) L. R. 42 I. A. 1 : s. c. 19 C. W. N. 250 (1914).
(14) 12 Cl. & F. 45, 47, 61, 73 (1845).
(15) [1894] 1 Q. B. 466, 468, 471.
(16) [1916] A. C. 266, 272 (1915).
(1) 4 H. L. C. 1039 (1854).
(2) 8 App. Cas. 467 (1883).
(3) 5 H. L. C. 185, 210 (1854).
(14) 12 Cl. & F. 45, 47, 61, 73 (1845).
(17) L. R. 38 I. A. 104 : s. c. 15 C. W. N. 497 (1911).
(18) 3 Giff. 592 (1862).

Registration Act had no application to contracts. The cases cited on behalf of the Respondents did not apply as the contract pleaded here had been established by the evidence.

Their Lordships' Judgment was delivered by

Lord Shaw.—These are consolidated appeals against a judgment and decree, dated the 26th November 1909 pronounced by the Chief Justice and two Judges of the High Court of Judicature at Madras in an appeal under Letters Patent against a decree of the High Court dated the 16th November 1908. The two Judges constituting the High Court differed in opinion, with the result that a decree pronounced by the District Judge of Godaveri, dated the 3rd November 1904, had been affirmed in the original appeal. The Letters Patent appeal was allowed and the suit was dismissed. The form which the dismissal took will be afterwards referred to.

The suit was brought with the main object described in the first prayer of the plaint—to the effect that it be declared that the Plaintiff is entitled to the village of Repudi, and that Defendants do put the Plaintiff in possession of the same.

Rajah Narayya, who died in 1864, was the owner of an extensive zemindary of Nidadavole. He was survived by two widows, both of whom were childless. One of these widows died in 1881; the other, a lady named Papamma, became sole life owner and continued to enjoy the estate until December 1899, when she died.

She resided in her palace, or fort, at Senivarpet, having a large income amounting to about 6 lakhs of rupees per annum. The Appellant, who is Plaintiff in the suit, was a grandniece of Papamma, and was brought up by her from an early age. In 1886, at the age of 14, she was married to the ex-zemindar of Narasaropet. He was a man of good standing, in the enjoyment of a small pension from the Government, and himself the owner of property of considerable value.

There can be little doubt that the Rani, herself childless, was on terms of attachment and affection towards the Plaintiff and valued her companionship. When the marriage was arranged, the Rani disbursed all the suitable expenses thereof; but she appears to have been extremely anxious that her grandniece, although married, should continue to live with her. This, however, would without doubt have involved a certain loss of dignity and position on the part of her husband: and it appears clear from the facts proved that the obtaining of his consent to any arrangement of the kind was obtained with difficulty. The Rani agreed to make presents of jewellery to her grandniece, and to make provision for her apparently on a fairly ample scale by the purchase of immovable property for her. Upon this footing an arrangement was made and matters were settled. The date of that settlement was 1886, namely, the year of the Plaintiff's marriage.

The arrangement was indefinite; and the indefiniteness was the cause of considerable uneasiness. Following upon it, however, the Plaintiff and her husband did reside with the Rani until 1893. During this interval of time two properties were purchased by the Rani. The form in which she carried out her promise towards her grandniece was that in each instance she took the property in the first place in her own name, and after a period of about two years she granted

a conveyance thereof to her grandniece. These properties were small. The balance of evidence is that they would not have been held by any of the parties as sufficient consideration for the Plaintiff and her husband continuing to reside as stated. The Rani herself appeared, as circumstances afterwards showed, to be anxious to make further and more substantial provision for her grandniece. This was the situation of affairs up till the spring of the year 1893.

At that time the Rani purchased the property known as Repudi, she made no concealment of having done so for the Plaintiff; but she did raise objection to the title of Repudi being taken directly in the Plaintiff's name. The impression of her Dewan had been that the transaction was to be direct; and on the 28th February 1893, a receipt was given to him for an advance paid in respect of the purchase which bore that "having settled to sell to you, for 40,000 rupees the village" . . . . . "in order that you may give away the same to M. R. Ry. Rajah Malraju Lakshmi Venkayyamma Rao Garu for dowry," . . . . . "we have this day received from out of your own separate property 100 rupees as advance towards the said sale amount." This appeared to be much too direct for the Rani, and she wrote to the Dewan on the 8th March: "I have told you that this village should be purchased and the document obtained, for the present, in my name alone, as was done before." She mentioned her desire that the document "should be got written" as on the previous occasion, and she added "it is not my intention to have this village conveyed to anyone's name for the present, and so I have written this." In their Lordships' opinion the Rani desired to follow her own previous practice of taking the title in her own name, and as was done with the two other villages, thereafter to give a conveyance from herself. She uses the expressions "for the present," and "as was done for the former villages." The title was accordingly taken in her own name.

This, however, brought matters to a head with regard to the position of the Plaintiff and her husband, and to their continuing to reside with the Rani. The Plaintiff's husband left; he betook himself to his own property, and he received various communications which asked him to return, and contained assurances that the arrangement upon which Repudi was bought, namely, that it should be truly for the Plaintiff, should be carried out. Their Lordships do not state these arrangements in detail. They are, however, fully satisfied on the evidence that the Dewan and the Plaintiff's uncle were authorised to communicate to the Plaintiff's husband this assurance and promise, and that in pursuance of that authority they visited him and made the communication.

The negotiations were protracted, but they culminated in a letter of date, 12th October 1893, written by Papamma in her own hand to the Plaintiff herself, in which she stated: "Repudi was purchased for you alone. Some encumbrances thereon have yet to be discharged. I shall discharge the debt, retain it under me so long as I am alive, and afterwards convey it to you yourself. From that forwards you may do with it as you please. The whole world knows that I purchased it (only) to give it away to you. Do not think, even in your dream, that I, who brought you up from infancy, would ruin you. I wrote to the grandson (she designated the Plaintiff's husband thus) in

that manner, thinking that there was need to tell him all these matters and nothing else."

This letter appears to their Lordships to be a promise, and to be quite definite (1) with regard to its subject-matter, namely, the village of Repudi; (2) with regard to the ownership thereof, namely, that that was to be in the Plaintiff; and (3) with regard to the date of her entry into possession thereof, namely, that possession would be given immediately upon the expiry of the life interest therein, which Papamma reserved to herself.

In their Lordships' opinion this promise was accepted. The evidence taken as a whole and the actings of parties are in entire conformity with this being so. Their Lordships believe the Plaintiff's testimony to the following effect: "In the said letter she wrote to say that she would pay off the debts, keep the village under her throughout her lifetime and then give it to me. I agreed to it. I informed my husband of this. He too consented to it. Being unable to bear the separation, she desired me to stay with her. She promised to give me, as aforesaid, for staying with her accordingly till her death. The arrangement was that both myself and my husband should remain there. I consented to it accordingly. My husband also consented to it. Had Papamma Rao Garu failed to enter into such an agreement in regard to Repudi, myself and my husband would not have stayed there."

The Board is of the opinion accordingly that there was here a completed contract. Papamma accomplished her desire, and she obtained the consideration which she had so much at heart. Acceptance of her terms and compliance with her stipulation were made. The words of Lord St. Leonards in *Maunsell* v. *Hedges* (1) might be asked here "Was it not a proposal, with a condition, which, being accepted, was equivalent to a contract?" Their Lordships do not doubt that it was.

From that date forward, for a period of about seven years, namely, until Papamma's death in 1899, the Plaintiff and her husband continued to live with her in her palace. There is a mass of oral and documentary evidence, but it does not advance, nor does it in their Lordships' opinion recede from, the point of completed contract as above set forth.

This being so, the citation of that set of cases of which *Maddison* v. *Alderson* (2) and *Maunsell* v. *Hedges* (1) are the familiar examples is beside the mark. In both of these cases, as must be done in all cases of a similar character, the true issue must be disentangled from statements or representations *simpliciter*, or from mere announcements of intention; and that true issue is: Is a contract proved? Had a contract been proved in either of the examples cited, there is nothing to suggest that the law would have refused to give effect to it by way of specific performance.

Maddison v. *Alderson* (2) is a good instance of the point. The contract was alleged to be constituted by a promise followed by actings on the faith thereof. The actings were carefully scrutinised in order to see whether the contract, the sole evidence of which otherwise was in the testimony of the Plaintiff herself, was established. Lord O'Hagan put the matter thus: "Assuming that the action be considered maintainable, if at all, for the purpose of forming a parole contract partly performed, the course of the argument appears to me to have been further

(1) 4 H. L. C. 1039 (1854).
(2) 8 App. Cas. 467 (1883).

erroneous in this, that instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The Court was asked from the findings of the jury and the testimony supporting them to say there was a contract, and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained." And Lord Blackburn put the matter broadly thus: "It seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury if it had been explained to them that to make a contract there must be a bargain between two parties."

In the case of *Maunsell* v. *Hedges* (1) a bill was filed for the purpose of compelling those claiming under a certain will to settle certain real estates in Tipperary on the Appellant pursuant to an alleged obligation arising out of certain letters. The letters disclosed that the deceased had positively declined to be bound. "I shall never settle," said he, "any part of my property out of my power so long as I exist." It was held that there was no contract placing the testator under such obligation.

In short, to use the language of Lord Cranworth in *Jordan* v. *Money* (3) (a case in which the process of disentangling the true from the erroneous issues, as above alluded to, was carefully followed), "The question upon this part of the case is simply one of fact. Is it made out by such evidence as can justify a court of justice in acting upon it that such a contract as that which is alleged really was entered into?" The Board is of opinion in the present case that this question should be affirmatively answered.

It was strongly pressed upon their Lordships that the letter did not contain sufficient evidence of anything but an intention, and that it stopped short of any actual promise upon which acceptance of it as such might follow. Their Lordships do not think so. The law of India does not require writing at all in regard to such a bargain; but their Lordships are not surprised, looking to the frequent challenges made of contracts resting upon word of mouth alone, that the desire should have been expressed to have Papamma's undertaking in writing and distinctly set down. In their Lordships' opinion they were so obtained, and a contract was concluded in October 1893.

Another view of the case would lead precisely to the same result. It is this: Suppose the proof of the acceptance made by the Rani, that is to say, of an acceptance in terms, were considered to be defective, what is the situation of the parties in view of the actings of the Plaintiff and her husband? Their Lordships are of opinion, looking to the demand for a definite proposal as a condition of the Plaintiff and her husband staying on with the Rani, that their actings did take place upon the footing of the proposal so made and that they were known by Papamma to have taken and to be taking place on that footing. In these circumstances the objection that the contract itself was inchoate or incomplete cannot be maintained. The law in this sense was fully explained by Lord Selborne in the case of *Maddison* v. *Alderson* (2), a judgment which was cited at some length by this Board in *Mahomed Musa* v. *Aghore*

(1) 4 H. L. C. 1039 (1854).
(2) 5 H. L. C. 217 (1854).
(2 8 App. Cas. 467 (1883).

Kumar Ganguli (4). After such actings *locus penitentiæ*, or the power of resiling from an incomp'ete engagement or an unaccepted offer is, to use language borrowed from the law of Scotland and highly approved in the case referred to, barred by '*rei interventus*, which raises a personal exception which excludes the plea of *locus penitentiæ*." As was stated in the judgment of the Board in *Mahomed Musa's* case, " Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but upon the contrary, that these laws follow the same rule."

As stated, accordingly, the same result is reached. And it would not be open for those representing the Rani or her estate to resile from or fail to perform the obligation to deliver possession of the village of Repudi to the Plaintiff, such possession to take effect as from the date of the Rani's death.

The question of Papamma's intention is, of course, of fundamental importance, and it was much pressed upon the Board that she never meant to be bound. Their Lordships do not agree. They do not think that Papamma meant to avoid a bargain, or ever meant to have her grandniece and husband live on with her under the impression, on their part, that they were bound, whereas all the time she, Papamma, knew she was, and intended to be, free. Their Lordships do not think that the Rani's design included duplicity of this character.

The transactions of October 1893, followed by the years of compliance, on the footing that those transactions formed a concluded contract, leave no substantial doubt that no repudiation by the Rani would have affected it. Fortunately, however, there is a body of evidence throwing light upon the Rani's own view.

Her death occurred on the 5th December 1899. On her death-bed she declared that she had purchased Repudi village solely on account of the Plaintiff. Their Lordships believe the Plaintiff's statement that the Rani then said " that she had purchased the Repudi village on my account alone, that I should take it after her death." The Dewan's evidence is quite plain upon the subject. He made a statement on the 5th December before the Tahsildar as to his instructions by the Rani, in which he said " she has given me directions saying, among other things, that the village of Repudi had been given away to her granddaughter, and that the same should be delivered into possession of her after her death."

In the opinion of the Board accordingly, instead of there being any such repudiation of the contract, there was a dying declaration by the Rani, which, in their Lordships' opinion, constituted a reaffirmation and confirmation thereof.

Their Lordships observe that much discussion and considerable difference of judicial opinion arose, in the Courts below, upon the question whether these statements made on death-bed by the Rani did not constitute a nuncupative Will. Such a Will is valid in India. Some of the Judges, including the trial Judge, thought that it did; others thought it did not. The argument presented at this Board is noticeable in this particular: It was to the following effect: " Granted that the words taken by themselves might have made a Will, it really could not have been so because the lady used language, the true effect of which was a declaration that the property of Repudi was already the Plaintiffs'. She thought that it was, and therefore did not make a

(4) L. R. 42 I. A. 1: s. c. 19 C. W. N. 250 (1914).

MALRAJU LAKSHMI VENKAYYAMMA RAO *v.* VENKATA NARASIMHA APPA RAO.

Will with regard to it." If this argument be sound, that there was no Will for the reason given, then the reason given is very helpful evidence that the Rani had already and effectually given a right to Repudi to the Plaintiff, under which, immediately she, the Rani, died, the Plaintiff would enter into possession of the village.

As stated, their Lordships are of opinion that the Plaintiff has such a right in terms of a contract accepted and complete, and that a Will accordingly would not have been in place in the circumstances, and should not be affirmed by law. Upon the other hand, the declaration on death-bed by the Rani herself leaves no doubt that what had been done had been effectively done. Her belief and statement to that effect were entirely well-founded.

With regard to the shape of their Lordships' decree, it is to be noted that, consequent upon litigation with regard to this and other property, a receiver was appointed. This circumstance saves any complexity from arising in the carrying out of the present judgment. The receiver will act upon it. He will deliver possession of Repudi upon the terms of the contract now affirmed, that is to say, the Plaintiff will be entitled to the village as from and after the Rani's death.

The judgment now given disposes of any necessity for a pronouncement upon the cross-appeal.

Their Lordships will humbly advise His Majesty that the appeal be allowed with costs, and that the cross-appeal be dismissed also with costs.

Solicitor: *Mr. Douglas Grant* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* and *Edward Dalgado* for the Respondents.

B. D. *Appeal allowed with costs.*

[INSOLVENCY JURISDICTION.]

No. 250 OF 1911 AND No. 19 OF 1912.

GREAVES, J.
1916,
16, June.

Re SITAL PRASAD and others, Insolvents.

Infants, if may be adjudicated insolvents under the Presidency Towns Insolvency Act (III of 1909) —Indian Contract Act (IX of 1872), secs. 68 and 247.

Infants cannot be adjudicated insolvents under any circumstances.

Secs. 68 and 247 of the Contract Act provides special remedies against the property of an infant but that does not make an infant a debtor.

The facts of the case are as follows :—

One Raj Kumar Lall who had been carrying on business along with others under the name and style of Sital Persad Raj Kumar Lall died in May 1909 leaving three sons Gouri Sunker, Kedarnath and Juggernath, all minors. Then one Raghubir Prosad was appointed the guardian of the person and property of the three minors. By two adjudication orders, dated respectively the 22nd of November 1911 and the 29th of January 1912, the said Raghubir Prosad and the minors Gouri Sunker, Kedarnath and Juggernath were adjudicated insolvents along with others in respect of the family trading business under the above mentioned name and style of Sital Persad, Raj Kumar Lall. In 1912, Raghubir Prasad for himself and as the certificated guardian of Gouri Sunker applied that the adjudication order of 22nd November 1911 might be annulled but the application was refused. In 1916 Gouri Sunker came of age and he as well as Raghubir Prasad on behalf of Kedarnath and Juggernath, still minors, made this present application to set aside the adjudication orders mentioned above. The

application was opposed by two secured creditors.

Mr. S. K. Chackravarti for the Official Assignee.

Mr. Zorab for the secured creditors contended that the Presidency Towns Insolvency Act (III of 1909) made no exception in favour of an infant. Under the English Law, *Ex parte Jones* (1) no doubt lays down as a general rule that an infant cannot be adjudicated an insolvent. But there are well recognised exceptions to that general rule, *e.g.*, in the cases where the debt is in respect of necessaries supplied to the infant or in the case of a judgment-debt in an action for tort. See Williams on Bankruptcy, page 4.

In the cases of *In re Hansraj Madji* (2) and *In re Nobodeep Chunder Shaw* (3) adjudication orders made against infants were set aside but those cases merely follow *Ex parte Jones* (1). Under the Indian Contract Act the position of a creditor in respect of necessaries supplied to an infant and in respect of an infant partner is the same, *viz.*, that the infant is not personally liable but that his property is liable to answer for the debt. See secs. 68 and 247 of the Contract Act. Moreover this is a case of joint family partnership and the adjudication orders should stand. In the case of Gouri Sunker the matter is also *res judicata* as his former application was dismissed by this Court.

Babu Subodh Chandra Mitter, Attorney for the infants was not called upon.

The Judgment of the Court was as follows :—

Greaves, J.—This is an application on behalf of Gouri Sunker and the other partners in the firm Kedarnath and Juggernath who were adjudicated insolvents on the 29th January 1912, Gouri Sunkér having been adjudicated on the 22nd November 1911. These two insolvency proceedings have been consolidated. The application now before me is to set aside the order of adjudication so far as these three persons are concerned on the ground that they were infants at the date when the orders of adjudication made against them respectively were passed. It appears that an order was passed in the Court of the District Judge of Ghazipur under sec. 7 of Act VIII of 1890 (the Guardian and Wards Act) on the 11th December 1909. These three persons were minors on that date and Gouri Sunker attained his majority in the year 1916, and the other two infants will attain their majority in the years 1925 and 1928 respectively, and by virtue of the order of the District Judge of Ghazipur the age of majority of the infants will be 21. The application is opposed by certain secured creditors who have obtained an order for sale for the purpose of realising their securities under sec. 2, cl. 18, of the Presidency Towns Insolvency Act, and I was referred to two sections of the Contract Act, *viz.*, sec. 68 which provides that if a person incapable of entering into a contract is supplied with necessaries the person supplying the necessaries is entitled to be re-imbursed from the property of the person incapable of so contracting, and also to sec. 247 of the Contract Act which provides that a person who is under the age of majority may be admitted to the benefits of partnership but cannot be made personally liable for any obligation of the firm and the argument addressed to me founded upon these two sections was that the infants, who are rendered liable under these sections, must be debtors, or otherwise there would be no right against their property under those sections. I think that argument is not

(1) L. R. 18 Ch. D. 109 (1881).
(2) I. L. R. 7 Bom. 411 (1883).
(3) I. L. R. 13 Cal. 68 (1886).

RE SITAL PRASAD.

well founded. I do not think that the sections presuppose that they are debtors. In the case of infants who are under a disability, the law in this country to prevent hardships arising in the case of supply of necessaries, or in the case of a family partnership, has provided special remedies against their property, but I do not think for a moment that they are debtors, and so the distinction that Counsel who appeared for the secured creditors sought to make with regard to the English case of *In re Jones* (1), the passage to which he referred being at page 119, does not seem to me well founded. I do not think that the law contemplates that an infant should be adjudged an insolvent, although there is a passage in Williams on Bankruptcy, 11th Ed., p. 4, in which it is suggested that in respect of judgment-debts or necessities an infant may be so adjudicated, but there is no decision which so lays down, and I do not propose to so decide in the absence of any authority for the proposition. My own view is that an infant cannot be adjudged an insolvent under any circumstances, and so I grant the application and set aside the orders of adjudication made against Gouri Sunker and the other applicants Kedarnath and Juggernath. So far as the costs of the secured creditors are concerned, they can add their costs, of their appearing here, to their securities, and I make no order against Raghubir or against the infants themselves. The Official Assignee will take his costs out of the assets in his hands.

Mr. J. A. Arnowitz, Solicitor, for the Official Assignee.

Babu Subodh Ch. Mitter, Attorney, for the Infants.

Babu H. C. Ghosh and *Messrs. G. N. Dutt & Co.*, Solicitors, for the Creditors.

D. B.

(1) L. R. 18 Ch. D. 109 (1881).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES NOS. 1104 AND 1185 OF 1913.

MOOKERJEE, J.
RICHARDSON, J.
1915,
28, July.

NADIA CHAND SAHA and others, Defendants, Appellants,
v.
BIRENDRA CHANDRA DUTT, Plaintiff, Respondent.

Kabuliyat *containing stipulation to pay excessive rate of interest—Assurance by landlord at the time of execution of* kabuliyat *that covenant will not be enforced, effect of, on the document—Indian Evidence Act (I of 1872), sec 92, prov. 1.*

A kabuliyat *for a period of one year provided that on default of payment of rent the arrears would carry interest at 75 per cent. per annum. The tenant held over after one year. On a suit for rent on the basis of the* kabuliyat *the tenant pleaded that before the* kabuliyat *was executed by him, the landlord assured him that the covenant for payment of interest at 75 per cent. would not be enforced. This allegation was found to be true.*

Held—*That under the circumstances the* kabuliyat *was not the real agreement between the parties, having been induced by fraudulent misrepresentation, and the tenant was not liable to pay interest claimed on the basis of the* kabuliyat.

Sec. 92, Prov. 1 of the Evidence Act referred to.

This was an appeal preferred on the 26th March 1913 against the decree of S. E. Stinton, Esq., District Judge of Zillah Sylhet, dated 7th December 1912, modifying the decree of Moulvie Abdul Khallique, Munsif of Habigunge, dated 14th May 1912.

The facts of the case will appear from the judgment.

NADIA CHAND SAHA *v.* BIRENDRA CHANDRA DUTT.

Babus Mohendra Nath Ray and *Gopal Ch. Das* for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Hemendra Kumar Das* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Defendant in a suit for recovery of arrears of rent on the basis of a *kabuliyat* executed on the 11th April 1895, for a term of one year. The *kabuliyat* provided that rent would be paid on the 30th July and that on default the arrear would carry interest at the rate of 75 per cent. per year. The year expired and the tenant held over. Rent is claimed in this suit for the years 1909-10 and 1910-11, and the only question in controversy is, at what rate is interest payable on the arrears. The Defendant pleaded that before the *kabuliyat* was executed by him, the landlord assured him that the covenant for payment of interest at 75 per cent. per annum would not be enforced, and it was on the faith of this assurance that he agreed to the insertion of the clause in the document. The Court of first instance found that the allegation of the Defendant was true and held that the landlord was not entitled to claim interest on the arrears at the rate of 75 per cent. per year. On appeal the District Judge has expressed no opinion upon the question of fact, but has decreed interest at the rate claimed, on the ground that oral evidence was not admissible to contradict the terms of the *kabuliyat*. He has referred to proviso (4) of sec. 92 of the Indian Evidence Act, and has concluded that as that proviso deals with a subsequent oral agreement, it has no application to the case before us, while none of the other provisos was of avail to the Defendant. On the present appeal, reliance has been placed by the Defendant upon the first proviso to sec. 92, which is in these terms. "Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law." We may parenthetically observe that this is not an exhaustive enumeration of the circumstances which may invalidate a document or may entitle a person to a decree or order relating thereto.

The Appellant contends that the execution of the *kabuliyat* was secured by fraud or imposition, in respect of the clause for payment of interest, and in support of this view refers to the decision of the Judicial Committee in *Pratap Chandra* v. *Mohendra Nath* (1). Sir Richard Couch observed in that case that where one party induced another to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of equity, considered as having been obtained fraudulently. Consequently, where a tenant executes a *kabuliyat* containing a stipulation which the landlord has told him will not be enforced, the tenant cannot be held to have assented to it, and the *kabuliyat* is not the real agreement between the parties. A similar view was taken by this Court in the cases of *Kasinath* v. *Brindaban* (2) and *Beni Madhub* v. *Lalmoti* (3). The test is, whether the tenant can maintain a suit for rescission, cancellation or variation of the contract; if he can, he may successfully resist the claim on the basis of the contract. There is no room for controversy in this case

(1) I. L. R. 17 Cal. 291 (1889).
(2) I. L. R. 10 Cal. 649 (1884).
(3) 6 C. W. N. 242 (1898).

that such a suit could be maintained by the tenant. But it has been ingeniously argued on behalf of the Respondent that as the *kabuliyat* in this case was for a term of one year only, and as since the expiry of the term the Defendant has held over, he is bound by the terms entered in the document. This contention is obviously fallacious. As there was an agreement that this particular clause in the deed would not be enforced, the relative position of the parties is the same as if the clause was deleted from the document; and the tenant must be deemed to have held over according to what constituted the true terms of the agreement between him and his landlord. [*Baijnath Prasad* v. *Raghunath Rai* (4) and *Durgi Nikarini* v. *Goberdhone Bose* (5)]. The tenant could, after the expiry of the term, be made liable for interest, only if there was a subsequent agreement to pay interest at the specified rate. None such is alleged in this case.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. The Appellant will have his costs in this Court, but the parties will bear their own costs before the District Judge.

We may add that the Respondent has not insisted upon a remand in view of the small amount in controversy; otherwise a remand would have been necessary for a determination of the question of fact which was raised in the Court of first instance and decided for the Defendant but has been left undecided by the District Judge.

This judgment will govern S. A. 1185 of 1913; in that case also, the decree of the District Judge will be set aside and that of the Court of first instance restored; there will be the same order for costs as in the other case.

S. C. M. *Appeal allowed.*

(4) 16 C. W. N. 496 (1911).
(5) 19 C. W. N. 525: s. c. 20 C. L. J. 448 (1914).

[CIVIL REFERENCE]

REF. No. 2 OF 1916.

TEUNON, J.
CHAUDHURI, J.
1916,
Heard, 27, March.
Judgment,
30, March.

In the matter of a PLEADER.

Pleader—Professional misconduct—Altering Court's record to conceal error due to carelessness.

Where a property to be sold in execution of a decree was, through the carelessness of the pleader for the decree-holder and his clerk, misdescribed in the application for execution, in the warrant of attachment, and in the sale-proclamation, and after they had been presented to Court, the clerk actuated by a desire to conceal his and his master's carelessness from the decree-holder altered the descriptions and the alterations were initialled by the pleader:

Held (*ordering the pleader's suspension for three months*), *that to tamper with the Court's records is at all times a serious matter and the pleader had acted without due care and caution and without that sense of responsibility which should govern the conduct of all officers of the Court in matters of such importance.*

This was a Reference under sec. 14 of the Legal Practitioners Act made by Mr. A. Mellor, District Judge of Khulna, on the 22nd November 1915 based on a report of the 1st Munsif, Bagerhat, for orders of this Court.

The facts of the case will appear from the Judge's reference which was as follows:—

"The facts of the case are fully given

in the report of the learned Munsif. It appears that the pleader made alterations in certain papers in an execution case after the issue of sale-proclamation intending it to be supposed that the alterations were made before the papers were filed and that the figures were in the papers when they were first filed. The fraud was detected because the advertisement printed in the weekly newspaper the " Jagaran " shows what the original figures were. The pleader admits having altered the papers at a later stage of the case but pleads that he acted in good faith. I agree with the learned Munsif that this plea cannot be accepted, that he has been guilty of misconduct, and I think that some notice should be taken of it in order to deter pleaders in Mofussil Courts from such practices. I do not make any recommendation as to what action should be taken but leave it entirely to the Judges of the Hon'ble Court. The Munsif reports that the pleader is a young man and may have acted at the instigation of his clerk who has had long experience of the work."

Mr. B. Chuckerbutty and *Babus Jadunath Kanjilal* and *Brojo Lal Chakerbutty* for the Pleader.

Babu Ram Charan Mitter for the Government.

The Judgment of the Court was as follows :—

These are proceedings under secs. 13 and 14 of the Legal Practitioners Act.

It appears that a certain landlord obtained a decree for rent in respect of a holding measuring 50 bighas at a rental of Rs. 62-8, that is at Re. 1-4 a bigha.

The decree-holder put his decree in execution and brought the property to sale.

The pleader now in question one Babu A———— was employed in the execution proceedings, and it appears that in the application for execution, in the warrant of attachment, and in the sale proclamation the property to be sold was described as a holding measuring 75 bighas at a rental of Rs. 15. It seems that these figures were obtained from a *pottah* granted at a time when the cultivated area was 12 bighas and the rent at the rate of Rs. 1-4 a bigha was therefore Rs. 15.

The matter then appearing against the pleader is that after the property had been sold a second time, certain alterations intended to bring the description of the holding into conformity with the decree, and in so far as the area was concerned, intended to reconcile the decree and the sale notifications were made in the application for execution, in the warrant of attachment and in the office copies of the two sale-proclamations. These alterations were made by the pleader's clerk and initialled by the pleader. His explanation is that he affixed his initial " *bonâ fide*," or, as we understand, in the belief that the alterations were in the document when presented to and issued from the Court.

It has been suggested that no hardship has been caused to the auction-purchaser who has not applied for the setting aside of the sale, but it may well be that he thinks that he can successfully assert that the decree-holder landlord is and will remain bound by the description of the holding given in the sale-proclamation. It would seem, therefore, that in making the alterations the clerk was actuated by the desire to conceal from the decree-holder client his own and his master's carelessness.

It is not suggested now that the pleader's initials were appended at the preparation of the documents. It may be therefore that he was not a willing accomplice in the scheme conceived by the clerk.

But to tamper with Court records is at

IN THE MATTER OF A PLEADER.

all times a serious matter and taking the most lenient view of the case it is abundantly clear that in appending his initials, and in thereby giving the weight of his authority to the assertion that the papers were in the condition in which they were presented to the Court he, the pleader, acted without due care and caution and without that sense of responsibility which should govern the conduct of all officers of the Court in matters of such importance.

We are, therefore, constrained to the opinion that he has been guilty of grave impropriety in the performance of his duties and we accordingly suspend him from the practice of his profession for a period of three months from this date.

N. G.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 77 OF 1916.

MOOKERJEE, J.
SHEEPSHANKS, J.
1916,
29th May.

AKSHOY SINGH and anr., Petitioners,
v.
RAMESWAR BAGDI, Opposite Party.

***Criminal Procedure Code** (Act V of 1898), secs. 439, 345—High Court in revision can grant leave to compound offence—Indian Penal Code (Act XLV of 1860), sec 447—Criminal trespass, elements necessary to constitute offence.*

The accused were charged under secs. 447 and 504, I. P. C. The trying Magistrate held that the evidence was not sufficient to justify a conviction under sec. 504, I. P. C., and convicted the accused under sec. 447, I. P. C., only and passed a non-appealable sentence. The Sessions Judge on being moved in the matter called for the record and on the date fixed for hearing the complainant filed a petition to the effect that the case had been compromised and asked for leave to withdraw the case. On a reference by the Sessions Judge under sec. 438, Cr. P. C., recommending that permission might be given to the parties to compound the case,

Held—*That when an accused has been convicted of a compoundable offence the High Court in the exercise of its revisional jurisdiction under sec. 439, Cr. P. C., is not competent to grant leave to compound the offence under sec. 345, Cr. P. C., when such composition has been entered into after the conviction of the accused.*

That to sustain a conviction under sec. 447, I. P. C., it is necessary to prove as required by sec. 441 not only that the accused entered upon the property in the possession of the complainant but that they did so with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property and no such intent having been proved in the case, which was one of civil dispute, the conviction under sec. 447, I. P. C., should be set aside.

This was a Reference under sec. 438, Cr. P. C., by Mr. G. N. Roy, Sessions Judge, Burdwan, dated 17th May 1916, recommending that, in the circumstances of the case, permission be given to the parties to compound the case in which the accused were convicted under sec. 447, I. P. C., by Mr. Abdul Bari, Deputy Magistrate, Burdwan, on the 30th March 1916, and sentenced to pay a fine of Rs. 10.

The facts will appear from the judgment.

No one appeared on this Reference.

The JUDGMENT OF THE COURT was as follows :—

This reference, under sec. 438, Criminal Procedure Code, raises an important question of law which has led to some diversity of judicial opinion.

The Petitioners, Akshoy Singh and

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Akhil Singh, were prosecuted on the complaint of one Rameswar Bagdi before the Deputy Magistrate of Burdwan for offences under secs. 447 and 504, Indian Penal Code. They were convicted only under the former section and were sentenced to pay a fine of Rs. 10 each, in default to suffer rigorous imprisonment for two weeks. There was also an order under sec. 545, Criminal Procedure Code, that Rs. 5 out of the fine, if realised, be paid to the complainant as compensation. This sentence which was passed on the 30th March 1915 was non-appealable. On the 14th April the Petitioners moved the Sessions Judge to call for the record and to recommend to this Court that the conviction be set aside on the ground amongst others that the case was one of civil dispute and not of criminal trespass. The Sessions Judge called for the record and fixed the 12th May for hearing. On that date, the complainant filed a petition to the effect that the matter in dispute between the parties had been settled by the intervention of the gentlemen of the locality, that as the case was compoundable it had been compromised and that his prayer was for leave to withdraw the case. The Sessions Judge reserved his order, and subsequently made this reference with the recommendation that permission may be given to the parties to compound the case. The question thus arises, whether when an accused has been convicted of a compoundable offence, it is competent to the High Court in the exercise of its powers of revision under sec. 439 (1), Criminal Procedure Code, to grant leave to the parties to compound the offence.

Sec. 345, Criminal Procedure Code, treats of the compounding of offences and consists of seven clauses. The first clause specifies the offences which may be compounded and mentions the person who may compound. The second clause specifies certain other offences which may be compounded only with the permission of the Court before which any prosecution for such an offence is pending. The third clause makes compoundable the abetment of or the attempt to commit a compoundable offence. The fourth clause provides that in the case of a person under disability another person competent to contract on his behalf may compound. The fifth clause defines the stage of the proceeding when an offence may be compounded and is in the following terms: "When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or as the case may be, before which the appeal is to be heard." The sixth clause lays down that the composition of an offence under the section shall have the effect of an acquittal of the accused. The seventh clause finally provides that no offence shall be compounded except as provided by the section. This analysis of sec. 345 shows clearly that it deals exhaustively with the subject of the composition of offences; with regard to this matter, it defines the persons who may compound, the nature of the offences compoundable, the stage when composition may be made, and the condition under which composition may be effected in the case of some of the offences. The inference is legitimate that when the Legislature provided in cl. 7 that no offence shall be compounded except as provided by the section, the intention was that each of the requirements just mentioned must be fulfilled. Now the fifth clause allows a composition with the leave of the Court when an accused

has been committed for trial, or, when, after conviction, an appeal by him is still pending. There is no reference to a case where after conviction (whether by the first Court or by the Appellate Court where an appeal is allowed by law) an application for revision is pending before the High Court. It cannot be contended for a moment that the criminal revisional jurisdiction is included in the criminal Appellate jurisdiction. It is remarkable that although the Letters Patent divides the civil jurisdiction into original and appellate, thus indicating that the civil revisional jurisdiction is in reality an aspect of the civil appellate jurisdiction, [*Secretary of State* v. *British India Steam Navigation Co.* (1)], cls. 22, 27 and 28 of the Letters Patent clearly differentiate between the original, the appellate and the revisional jurisdiction in criminal cases. The Code of Criminal Procedure also plainly distinguishes between appeals and revision, which form the subject of separate chapters (Chapters 31 and 32). By no stretch of language can we consequently hold that cl. 5 of sec. 345 authorises a composition, not merely during the pendency of an appeal, but also during the pendency of an application for revision. We must accordingly answer in the negative the question formulated above. The view we take is in accord with that adopted by this Court in *Adhar Chandra* v. *Subodh Chandra* (2) and by the Madras High Court in *Sankar Rangayya* v. *Sankar Ramayya* (3). The Allahabad High Court, however, is clearly not of one mind upon this point. The question arose in *Emperor* v. *Ram Piyari* (4). Richards, J., who heard the case in the first instance, thought it very doubtful whether the High Court, in exercise of its powers of revision, had any jurisdiction to allow a composition, and directed a reference to a Bench of two Judges for determination of the question. Knox and Keramat Husain, JJ., were satisfied that the High Court had the power and based their view on *Abadi Begum* v. *Ali Husen* (5), a case under sec. 517 and by no means analogous. No reference was made to the terms of sec. 345; but reliance was placed upon sec. 423, cl. (*d*) read with sec. 439. The question arose again in *Naqi Ahmad* v. *King-Emperor* (6), where Tudball, J., doubted the correctness of the decision in *Emperor* v. *Ram Pyari* (4), as inconsistent with sec. 345 (5); but as a single Judge he felt bound to abide by that ruling. The question came up for consideration again in *Emperor* v. *Ram Chandra* (7), where Knox, J., held, without reference to his previous decision to the contrary effect in *Emperor* v. *Ram Pyari* (4), that a Court of revision cannot allow the composition of an offence which had already resulted in a conviction before the proposed settlement. In the Chief Court of the Punjab, the question was considered in *Nidhan Singh* v. *King-Emperor* (8). Chatterjee, J., doubted the correctness of the view that a composition could be sanctioned by a Court of revision, but felt bound to follow two unreported precedents to the contrary. The matter has formed the subject of discussion in

(1) 18 C. L. J. 90, 92 to 97 (1914).
(2) 18 C. W. N. 1212 (1914).
(3) 29 Mad. L. J. 521 : s. c. 16 Cr. L. J. 750 (1915).
(4) I. L. R. 32 All. 153 : s. c. 11 Cr. L. J. 203 ; 7 All. L. J. 103 (1909).
(5) [1897] All. W. N. 26.
(6) 11 All. L. J. 13 (1912).
(7) I. L. R. 37 All. 127 : s. c. 13 All. L. J. 104 ; 16 Cr. L. J. 247 (1914).
(8) 5 Punj. L. R. 263 : s. c. 1 Cr. L. J. 509 (1904).

two recent cases before the Court of the Judicial Commissioner of Oudh, *Ram Swarup v. Emperor* (9) and *Lalla* v. *Emperor* (10) where the decision in *Emperor* v. *Ram Pyari* (4) was followed, without examination of the terms of sec. 345. It is thus plain that the view that a Court of revision is competent to grant leave for composition of an offence which has already resulted in a conviction has been followed either with doubt or reluctance, and always without consideration of the true effect of the provisions of sec. 345. The supporters of this view have, on the other hand, invoked the aid of sec. 423, cl. (*d*), which authorises a Court of Appeal to make any amendment or any consequential or incidental order that may be just or proper; but this is clearly of no real assistance. An order for composition can in no sense be said to be a consequential or incidental order. There are further two weighty considerations against the applicability of sec. 423, cl. (*d*). In the first place, it is an elementary rule for the construction of statutes that when a special provision, obviously exhaustive in its scope, has been made for a special topic, as in sec. 345, the scope thereof cannot be indirectly enlarged by reference to a general provision, such as that contained in sec. 423, cl. (*d*). In the second place, cl. 5 was introduced into the Code for the first time in 1898 to meet the effect of the decision in *Empress* v. *Thompson* (11), and cl. (*d*) was also introduced into sec. 423 at the same time; if the Legislature had intended that composition of offences should be allowed during the pendency of an application for revision, sec. 345, cl. (5) might have been suitably framed; it is inconceivable that compositions during appeals should have been expressly mentioned and compositions in revision should have been left to be inferred from sec. 423, cl. (*d*). The position then is that sec. 439 empowers a Court of revision—not to exercise all the powers of an Appellate Court, as is sometimes loosely expressed, but only such powers as are conferred on a Court of Appeal by secs. 195, 423, 426, 427 and 428, that the power to sanction composition of an offence is conferred on a Court of Appeal, not by sec. 423, cl. (*d*), or any of the other sections just mentioned but by sec. 345, cl. (5), and, that, consequently, sec. 439 which defines the powers of the Court of revision does not confer on it the power to sanction the composition of offences. We hold accordingly that this Court, in the exercise of its revisional jurisdiction under sec. 439, is not competent to grant leave to compound an offence under sec. 345, when such composition has been entered into after the conviction of the accused. We are, therefore, unable to accept the recommendation of the Sessions Judge and to grant leave to the parties to compound the case.

In the view we take, it becomes necessary to consider the propriety of the conviction which, as already stated, is assailed on the ground that the case is really one of civil dispute and not of criminal trespass. The allegation of the complainant was that the accused had put up a fence on his land and blocked his way out and that they had done so with a view to insult and annoy him. The case for the accused was that the fence had been erected on their own land. The accused were accordingly charged under secs. 447 and 504, I. P. C. The Magistrate held that the evidence was not sufficient to justify a conviction under sec. 504,

(4) I. L. R. 32 All 153: s. c. 11 Cr. L. J. 202; 7 All. L. J. 103 (1909).
(9) 13 O. C. 161.
(10) 17 O. C. 92: s. c. 15 Cr. L. J. 567 (1913).
(11) I. L. R. 2 All. 339 (1879).

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I. P. C. He then proceeded to consider the charge under sec. 447, I. P. C. Upon the evidence, oral and documentary, he came to the conclusion that the fence had been erected on the land of the complainant and that the accused had thereby encroached on his land. He held accordingly that the accused were guilty of criminal trespass. This view cannot be supported. To sustain a conviction under sec. 447, it is necessary to prove, as required by sec. 441, not only that the accused entered upon the property in the possession of the complainant, but that they did so with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property. No such intent has been proved in this case; the intent which was imputed and was made the foundation of a charge under sec. 504 has not been established. It is well settled that if a person enters on land in the possession of another in the exercise of a *bonâ fide* claim of right without intention to intimidate, insult, or annoy the person in possession or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass, *Empress* v. *Budh Singh* (12), *Re: Shistidhur* (13) and *Jura Khan* v. *King-Emperor* (14). The case before us is clearly one of civil dispute and the Magistrate has not found the elements essential to sustain a conviction under sec. 447, I. P. C. The result is that we set aside the convictions and sentences and direct that the fines, if paid, be refunded.

S. C. M. *Conviction set aside.*

(12) I. L. R. 2 All. 101 (1879).
(13) 9 B. L. R. App. 19 (1887).
(14) 7 C. L. J. 238 (1907).

[CRIMINAL REVISIONAL JURISDICTION]

REF. No. 90 OF 1916.

MOOKERJEE, J. SHEEPSANKS, J. 1916, 14, June.	KARALI PRASAD GURU *v.* KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec. 233—Indian Penal Code (Act XLV of 1860), secs. 456, 457—Conviction under sec. 456 when charge under sec. 457, propriety of—Criminal intention if should be specified in the charge in a case under sec. 456 Intention of accused how may be determined by Court.

The view that under no circumstances can a conviction be made under sec. 456 of the Penal Code, when the accused has been charged with the commission of an offence under sec. 457, cannot be maintained.

The accused in the middle of the night entered the house of the complainant while she was asleep, was caught but ultimately ran away. The motive alleged by the prosecution was to commit theft of the complainant's ornaments. The accused was summarily tried for offences under secs. 457 and 380, I. P. C., and the trying Magistrate finding that the intention of the accused was really to make immoral proposals to the complainant and thus to annoy her convicted him under sec. 456, I. P. C.

Held—*That although the specific intent, namely, the intent to commit theft was not established, yet it was competent to the Court to convict the accused under sec. 456, I. P. C., sec. 238, Cr. P. C., being clearly applicable to a case of this character, and the accused not having in any way been prejudiced by such conviction.*

JHARU SHEIKH *v.* KING-EMPEROR (1) *distinguished.*

(1) 16 C. W. N. 696 (1912).

KARALI PRASAD GURU *v.* KING-EMPEROR.

That it is well settled that to sustain a conviction under sec. 456 it is not necessary to specify the criminal intention in the charge; it is sufficient if a guilty intention is proved such as is contemplated by sec. 441, I. P. C.

That the intention may be determined as well from direct evidence as from the conduct of the party concerned and the attendant circumstances and in the circumstances of the case the Court could presume that the accused effected the entry with an intent such as is provided for by sec. 441, I. P. C.

This was a reference under sec. 438, Cr. P. C., by C. Tindell, Esq., Sessions Judge, Bankura, dated 6th June 1916, recommending that the order of Babu Akshaykumar Sen, Deputy Magistrate, Bankura, dated 25th May 1916, convicting accused under sec. 456, I. P. C., and sentencing him to six weeks' rigorous imprisonment, be set aside and the case be retried.

The facts will appear from the judgment.

No one appeared on the Reference.

The JUDGMENT OF THE COURT was as follows :—

This is a reference under sec. 438, Cr. P. C., by the Sessions Judge of Bankura.

The facts material for the determination of the questions raised on this reference may be briefly stated. On the morning of the 29th April 1916, one Golap Goalini lodged an information in the Police Station at Nejhia that, at midnight, Karali Prasad Guru had entered into her house while she and her mother were asleep on the same bed and that the entry was made with intent to commit a theft of her ornaments. She woke up as soon as her body was touched, and noticed the accused who took away her ear-ring from her right ear. She caught his clothes and raised a cry. Her mother awoke, lighted a match and caught the man. He pushed her down, tried to free himself from the hold of the complainant but failed, and ran away naked, leaving his wearing cloth behind. On this information, the Police took action, arrested the accused, and sent him up for trial. He was then summarily tried of offences under secs. 457 and 380, I. P. C., that is, lurking house-trespass by night and theft from a dwelling-house. He pleaded not guilty and filed a written statement. The substance of his defence was that he had for a long time carried on an intrigue with the complainant and had on the night of the incident entered the house at her invitation; he denied the theft of the ear-ring and asserted that the cloth produced in Court had never been worn by him. His story was in effect that as soon as he discovered that the mother of the complainant was awake, he stealthily withdrew from the place in fear. Evidence was adduced on behalf of the prosecution not only to prove the incident as alleged by the complainant, but also to show that she was a respectable woman and had led a blameless life since the death of her husband, 6 or 7 years ago. The accused, on the other hand, brought forward witnesses to depose that he had, for some time past, carried on an intrigue with the complainant. The Deputy Magistrate came to the conclusion that the incident had happened as narrated by the complainant and her witnesses. He also held that the story of an intrigue between the complainant and the accused, as told by the defence witnesses, was untrue and that the accused had entered that night into the house of the complainant, not to commit theft as she alleged, nor to

carry on an intrigue at her invitation, as he asserted, but really with a view to make immoral proposals to her and thus to annoy her. In this view, the Deputy Magistrate convicted the accused under sec. 456, I. P. C., and sentenced him to six weeks' rigorous imprisonment. The accused thereupon moved the Sessions Judge on the ground that the conviction under sec. 456 was illegal, on the authority of the decision of this Court in *Jharu Sheikh* v. *King-Emperor* (1). The Sessions Judge has accepted this contention and has recommended that the conviction may be set aside and the accused retried. We have carefully examined the record and arrived at the conclusion that the conviction should be sustained.

The decision in *Jharu Sheikh* v. *King-Emperor* (1), by reason whereof the Sessions Judge felt constrained to make this reference, is, we think, distinguishable. There the accused was charged with offences under secs. 457 and 360. As regards the charge under sec. 457, the intent imputed to him was the commission of theft. The defence was a complete denial of the incident, and, the prosecution was said to be due to malice and ill-feeling. In these circumstances, this Court held that no conviction could properly be made under sec. 456, till the charge under sec. 457 had been amended. The reason assigned for this opinion was that the accused must have been seriously prejudiced by not knowing what really was the charge against him. It is not necessary for us to express an opinion upon the question, whether this view was correct, even in the circumstances of that case. But it is plain that if the Court intended to formulate an inflexible rule of universal application that under no circumstances can a conviction be made under sec. 456, when the accused has been charged with the commission of an offence under sec. 457, the view cannot possibly be sustained. Sec. 238, Cr. P. C., which provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it, would clearly be applicable to a case of this character. This view was adopted by West and Nanabhai, JJ., in *Queen-Empress* v. *Baluj* (2). There the accused had been convicted by the trial Court under sec 457; on appeal the conviction was altered to one under sec. 414. The High Court held that sec. 457 applied to what might be called a composite offence, and, consequently, under sec. 238, Cr. P. C., an accused might be convicted of any element of the composite offence which constituted a minor offence. A similar course was followed in *Emperor* v. *Ishri* (3). There the accused was charged under sec. 457, but convicted under sec. 456, as the intent imputed to him was not established; the conviction was sustained by the High Court (See also *Sher Singh* v. *Empress* (4). We are of opinion that the decision in *Jharu* v. *King-Emperor* (1) must be limited to its special circumstances, and, in this connection, the warning given by Lord Halsbury, L. C., in *Quinn* v. *Leathem* (5) may be usefully borne in mind, namely, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there, are not intended to be expositions of the whole law

(1) 16 C. W. N. 696 (1912).
(2) Bom. Cr. 293.
(3) I. L. R. 29 All. 46 (1906).
(4) [1883] P. R. 14.
(5) [1901] A. C. 495 (506).

but governed and qualified by the particular facts of the case in which such expressions are to be found. We cannot, consequently, hold that merely because the intent imputed to the accused to sustain a conviction under sec. 457 has failed, no conviction can be made under sec 456. We are not now concerned with the question, whether a conviction under sec. 457 can be sustained when the specific intent imputed to the accused is not established, but another intent is proved. We are accordingly not called upon to consider the applicability of the class of cases in which it has been ruled that a conviction under sec. 147 cannot be supported, unless the common object of the assembly as established by the evidence agrees in essential particulars with that laid in the charge. *Silajit Mahto* v. *Emperor* (6), *Poreshnath* v. *Emperor* (7) and *Rahimuddi* v. *Ashgar Ali* (8). In that class of cases, the weighty observations in *Behari Mahton* v. *Queen-Empress* (9) may be borne in mind; "an accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases, but it is more specially true in cases where (as in a case under sec. 147) it is sought to implicate him for acts not committed by himself but by others with whom he was in company." We hold, consequently, that although the specific intent, namely, the intent to commit theft, was not established, yet it was competent to the Court to convict the accused under sec. 456, and the only consideration is, whether the accused has been prejudiced at the trial by the conviction for a minor offence, in conformity with sec. 238, Cr. P. C. In the determination of this question, as pointed out by Couch, C. J., in *R.* v. *Govindas Haridas* (10) the nature of the case made at the trial against the prisoner, the evidence that was given and the line of defence set up by him, are all matters to be taken into consideration.

Now it is well settled that to sustain a conviction under sec. 456 it is not necessary to specify the criminal intention in the charge; it is sufficient if a guilty intention is proved, such as is contemplated by sec. 441; *Koilash Chandra* v. *Queen-Empress* (11), *Balmakand* v. *Ghansamram* (12), *Premanundo* v. *Brindaban* (13), *Emperor* v. *Ishri* (3), *Sher Singh* v. *Empress* (4), *Lalji Ram* v. *Queen-Empress* (14) and *Ramrang* v. *King-Emperor* (15). In the case before us, the accused admitted his presence at midnight in the house of the complainant. He alleged that he went there by invitation of the complainant with whom he had an intrigue. Evidence was directed at the trial to this point by both the prosecution and the accused, and the question in controversy has been decided. The trial Court has disbelieved the defence witnesses and has accepted the prosecution testimony. The Sessions Judge has examined the evidence and has confirmed the view of the Deputy Magistrate. We see no reason to differ from these conclusions. The position then is that the accused is found at midnight in the house of the complainant, a respectable widow, while she is asleep on the same bed with

(3) I. L. R. 29 All. 46 (1906).
(4) [1883] P. R. 14
(6) I L. R. 36 Cal. 865 (1909).
(7) I. L. R. 33 Cal. 295 (1905).
(8) 5 C. W N 3'; s c I. L R. 27 Cal. 996 (1900).
(9) I. L. R. 11 Cal. 106 (1884).
(10) 6 Bom H C R, Cr. 76 (1869).
(11) I. L. R. 16 Cal. 657 (1889).
(12) I L. R. 22 Cal 391 (1894).
(13) I. L. R 22 Cal. 994 (1895).
(14) [1898] P. R. 12.
(15) [1902] P. R. 18.

her mother. He is caught, struggles to get off, and ultimately runs away, leaving his wearing cloth behind. The explanation he offers for his presence in the house at dead of night and for this singular incident, has been rejected. What, then, could have been his intention? The answer is best given in the words of Hill, J., in *Koilash Chandra* v. *Queen-Empress* (11): "what we have then to deal with is the case of a man, a stranger, who uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who, when an attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances, we think the Court ought to presume that the entry was effected with an intent such as is provided for by sec. 441, I. P. C." In the language of Pigot, J., *in Premanundo* v. *Brindaban* (13) " the position of the accused and all the facts preclude any notion of his going there to steal or for any purpose save his own pleasure; the facts are good evidence of an intent and of an intrusion on privacy within the meaning of sec. 509, I. P. C., and, therefore, the intent to commit an offence within the meaning of sec. 441 is made out." To the same effect are the observations of Banerjee, J., in *Balmakand* v. *Ghansamram* (12) and Turner, C. J., in *Samban* v. *Queen* (16). As was pointed out by Banerjee, J., the intention may be determined as well from direct evidence as from the conduct of the party concerned and the attendant circumstances, for as Lord Ellenborough, C. J., said in *R.* v. *Dixon* (17) " it is an universal principle that when a man is charged with doing an act, the intention is an inference of law resulting from the doing the act." We are further clearly of opinion that the accused has been in no way prejudiced and will gain nothing by a retrial. If a retrial is directed, if he is charged under sec. 456, if it is alleged that the trespass was committed with intent to commit an offence under sec. 509, and if he urges in defence that he entered into the premises at the invitation of the complainant with whom he was on terms of intimacy, what will be the question for investigation? The very question which has now been determined on evidence adduced on behalf of the complainant and the accused. We feel no doubt whatever that, in these circumstances, it would not be right to direct a retrial and afford a possible opportunity for the manufacture of perjured evidence. As regards the sentence, we are of opinion that it does not err, by any means, in the direction of severity. The offence committed was very serious. The complainant is a respectable woman, and though she occupies a humble station in life, she is entitled to the full protection of the law. The accused, on the other hand, is said to be well connected and is a person of means and some position, but that is a good reason why he should not be treated with misplaced leniency. Unless exemplary sentences are passed in these cases, persons, who are inclined to run the risk of detection in the commission of such offences, are not likely to be deterred. We accordingly decline to interfere in the exercise of our revisional jurisdiction and direct that the accused be called upon to surrender, so that he may serve out the remainder of the term of imprisonment.

S. C. M.

(11) I. L. R. 16 Cal. 667 (1889).
(12) I. L. R. 22 Cal. 391 (1894).
(13) I. L. R. 22 Cal. 994 (1895).
(16) 1 Weir 535.
(17) 3 M. & S. 11 (15) (1814).

PATNA HIGH COURT.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 46 OF 1916.

SHARFUDDIN, J.
ROE, J.
1916,
12th June.

BABU GANGA PRASAD, Plaintiff, Petitioner,
v.
NANDU RAM, Defendant, Opposite Party.

Return of a plaint under sec 23 (1), Provincial Small Cause Courts Act (IX of 1887)—High Court's power of interference—Sec. 25, Provincial Small Cause Courts Act, sec. 115, Civil Procedure Code (Act V of 1908), and sec. 107, Government of India Act of 1915.

Where a Provincial Small Cause Court returned a plaint for presentation to a proper Court on the ground that the "suit involved a question of title which should be tried in a regular suit" and the Plaintiff thereupon moved the High Court and obtained a rule, on a preliminary objection taken that the order under sec. 23 (1) is not covered by sec 25 of the Provincial Small Cause Courts Act:

Held—*That there is a good deal of distinction between disposing of a case and deciding a case. A case is something less definite than a suit. The meaning of the word "decided" as held in* SUBAL RAM DUTT *v.* JAGADANANDA (1) *approved.*

UMESH CHANDRA *v.* RAKHAL CHANDRA (2) *referred to.*

Under sec. 115 of the Civil Procedure Code the High Court would only interfere if the question were one of jurisdiction.

The Calcutta High Court's powers under the Charter Act have been exercised, with few exceptions, only in cases where jurisdiction has been exceeded or the Judge has ignorantly or perversely refused to exercise or made only a colourable pretence at exercising judisdiction vested in him by law. This limited power should be exercised only when irreparable injury would be caused to one of the litigants if matters were not set right.

CHANDI RAY *v.* KRIPAL RAY (3) *and* AMJAD ALI *v.* ALI HUSSAIN JOHAR (4) *referred to.*

Sec. 23 (1) of the Provincial Small Cause Courts Act is designed to meet cases in which a Small Cause Court Judge is satisfied that the question of title raised is so intricate that it should not be decided summarily, but in a Court in which the evidence is recorded in full and the decision is open to appeal. The matter is one of discretion, and where discretion is vested in a Court, it is not open to interference unless it has been exercised ignorantly or perversely.

This case arose out of an order passed by Babu Charu Chander Mukerjee, Subordinate Judge, vested with the powers of a Small Cause Court Judge of Patna, dated 17th March 1916.

The facts out of which the above case arises are briefly as follows:—One Sheonath Parshad owned and possessed two houses commonly known as godown houses situated at Mahulla Marufganj in Patna City. The said owner gave the above two houses in usufructuary mortgage to the Plaintiffs-Petitioners under a deed, dated the 10th June 1914, for a consideration of Rs. 4,000 carrying interest at the rate of 12 per cent. per annum and the Plaintiffs had the deed executed in the name of the Plaintiff No. 1 who is the head of the Plaintiffs' family. One of the two houses covered by the aforesaid usufructuary mortgage-deed had been let out to the Defendants Opposite Party at a rental of Rs. 20 per mensem from before the usufructuary mortgage and it was provided in the mortgage-deed that the Plaintiffs would be entitled to recover rent from the Opposite Party. The Plaintiffs as

(1) 13 C. W. N. 403 (1909).
(2) 15 C. W. N. 666 (1911).
(3) 15 C. W. N. 682 (1911).
(4) 15 C. W. N. 353 (1910).

usufructuary mortgagees instituted a suit for rent for the said house in occupation of the Defendants Opposite Party for the period commencing with 1st Ashar Sambat 1971 to 30th Aghan Sambat 1972 in the Small Cause Court at Patna.

The defence *inter alia* was that the Defendants were *maliks* of the house at the time and that the house was held before under a third person by the Defendants. The Small Cause Court Judge passed the following order on the 17th March 1916 :—" The Plaintiff sues for rent, but the Defendant alleges that he is at present the *malik* and that he held before under a third person. This suit involves a question of title which should be tried in a regular suit. Plaint returned for presentation to a proper Court." Against the said order, the Plaintiffs obtained the present rule.

Messrs. Fakhruddin and *Nirsu Narayan Singh* for the Petitioners.

Mr. Rai Tribhubannath Sahai for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

ROE, J.—In this matter we are asked to interfere either under sec. 25 of the Small Cause Courts Act or sec. 107 of the Government of India Act with an order made by a Small Cause Court Judge under sec. 23 (1) of the Provincial Small Cause Courts Act. The preliminary objection is taken that an order made under sec. 23 (1) is not covered by sec. 25. Two cases have been quoted, one on either side. In *Subal Ram Dutt* v. *Jagadananda* (1) the judgment was one to which my learned brother was a party. I agree with the conclusions arrived at therein with regard to the meaning of the word " decided," even though in *Umesh Chandra* v. *Rakhal Chandra* (2) its correctness was questioned. I would lay emphasis on the distinction between disposing of a case and deciding a case, but would concede that the meaning of the word case, as commentaries on sec. 115 of the Civil Procedure Code indicate, is not without difficulty. A case is something less definite than a suit, and it may be argued that a proceeding in which a Small Cause Court Judge discusses and decides the question whether a plaint should be returned may be regarded as constituting in itself a *case*. It is not in the matter before us necessary to go deeply into this question, for whether we regard ourselves as taking action under sec. 25 of the Small Cause Courts Act or sec. 115 of the Civil Procedure Code, or sec. 107 of the Government of India Act, the point in issue seems to me to be the same point.

Under sec. 115 of the Civil Procedure Code we could only interfere if the question were one of judisdiction. From the earliest days of the High Court at Fort William when Mr. Justice Norman introduced superintendence to the notice of his colleagues as a term having " a legal force and significance well known to the Legislature " the Court's powers under the Charter Act have been exercised, with few exceptions, only in cases where jurisdiction has been exceeded or the Judge has ignorantly or perversely refused to exercise or made only a colourable pretence at exercising a jurisdiction vested in him by law. As I read the judgments in *Chandi Ray* v. *Kripal Ray* (3) and in *Amjad Ali* v. *Ali Hussain Johar* (4) even this limited power should be exercised only when irreparable injury would be

(1) 13 C. W. N. 403 (1909).

(2) 15 C. W. N. 666 (1911).
(3) 15 C. W. N. 682 (1911).
(4) 15 C. W. N. 353 (1910).

caused to one of the litigants if matters were not set right. In the case before us no irreparable injury is being caused. The plaint has been returned. The Plaintiff has an ample remedy in the Courts of ordinary jurisdiction.

Nor would I interfere under sec. 25 of the Small Cause Courts Act, had I power to do so. Sec. 23 (1) is designed to meet cases in which a Small Cause Court Judge is satisfied that the question of title raised is so intricate that it should not be decided summarily, but in a Court in which the evidence is recorded in full and the decision open to appeal. The matter is one of discretion, and where discretion is vested in a Court, it is not open to our interference unless it has been exercised ignorantly or perversely. Whether we look at the matter from the point of view of superintendence or revision the question in issue is whether the Judge has acted ignorantly or perversely.

In *Umesh Chandra* v. *Rakhal Chandra* (2) the Divisional Bench declined to believe that there could be any intricate question of title in a dispute over the carcase of a goat.

In the case before us the suit is for house rent. If title in the house was in good faith disputed, the Judge would have been most unwise to adjudicate upon it summarily. The Judge heard the Pleaders and decided that the title of the Plaintiff had been challenged in good faith. I see no reason for believing that his decision was either ignorant or perverse.

The application should be rejected with costs—hearing fee, two gold mohurs.

A. K. R. *Application refused.*

(2) 15 C. W. N. 866 (1911).

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 4201 OF 1913 *

MULLICK, J.	TUNI ORAIN,
1916,	Defendant, Appellant,
Heard, 14, April.	*v.*
Judgment,	LEDA ORAON and anr.,
26, April.	Plaintiffs, Respondents.

Aboriginal tribes in Chota Nagpur—Inheritance—Law applicable, Indian Succession Act (X of 1865) or custom—Special notification under sec. 332 issued at the appellate stage, whether has retrospective effect—Historical works, referred to in appeal—Propriety

Notification, dated 2nd May 1913, issued by the Government of India under sec. 332 of the Indian Succession Act at the appellate stage of a case did not apply where there had already been a decision of a competent Court regarding the rights of parties.

In the case of codified law the ordinary practice of the legislature is to make special provision when it thinks fit to do so for the saving of custom, usage and ordinary rights. There is no authority that, after customary law has been stereotyped in the form of a statute which contains no provision saving custom, it is open to a Court to give effect to custom, much less to a custom inconsistent with the statute. As the Indian Succession Act contains no clause saving custom, the Courts are not competent to accept custom as a reason for deviating from the provisions of the Act.

References to works of history (not given in evidence or referred to in the Court of first instance) at the Appellate stage are irregular and to be avoided.

VALLABHA *v.* MADUSUDANAN (3).

(3) I. L. R. 12 Mad 495 (1889).

* No Letters Patent appeal has been preferred against this judgment.—REPORTER.

TUNI ORAIN *v.* LEDA ORAON.

This was a Second Appeal preferred against the decision of D. H. Kingsford, Esq., Judicial Commissioner of Chota Nagpore, dated the 6th September 1913, reversing a decision of Babu Radha Kanta Ghosh, Munsif at Ranchi, dated the 21st January 1913.

The facts out of which this appeal arose were shortly as follows :—

One Sakra Oraon died leaving three sons, *viz.*, Somra, Leda and Karma; Somra died leaving the Defendant Tuni Orain as daughter, and Karma died leaving a son Budhu Uraon, Plaintiff No. 2, while Leda was alive being Plaintiff No. 1. The Plaintiff"s case was that the disputed plots belonged to Somra as his occupancy raiyati lands and he was in possession by cultivation until his death. That on the death of Somra the properties devolved on the Plaintiffs but that the Defendants dispossessed them. That according to the custom prevailing amongst these people daughters are excluded from inheritance and the Plaintiffs are the only heirs of the deceased Somra. The Plaintiffs prayed that their right by inheritance to the disputed lands be declared and they be put in possession of the same, and be allowed mesne profits. The defence was a total denial of the Plaintiffs' rights.

The first Court held that the parties were not Hindus and that they were governed by the Indian Succession Act and that the Plaintiffs could not be the heirs of the deceased person in the presence of his daughter the Defendant. As to custom, the Primary Court further held that the evidence on the custom was very meagre. The first Court's judgment was passed on 21st January 1913. The Plaintiffs preferred an appeal to the Judicial Commissioner of Chota Nagpur on 25th February 1913. In the meantime, on 2nd May 1913, the Government of India issued a Notification No. 550, Home Department (Judicial), Simla, in exercise of the powers conferred by sec. 332 of the Indian Succession Act (X of 1865) to the following effect :—

" The Governor-General in Council is pleased to exempt all Mondas, Oraons, Santals, Hos, Bhumij, Khasias, Ghasis, Gonds, Khonds, Kokawas, Kurmis, Malegurias and Pans dwelling in the province of Behar and Orissa from the operations of the Indian Succession Act retrospectively from the passing of the Act. Provided that this notification shall not be held to affect any person in regard to whose rights a decision contrary to its effect has already been given by a competent Civil Court."

The Judicial Commissioner held that the notification applied to the case and he further found that " it is perfectly clear from the authorities (Father Hoffman, S. J., Slacke and S. C. Roy) that under Uraon custom which governs the parties, the daughters are excluded from inheritance of immoveable property." But he held that the Indian Succession Act would govern the parties. He therefore decreed the appeal and the Plaintiffs' suit for *khas* possession. The Defendant thereupon preferred this Second Appeal.

Mr. Atul Krishna Ray for the Appellant contended that under sec. 6, cls. (*c*) and (*e*) of the General Clauses Act, the notification cannot affect the present case. As a decision has already been arrived at by the learned Munsif as to the rights of the parties in the case, the notification cannot apply. He then referred to secs. 2, 30, 331 and 332 of the Indian Succession Act. Maxwell on the Interpretation of Statutes, 5th Edn., pp. 349, 350 and 360. Halsbury's Laws of England, Vol.

27, p. 160. *Kaunsilla* v. *Isri Singh* (4) and *Gopeswar Pal* v. *Jiban Chandra* (5).

Mr. Ray Guru Saran Prasad for the Respondent submitted that the notification applied to the facts of the case and has retrospective effect. Even if the notification is not applicable, as there is a finding of custom by the lower Appellate Court, that custom would govern the parties.

Mr. Atul Krishna Ray in reply.—Custom cannot override the statutory law. The parties are not governed by Hindu law. They are governed by the Indian Succession Act, which contains no saving clause as to custom or customary rights. The finding of custom arrived at by the Court of Appeal below has not been properly arrived at. He could not properly refer to works mentioned for such finding.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff and the Defendant are Oraons, an aboriginal tribe in Chota Nagpore. The suit is for recovery of possession of certain lands on the allegation that by custom the Plaintiffs who are the male agnates of one Somra, deceased, are entitled to succeed to the exclusion of the Defendant, who is the daughter. The Munsif dismissed the suit holding that as the Indian Succession Act applied the parties being neither Hindus, Muhammadans nor Buddhists, the daughter had a preferential right to the brother and brother's son. But the learned Judicial Commissioner has set aside that decree on the ground that the Succession Act did not apply by reason of a special notification issued under sec. 332 of the Act by the Government of India during the pendency of the appeal before the Judicial Commissioner and that the Plaintiffs had proved a special custom that females are excluded from inheritance to immoveable property. The present appeal before me has been preferred by the Defendant.

It is clear that the learned Judicial Commissioner is wrong in holding that the notification of the Government of India applies to the present case. The notification expressly states that it is not to apply when there has been a decision of a competent Court regarding the rights of the parties. I cannot agree with the learned Judicial Commissioner that the decision here means some final decision such as would operate as *res judicata*. The Munsif's decision was the decision of a competent Court and in my opinion the rights of the parties are untouched by the notification and are governed by the Succession Act.

It is contended however by the learned Vakil for the Respondent that the learned Judicial Commissioner has found that a custom exists to exclude females and that this custom must override the statute.

Now the applicability of custom to the case before us arises by virtue of sec. 37, Act XII, 1887, and it cannot be disputed that in the case of Hindus custom outweighs the written text of Hindu law. As regards Muhammadans although there are cases to the contrary it has been held that custom cannot override the text of the Muhammadan law. *Jammya* v. *Diwan* (1). So again in the case of trade custom it has been held that usages may be proved to override the law merchant, that is to say, the common law. In the case of codified law the ordinary practice of the legislature is to make special provision when it thinks fit to do so for the saving of custom, usage and customary

4 I. L. R. 32 All 499 191).

(5) I. L. R. 41 Cal. 1125, 1140 ; 18 C. W. N. 804 (1914).

(1) I. L. R. 28 All. 20 (1906).

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Internments in India and England—Habeas corpus.

The application for a writ of *habeas corpus* by *K. N. Patel and others* before Mr. Justice Chaudhuri which was recently disposed of is certainly a case of first impression so far as India is concerned. It was quite competent for the High Court to issue a writ in the circumstances of the case. If the arrest and detention of the petitioners were under sec. 54 of the Code of Criminal Procedure and the persons arrested were not brought before a Magistrate within 24 hours and were being detained not in accordance with the law thereafter, the High Court might on a proper application being made issue a writ for the production of the persons before the Court and in the absence of materials to justify the arrest or detention, order their discharge. His Lordship observed in this case "that the usual procedure in these applications is to issue a rule in the first instance and not to order the production of the petitioner. I departed from the practice as it was not mentioned in this case that their detention was under the said Ordinances (III of 1914 and V of 1914) and as it appeared from the affidavit filed on behalf of the petitioners that they had been detained for a considerable time, without a warrant, merely on a suspicion that they had committed some unknown offence, which seemed to me *primâ facie* illegal and high-handed." On the return of the writ as the Crown pleaded that the arrest was under the Defence of India Act (I of 1915), His Lordship was of opinion that the jurisdiction of the Court to further enquire into the nature of the alleged offences or the cause of arrest was expressly precluded under the Ordinances incorporated into the Act. The Indian Act of 1915 which incorporates in it the War Ordinances passed since August 1914 seems to be more drastic in some respects than the English Defence of the Realm Act and the Regulations framed thereunder.

Be that as it may, following the opinion expressed by Lord Justices Swinfen Eady, Pickford and Bankes regarding the validity of the Regulations passed under the Defence of the Realm Act, which was specifically raised in issue in *King* v. *Sir Frederick Loch Halliday* (20 C. W. N. xci) His Lordship held that the validity of the Regulations passed under the Defence of India Act (I of 1915) and the Ordinances which now form part of the Act was not open to question.

The chief point of difference between the English and the Indian Acts is that the scope of the Regulations under the English Act (see Reg. 14B) regarding restrictions on internment are limited to cases of persons who are either of "hostile origin" or regarding whom there is some suspicion of "hostile association." The former, it is clear, include naturalized British subjects and the latter, British subjects if suspected of some "hostile association." In England, therefore, when a person is interned even under Reg. 14B, it is competent for the High Court to issue a rule or a writ of *habeas corpus* and to enquire into the "hostile origin" or "hostile association" of the person put under restraint or interned. In the case of *ex parte Weber* (20 C. W. N. cxviii; see also T. L. R. and L. T. R. 1916) the propriety of the order of internment was questioned by the petitioner, a writ of *habeas corpus* was issued and the matter was fought out up to the House of Lords and the order discharging the writ was upheld as the petitioner was unable, in the face of his being of

" hostile origin," to discharge the burden cast on him of showing that he had completely divested himself of his German nationality. In the recent case *ex parte Raznik*, noted in our present issue, the Lord Chief Justice and Scrutton and Avory, JJ., made a rule for a *habeas corpus* absolute on behalf of the petitioner who had been interned on suspicion of being an Austrian subject but who proved himself to be of Russian nationality.

In the case *Rex* v. *Halliday—Ex parte Zadig*, above referred to, the application was by a naturalized British subject. The petitioner did not in this case question the propriety of the order of internment, which was evidently on account of his " hostile origin " and, perhaps, " hostile association " but he challenged only the validity of the Regulation. It was therefore not necessary for the Lord Justices to enter into the merits of the case. But still their Lordships referred to the safeguards provided by the English Regulation against an arbitrary order of internment by the executive and suggested that that was a sufficient " security which an interned person had that proper consideration would be given to the facts of the case."

The proviso in the English Regulation 14B regarding British subjects runs in the following terms :—" Provided that any such order (of restraint or internment) shall in the case of any person who is not a subject of a state at war with His Majesty, include express provision for the due consideration by one of such advisory committees of any representation he may make against the order."

" The advisory committees for the purposes of this regulation shall be such advisory committees as are appointed for the purpose of advising the Secretary of State with respect to internment and deportation of aliens, each of such committees being presided over by a person who holds or has held high judicial office."

In England, as far as we are aware, orders of internment have been so far passed only against persons of " hostile origin." The Defence of the Realm Act provides other safeguards than representation to the advisory committees in respect of arrests and detention which we shall notice later on. But from the cases we have cited it would appear that it is quite competent for the High Court in England to enquire into cases of arrest or detention by the issue of a rule *nisi* or writ of *habeas corpus* and to grant relief in a proper case. In the case of *Leibman* v. *The King* (20 C. W. N. v) where a writ of *habeas corpus* was issued and discharged on the ground of the petitioner being in the eye of the law an alien enemy, His Lordship Mr. Justice Bailhache observed " I desire with emphasis to state expressly that I am not dealing with the case of British subjects or with aliens who are the subjects of neutral countries, and I trust that nothing in this judgment will be considered as having any bearing whatever upon any class of persons, other than alien enemies. I desire to say this because there were some observations by the Solicitor-General as to the extent of the Royal Prerogative to which I am not prepared to assent." The observation of the Solicitor-General referred to the discretionary power of the Crown and its advisers to intern an alien enemy when he appeared to be a menace to national security " without question in that or in any other Court."

Besides the above judicial safeguard, the British subject enjoys in England special privileges even under the Defence of Realm Act. For instance under the Defence of the Realm (Amendment) Act, 1915 (5 Geo. v, c. 34) sec. 1, sub-sec. 2, when a British subject not subject to military law is alleged to be guilty of an offence against any regulations under the Act, he is entitled within six days to claim trial by a Civil Court with a jury instead of being tried by a court martial and further the Act provides that before trial and as soon as practicable after arrest, the general nature of the charge shall be communicated to him in writing.

Sub-sec. (7), however, provides that in the event of military emergency arising out of the present war His Majesty may by Proclamation suspend the operation of this section.

Although there may not be military exigencies it may be that owing to State exigencies the privileges of British subjects in India have been suspended during the war. We do not ask the authorities in India to go so far as to amend the Defence of India Act on the lines of 5 Geo. v, c. 34 but is it too much to ask them to appoint some advisory committees on the lines provided for in Reg. 14B of the English Act to consider representations from interned British subjects of His Majesty in this country?

CURRENT INDIAN CASES.

(CIVIL.)

Hindu Law.

SOUNNDARA RAYAN *v.* ARUNACHELAM CHETTY, I. L. R. 39 Mad. 136 (F. B.).

The illegitimate son of a Sudra by a concubine continuously kept is entitled to get a share in the joint family property if the connection between his father and mother was not incestuous or adulterous.

Hindu Law.

SOUNNDARA RAYAN *v.* ARUNACHELAM CHETTY, I. L. R. 39 Mad. 159 (F. B.).

A member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition.

Civil Procedure Code, sec. 115.

VUPPULURI ATCHAYYA *v.* SRI KANCHUMARTI, I. L. R. 39 Mad. 195 (F. B.).

Held by the majority of the Full Bench—

Under sec. 115, C. P. C., the High Court has jurisdiction to interfere when an Appellate Court in the exercise of its admitted jurisdiction as an Appellate Court held that the Court of first instance was or was not competent to entertain a suit.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—Before THE LORD CHIEF JUSTICE, SCRUTTON and AVORY, JJ. *Rex* v. *Commandant of Alexandra Park, Ex parte Reznik.* 22nd May 1916.

Defence of the Realm Act—Internment— Habeas corpus.

The Petitioner in this case had obtained a rule *nisi* for a writ of *habeas corpus*. He was believed to be an Austrian subject and was deported from Canada and interned in England on suspicion of being of hostile origin under the Defence of Realm Act. He obtained the rule on the representation that he was in a position to prove that he was a Russian subject.*

At the hearing of the rule *Mr. Branson* on behalf of the Crown admitted that on the evidence he was not prepared to contend that the Petitioner was not a Russian.

Mr. Patrick Hastings for the Petitioner thereupon urged that the rule should be made absolute.

The COURT thereupon made the rule absolute but made no order as to costs.

* [It is stated in *English Law Journal*, 27th May, 1916, p. 266, that "It was alleged on the application for the rule that, after his claim to Russian nationality had been established to the satisfaction of the Russian consul, he was not at once released because it was desired to put pressure on him to join the Russian Army.—ED.]

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before TEUNON and CHAUDHURI, JJ. APPEAL FROM ORIGINAL ORDER No. 593 OF 1913. AMIR ALI SARDAR AND ANR., minors, through their guardian BASARUDDI MOLLA, Appellants *v.* NAZIR (of the Court) RECEIVER AND ORS., Respondents. 21st March 1916.

Provincial Insolvency Act, sec. 36—Order without any enquiry should be set aside.

This was an appeal preferred against the order of H. P. Duval, Esq., District Judge of 24-Parganas, dated the 14th and 15th July 1913.

The Appellants are the sons of Arip Sardar who was declared insolvent, through his first wife Balijan Bibi, after whose death, he married for the second time one Abedunnessa Bibi. Rs. 1,500 were settled as the amount of dower at the time of Balijan Bibi's marriage and the said amount remained unpaid at the time of her death when the Appellants and their father the said Arip Sardar became her heirs in respect of the said unpaid dower money. A settlement was made between the said Arip Sardar and one Basaraddi Molla, the father of the mother of the Appellants, under whose care the Appellants were living, that Rs. 1,125 would be paid to the Appellants in full satisfaction of their claim upon the said dower money and a *hibabilewajnamah* was executed by the said Arip Sardar in favour of the Appellants for a valuable consideration of Rs. 800 out of the said sum of Rs. 1,125 leaving a balance of Rs. 325 which could be paid in cash afterwards. The *hibabilewajnamah* was executed on the 16th September 1911. The said Arip Sardar presented an application for declaring himself as insolvent on the 5th June 1912, order of adjudication was thereafter passed and Nazir of the Court was appointed Receiver who was directed to enquire about the said *hibabilewajnamah* whether the same could be annulled under sec. 36 of the Provincial Insolvency Act. The Receiver com-

paring the date of execution of the *hibabilewajnamah* and that of the application for insolvency reported that the transfer should be annulled.

Upon this report the District Judge annulled the said *hibabilewajnamah*, in the absence of the Appellants. The Appellants subsequently appeared before the District Judge praying that proper enquiries should be made about the said *hibabilewajnamah* and the order annulling it should be set aside. The District Judge refused this application and confirmed his last order.

Hence this appeal.

Held—That the District Judge acted illegally. Proper enquiries should be made before an order of annulment can be passed under sec. 36 of the Provincial Insolvency Act.

Babu Kshitis Chandra Chakrabarti (with him *Babu Pramatha Lal Dutt*) for the Appellants.

Babu Kshirod Narain Bhuia for the Respondent.

K. C. *Case remanded.*

CRIMINAL REVISIONAL JURISDICTION. Before CHITTY and WALMSLEY, JJ.—CRIMINAL REVISION No. 412 OF 1916. GADADHAR DAS AND ORS., Petitioners *v.* KING-EMPEROR, Opposite Party. 12th May 1916.

Criminal Procedure Code (Act V of 1898)—Secs. 133, 143—Water-course—Embankment—Nuisance—Conditional order under sec. 133—Enquiry—Dropping of 133 proceedings—Order under sec. 143—Procedure, if legal—Jurisdiction.

On the 22nd December 1915 the Sub-divisional Magistrate of Nilphamari drew up a proceeding under sec. 133, Cr. P. C., against the Petitioners, which was in the following terms:—"Whereas it appears from the petition filed by the villages of Salmara, etc., that Gadadhar Dhar and others (the names of the other petitioners) have stopped the current of river Burikhora by erecting an embankment (*bundh*) near Ramganj which has caused great inconvenience to the public and is injurious to public health, it is hereby ordered that a conditional order be issued to the abovenamed persons to open the *bundh* and bring it to its original condition or to shew cause on the 8th January 1916 against this order or apply for a jury to try whether the same is reasonable and proper." That on the 8th January 1916 another officer, who was then the Sub-divisional Magistrate, passed the following order: "Proceeding could not have been served for illness of the peon. I will inspect the locality on the 12th January morning and then pass necessary order." On the 12th January the said Sub-divisional Magistrate passed the following order: "I have inspected the locality and made a full enquiry. The proceeding under sec. 133, Cr. P. C., ordered by my predecessor is not required. So it is dropped . . . . The Burikhora is a public water-course and serves as a natural drainage for the fields and villages on both sides of the water-course and also of the *bheel* and village at the source. This drainage is necessary in the interest of public health. This Ramganj *bundh* having obstructed nay stopped the natural drainage and lock-gating the water has become a source of public nuisance. I therefore under sec. 143, Cr. P. C., direct those abovenamed persons of the two villages (*i.e.*, the Petitioners) to remove this nuisance of obstruction by cutting an opening of thirty feet width, deep down to the river-bed in the *bundh* within ten days from notice. The order is explained before all present. It however appears that this *bundh* was put for the interest of cultivation and to afford facility to irrigation of the fields in the locality. . . . But this is a lesser consideration to the broader question of larger public interest. If some facility to the said irrigation may be afforded . . . by means of a lock or sluice gate by the District Board, that is highly desirable."

Against this order of the learned Sub-divisional Magistrate, dated the 12th January 1916, the Petitioners moved the District Magistrate of Rungpur, but the application was rejected on the 22nd February 1916. The Petitioners then moved the High Court and obtained a Rule on the grounds 1 and 2 mentioned in the petition which were as follows: (1) For that the order of the learned Sub-divisional Magistrate under sec. 143, Cr. P. C., is without jurisdiction. (2) For that the learned Sub-divisional Magistrate acted without jurisdiction in dropping the proceeding under sec. 133, Cr. P. C., and in passing an order under sec. 143, Cr. P. C., without drawing up a fresh proceeding and giving opportunity to the Petitioners to show cause or to apply for a jury.

Their Lordships made the Rule absolute upon the grounds on which it was issued and set aside the order complained of.

Babu Surendro Chandra Sen (with *Babu Hemendra Chandra Sen*) for the Petitioners.

None appeared for the Opposite Party.

H. C. S. *Rule made absolute.*

rights. But I have been unable to find any authority that after customary law has been stereotyped in the form of a statute which contains no provision saving custom it is open to a Court to give effect to custom, much less to a custom inconsistent with the statute. In *Abraham* v. *Abraham* (2), it was held that a particular family custom is capable of attaching to Hindus converted to Christianity, but that case was before the passing of the Succession Act and I have been unable to find any instance of custom varying the rules of the Act among the parties who are governed by it. As the Act contains no clause saving custom the Courts are not competent to accept custom as a reason for deviating from the provisions of the Act. The learned Judicial Commissioner therefore is, in my opinion, wrong and the decree of the Munsif is right.

As regards the question whether the custom has been proved the learned Judicial Commissioner has dealt with it very summarily and it is not clear whether he has considered all the points necessary for the proof of a custom at law. He has based his finding chiefly on the writings of three authors which do not appear to have been ever adduced in evidence or referred to in the Court of first instance. I would invite the attention of the learned Judicial Commissioner to the observations of the Madras High Court in *Vallabha* v. *Madusudanan* (3), to the effect that references to works of history at the Appellate stage is irregular and to be avoided.

The result is that the appeal is decreed with costs and the decree of the Munsif is restored.

A. K. R. *Appeal allowed.*

(2) 9 M. I. A. 195, 242 (1863).
(3) I. L. R. 12 Mad. 495 (1889).

[PRIVY COUNCIL.]

[APPEAL FROM THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

LORD SHAW.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
1916,
Heard, 6, April.
Judgment, 19, May.

MUSAMMAT GIRJA BAI, Appellant,
v.
SADASHIV DHUNDIRAJ and ors., Respondents.

Hindu Law—Mitakshara—Joint family property, partition of—Individual if may sever himself from family by his own act and how—Division into metes and bounds, if essential—Agreement by all members to divide, if essential—Distinction between severance of status and division of property—Suit for partition by co-sharer—Plaintiff's death pending suit—Widow if may continue suit.

Under Hindu Law, "separation," i.e., severance of the status of jointness is a matter of individual volition, and agreement between all the coparceners is not, still less is actual division and distribution of the property held jointly, essential to the disruption of the joint status.

Once an individual cosharer has unequivocally expressed and clearly intimated to his cosharers his decision to sever himself from the joint family, his right to obtain and possess the share to which he admittedly has a title is unimpeachable. Neither the cosharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well-founded or sufficient, the Court has simply to give effect to his right to have his share allocated separately from the others.

The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit.

MUSAMMAT GIRJA BAI *v.* SADASHIV DHUNDIRAJ.

H, one of the members of a joint Mitakshara Hindu family, served on his coparceners a registered notice in which he affirmed in explicit terms his desire to get partitioned his one-third share and then instituted a suit for partition. The Defendants, somewhat unwillingly, agreed to the demand and admitted the Plaintiff's share in the joint property and the extent thereof; and all that remained for the Court to determine was the best mode of effecting the division; but before this could be done, H died leaving him surviving his widow who applied for substitution of herself on the records in the place of the Plaintiff:

Held—*That H had indicated his intention to separate himself most unequivocally by the registered notice, coupled with the suit, and that these acts amounted to a separation with all its legal consequences.*

That on the facts there was no disagreement or averseness on the part of the Defendants to the Plaintiff's demand for separation.

That the widow of H was entitled to have H's one-third share separated and given to her.

SURAJ NARAIN *v.* IKBAL NARAIN (1), MADHO PERSHAD *v.* MEHRBAN SING (3), DEO BUNSEE KOOER *v.* DWARKA NATH (4), JOY NARAIN GIRI *v.* GRISH CHUNDER MYTEE (5) *and* VATO KOER *v.* ROWSHUN SINGH (6) *referred to.*

Dictum of Lord Westbury in APPOVIER *v.* RAMA SUBHA AIYAN (2) *explained.*

This was an appeal from a decree of the Court of the Judicial Commissioner, Central Provinces (Messrs. Drake-Brockman and Stanyon) dated 25th July 1912, which reversed a decree of the District Judge of Nagpur.

The facts of the case sufficiently appear from their Lordships' judgment. Harihar, one of the members of a joint Mitakshara family, instituted a suit on the 21st October 1908 for partition of the joint estate and for possession of his one-third share, but he died during the pendency of his suit on the 17th June 1909, leaving the Appellant Girja Bai his widow. The question raised was whether, at the time of his death, Harihar was separate from the joint family. The issue fixed at the trial was, "had the deceased, Harihar, unequivocally communicated to the Defendants his intention to separate from them in estate?" The District Judge found the issue in the affirmative, and that finding was affirmed on appeal by the Judicial Commissioners. In view of his finding, the District Judge held that Harihar was separate from his family at the date of his death, and that his widow was therefore entitled to inherit his share. On appeal, the Judicial Commissioners held that, except in a special case of a father severing from his sons, partition of joint property unaided by the Court among the members of a joint Hindu family, governed by the Mitakshara, can only be effected by an agreement among all the coparceners concerned. They held that a declaration of intention to separate by any fraction of the coparcenary body, or the mere demand by any member for partition of his share, did not, of itself, disrupt the family estate, or destroy the right of survivorship. They accordingly made a decree that, on the death of Harihar, the suit for partition abated, and that, by

(1) L. R. 40 I. A. 40 : s. c. 17 C. W. N. 333 (1912).
(2) 11 M. I. A. 75 (1866).
(3) L. R. 17 I. A. 194, 196 : s. c. I. L. R. 18 Cal. 157 (1890).
(4) 10 W. R. 273 (1868).
(5) L. R. 5 I. A. 228 (1878).
(6) 8 W. R. 82 (1867).

operation of the law of survivorship, Harihar's undivided interest lapsed to the Defendants. The learned Judicial Commissioners in the course of their judgment observed as follows :—

The question to be decided is purely one of Hindu law, and we are of opinion that analogies drawn from the English law or any other system of jurisprudence can afford little assistance and may be misleading. We can start from the principle laid down in *Appovier* v. *Rama Subba Aiyan* (2), and repeatedly affirmed in subsequent cases by the Judical Committee of the Privy Council, namely, that actual division by metes and bounds is not necessary to complete the dissolution of the joint tenancy of a Hindu family, because by an agreement between the coparceners there may be an operative division of title which will convert the joint tenancy into a tenancy in common, without there being a corresponding division of the subject-matter to which the title relates. Therefore, the question before us narrows itself down to this :—

In a Mitakshara family composed of coparceners who are collateral in relation to one another, is the mere communication of an intention to divide, made by one coparcener to the other or others, sufficient to effect a severance of his interest in the joint estate, so as to make him, as it were, a tenant in common of a defined share, which; upon his death, will devolve by inheritance as his severalty ?

We will now examine the material authorities cited before us, in order to see how far, if at all, they justify the affirmative answer which has been given to the above question by the lower Court, and which the Plaintiff-Respondent seeks to have repeated by this Court.

The only Sanskrit authorities which are said to deal expressly with the matter are the *Mayukha* and the *Saraswati Vilasa*, the relevant passages wherefrom, upon which reliance is placed for the Plaintiff-Respondent, have already been set out above. As regards the *Mayukha*, in the first place it is not a recognised authority in the school of law which governs this case. But, leaving that aside, the passage expressly refers to the case of a separation where no property is involved. In such a case separation is a matter of sentiment only, and a member who severs himself from his brethren does not invade or affect any legal right of his coparceners. But where there is property the severance of the interest of even a single member involves an alteration in the legal rights of his coparceners, and, in particular, a dissolution of their birth-right in a portion of the joint property. It seems to be not only Hindu law, but equity and commonsense, to hold that where a disposition of property jointly owned by two persons would, if made, affect the rights of them both, they should both have a voice in the making of such a disposition. As remarked by Garth, C. J., in *Radha Churan Dass* v. *Kripa Sindhu Dass* (7), " One can very well understand, that as regards separation, any member or members of a family, might separate from the rest at their option ; a mere declaration by one member *that he was separate* from the others would seem to be sufficient to effect the separation. But *partition* of the property is a different thing, because, in order to effect a just partition, it is necessary of course to ascertain the share to which each and every member of the family is entitled."

This passage has been clearly misunderstood by the learned counsel for the Plaintiff-Respondent, who has relied on it in support of his argument. It was also apparently misunderstood by Bhashyam Ayyangar, J., in *Sudarsanam* v. *Narasimhului* (8), and by DeGruyther, K.C., in *Maharaj Kedar Nath* v. *Thakur Ratan Singh* (9), where that learned counsel quoted it as an authority for the very proposition contended for on behalf of the Plaintiff in the present case. It seems clear from the passage itself that Garth, C.J., used the word " separation " to denote something which was not a severance of joint interest in family property. We are not prepared to accept the inference drawn by the learned counsel for the Respondent before us that the

(2) 11 M. I. A. 75 (1866).

(7) I. L. R. 5 Cal. 474, 478, 477 (1879).
(8) I. L. R. 25 Mad. 148, 155 (1901).
(9) 12 Bom. L. R. 656, 659 (1910).

Mayukha rule as to the requisites for a separation where there is no family property applies *a fortiori* to a severance of title to joint property.

As regards the passage from the *Saraswati Vilasa*, as already stated, it does not carry the case beyond the rule recognised in *Appovier's* case and constantly reaffirmed since that decision was published.

It was said that the above Sanskrit commentaries expressly set forth what is implied in all the others. We have not been able to find in the text-books anything more than this that partition is a consequence of intention and agreement. There is certainly no passage in the Mitakshara raising an implication that the wish of one coparcener communicated to the other or others is of itself sufficient to dissolve the joint tenancy.

Turning now to the case-law we think the most convenient way will be to examine first the relevant decisions of the supreme tribunal, and then those of the several High Courts.

In *Abraham* v. *Abraham* (10), the Judicial Committee were dealing with a family which, though purely Hindu in origin, had been for several generations converted to Christianity. Their Lordships laid down, more or less as an *obiter dictum*, that the *status* of a member of an undivided Hindu family was altered by his conversion to Christianity, since such conversion amounted, under Hindu law, to a severance of parcenership. This decision does not assist the Plaintiff in any way. By conversion to another religion the undivided Hindu becomes an outcaste. Under Hindu law that fact deprives him of his *status* in the joint family, and would also result in forfeiture of his estate if the Statute law did not intervene. But Act XXI of 1850 interferes to prevent such forfeiture. The only way of giving effect to this Statute is by dividing off the share of the apostate from the joint estate which he is no longer qualified to hold in a state of jointness, and to treat it as his severalty. Such a partition is one made by statute, and not by virtue of any authority conferred on the severing parcener by Hindu law. It is a special case offering no analogy in support of the contention advanced in this case on behalf of the Plaintiff-Respondent.

The next case is *Appovier* v. *Rama Subba Aiyan* (2) as to which it is only necessary to say that it is the leading authority on the subject of partition of title unaccompanied by partition of the subject-matter of such title. It was generally urged before us that it supports the case of the Plaintiff; but upon a careful perusal of the judgment of their Lordships, we are unable to find a single passage or phrase which is compatible with the view that a partition of title out of Court may be effected without an agreement among all the coparceners.

In *Raja Suraneni Venkata Gopala* v. *Raja Suraneni Lakshma Venkama* (11) there was a formal agreement, as in *Appovier's* case (2) and their Lordships again held that the agreement to divide dissolved the joint estate. They made no remark suggesting that if in place of the agreement between two brothers there had been only a demand, communicated by one to the other, the conclusion would have been the same.

Sri Gajapathi Radhika v. *Sri Gajapathi Nilamani* (12) was another case of a formal agreement to divide between two joint Hindu brothers, and the rule in *Appovier's* case (2) was re-affirmed. Here again the case of the Plaintiff finds no foothold.

In *Doorga Pershad* v. *Mt. Kunduu Kooeur* (13) the Judicial Committee laid down that inasmuch as there may be a division of a joint Hindu family and its property, which, though not carried out by a partition by metes and bounds, would nevertheless alter the status of the family, the question in every particular case must be one of intention, *i.e.*, (as stated in the judgment of their Lordships) "whether the intention of the parties" to be inferred from the instruments which they have executed, and the "acts they have done, was to effect such a division." If anything, this is an authority against the Plaintiff, because it suggests that the intention of all the coparceners, expressed by agreement, is necessary to dissolve

(10) 9 M. I. A. 199 (1863).
(2) 11 M. I. A. 75 (1866).
(11) 13 M. I. A. 113 (1869).
(12) 13 M. I. A. 497 (1870).
(13) 21 W. R. 214 (1870).

the joint estate. In any view the case affords no assistance to the Plaintiff.

Maharajah Ram Kissen Singh v. *Rajah Sheonand Singh* (14) lays down that the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty severs the joint interest and extinguishes the rights springing from united family ownership. Here again we have the same foundation of a *family agreement* for the conclusion of the Court.

In *Pirthi Pal* v. *Jowahir Rajah* (15), one of the ruling principles laid down was that a member of a joint Hindu family cannot sue for a share of the profits of a joint family estate because he has no definite share until partition; and the Plaintiff was required to sue for partition. This suggests that the Plaintiff was not entitled to have his share treated as separate merely because he himself so treated it, and claimed profits in respect of it.

In *Madho Pershad* v. *Mehrban Sing* (3) the Judicial Committee said:—

"Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. . . . Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient."

In *Parbati* v. *Naunihal Singh* (16), which was again a case of mutual agreement among coparceners, their Lordships of the Privy Council, reversing the judgment of the Court of the Judicial Commissioner of Oudh, insisted that the principle laid down in *Appovier's* case (2) should be followed.

(2) 11 M. I. A. 75 (1866).
(3) L. R. 17 I. A. 194, 196: s. c. I. L. R. 18 Cal. 157 (1890).
(14) 23 W. R. 412 (1875).
(15) I. L. R. 14 Cal. 493 (1887).
(16) I. L. R. 31 All. 412; s. c. 13 C. W. N. 983 (1909).

In *Maharaj Kedar Nath* v. *Thakur Ratan Singh* (9) it was contended on behalf of the Appellants before the Judicial Committee that the mere fact of one coparcener having filed a suit for partition amounted, in law, to a partition of title. Thereupon Mr. AMEER ALI, one of the presiding Judges, referred to *Debee Pershad* v. *Phool Koeree* (17) where it was held that a suit by one member of a Hindu family for a declaration of his right in the joint family property was not a sufficient indication on the part of the family of their intention to separate. In the same case another member of the tribunal, SIR ARTHUR WILSON, asked, "Is there a case where one coparcener declared that he was separate, and it was held that such a declaration constituted partition?" DeGruyther, K. C., cited *Radha Churan Dass* v. *Kripa Sindhu Dass* (7) as an authority in support of that proposition; but, as already pointed out, the learned counsel clearly misunderstood the true significance of the word "separation" as used by GARTH, C. J., in that case.

We turn now to the decisions of some of the Indian High Courts.

Having discussed seriatim the decisions of the Indian High Courts on the question, the Court concluded as follows:—

Upon the best consideration that we have been able to give the matter we are of opinion that, except in the special case of a father severing from his sons, partition of property, unaided by the Court, among the members of a joint Hindu family governed by the Mitakshara, can only be effected by an agreement among all the coparceners concerned, whereby, at least, they declare their intention to separate. We hold that a declaration of such intention by any fraction of the coparcenary body, or the mere demand by any member for partition of his share, does not of itself disrupt the family estate or destroy the right of survivorship.

Sir Robert Finlay, K. C. and *Mr. A. M. Dunne* for the Appellant, submitted that in view of the concurrent findings

(7) I. L. R. 5 Cal. 474, 476, 477 (1879).
(9) 12 Bom. L. R. 684, 686 (1910).
(17) 12 W. R. 518 (1869).

of fact, namely, that Harihar had expressed an unequivocal intention to separate from the family, the appeal was concluded by the decision in *Pandit Suraj Narain* v. *Pandit Ikbal Narain* (1). That decision summed up the result of all authorities on the subject.

Mr. L. DeGruyther, K. C. and *Mr. J. M. Parikh* for the Respondents, submitted that the point of Hindu Law was not argued by the Respondents in *Pandit Suraj Narain* v. *Ikbal Narain* (1). In that case, Counsel for the Respondents had assumed for the purposes of his argument, that the view of the Hindu Law contended for by the Counsel for the Appellant was correct. On that assumption, Counsel for the Respondents argued that there was no severance under the facts and circumstances of that case even if that were the Hindu Law. The point was, therefore, open for argument. Harihar's suit was, admittedly a suit for partition of the joint property at the date of the suit. Separation of a joint family could be effected in one of two ways only, namely, by a decree of Court, or by an agreement of parties. It is shown by the fact that mesne profits are not allowed for a period prior to a decree for partition. *Pirthi Pal Singh* v. *Thakur Jewahir Singh* (15). Reference was also made to *Appovier's* case (2); Mayne's Hindu Law, paras. 270 and 271. Counsel also argued that the finding of fact of the Courts below was not warranted by the evidence.

Sir Robert Finlay replied that the concurrent findings of fact were justified by the evidence.

(1) L. R. 40 I. A. 40: s. c. 17 C. W. N. 333 (1912).
(2) 11 M. I. A. 75, 89 (1866).
(15) L. R. 14 I. A. 37, 59: s. c. I. L. R. 14 Cal. 493 (1887).

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This appeal from two judgments and decrees of the Judicial Commissioner's Court in the Central Provinces of India arises out of a suit brought by one Harihar, since deceased, on the 21st October 1908, in the Court of the District Judge of Nagpur. The object of the suit was to obtain a declaration of his right to a one-third share in certain moveable and immoveable properties, which till then had been held as appertaining to a joint undivided Hindu family, of which he had been a member, a decree for partition, and other ancillary reliefs.

Harihar died on the 17th June 1909, during the pendency of his suit, and the question in the case is whether at the time of his death he was separated from the joint family. If he was, his share would be inherited by his widow Girja Bai, the Appellant; if not, the Defendants, Respondents in this appeal, would take it by survivorship.

The facts of the case are simple, and may be stated briefly. Bapuji, the common ancestor, left several sons, among them Harihar, the Plaintiff in this suit; two, Damoodur and Balaji, died many years ago without any issue. Atmaram, the eldest, who became the manager of the family on Bapuji's death, died in 1899, leaving Dhundiraj, the first Defendant, the son of his brother Ram Chunder, whom he had taken in adoption. Dhundiraj became the manager after Atmaram's death, and acted as such when this suit was instituted. He has since died, and he is now represented by his son Sadashiv. Ram Chunder died in 1902, leaving Nilkantha, his son, and two grandsons, all of whom are Defendants in this action. Jageswar, another brother, died

in 1906 without leaving any male issue. Thus, on the 21st October 1908, when he brought his suit, Harihar was entitled to a one-third share of the joint property. It is alleged in the plaint that after Atmaram's death "dissensions arose in the joint and undivided family," and in consequence thereof two shops were set up at Parseoni, their place of residence, one in the name of Harihar, the other in that of Dhundiraj, and separate *bahi-khattas* (account-books) were opened in their respective names. The Plaintiff further alleged that for "these reasons" he did not wish to continue as a member of the joint family; that he had communicated his intention to the Defendants; and had, on the 1st October 1908, served a registered notice on the first Defendant, "the manager of the joint family," and "as the Defendants were collusively putting off partition and evading to give him his share he was obliged to bring this suit." The cause of action was stated to have arisen on the 1st October 1908, when he demanded partition and his one-third share.

The Defendants admitted the Plaintiff's claim, and added that in answer to the registered notice, the first Defendant had stated that he had no objection to a division of the estate which "should be made by private persons without going to Courts." They further urged that as they were willing to divide the estate, the suit was premature and that they should not be saddled with costs.

What took place before the District Judge subsequent to the appearance of the Defendants and the filing of their written statement appears clearly from the judgment of the Judicial Commissioners under appeal. The learned Judges say:—

"The Defendants entered appearance on the 15th February 1909, and on the 9th March 1909, it was admitted on their behalf that the Plaintiff was entitled to have a decree for partition of a one-third share. As to the property to be divided, after some controversy the parties were in agreement except in respect of certain moveables. The District Judge, being desirous of consulting the parties regarding the best mode of carrying out the partition, adjourned the case for their personal attendance to the 4th May 1909. On that date the case was put off to the 10th May 1909, at the instance of the Defendants, who sought a compromise. Then there was a further adjournment to the 20th June 1909, upon the ground that the illness of Defendant Dhundiraj had prevented negotiations for a compromise."

On Harihar's death on the 17th June 1909, his widow, Girja Bai, the present Appellant, applied for substitution as the heir and legal representative of her deceased husband, and then the contest began. The Defendants objected to her substitution, on the ground that at the time of his death Harihar was an undivided member of a Hindu joint family, and that on his decease his share passed to them by survivorship. On the 23rd January 1911, the District Judge overruled their objections, and made the usual order for substitution in favour of the Appellant. The case then proceeded to trial, and on the 8th April 1911, a preliminary decree was made directing partition of the joint estate by commissioners appointed for the purpose.

The Defendants appealed to the Judicial Commissioners' Court both from the order of the 23rd January 1911, directing the substitution of Girja Bai's name in place of her deceased husband, and from the preliminary decree of the 8th April following. The Judicial Commissioners in an elaborate and learned judgment have upheld the Defendants' contentions; in substance the conclusion at which they

have arrived amounts to this: that no member of a joint undivided family under the law of the Mitakshara can separate himself from the joint family, or sever the status so far as he himself is concerned, without the consent of the others, or without an effective decree of the Court.

The two following passages from the judgment of the Appellate Court will show that their Lordships apprehend correctly the decision of the learned Judicial Commissioners. In one place, dealing with Harihar's action, they say:—

"The Defendants admitted what they could not deny, namely, that Harihar had a joint one-third share with themselves which he was entitled to have partitioned; but to confess the existence of a coparcenary interest is not the same thing as even a passive consent to the severance of that interest; much less is it tantamount to an agreement to divide. The Defendants never denied the title of Harihar, either before or after the suit, but they were all along averse to a partition, and, up to the day of his death, sought to compromise the suit by inducing him to abandon his desire to break up the joint estate. When he died the case stood adjourned in order that a compromise might be effected, and, in the circumstances, the only compromise (once the share of Harihar and the estate to be divided had been admitted), which Defendants could have sought, was an abandonment of the partition. The pleadings merely indicate what had already taken place, namely, that Harihar had finally decided to sever his estate, and had demanded that this should be done."

And again:—

"It remains therefore to decide, whether, as claimed by the Plaintiff, Harihar alone, despite the wishes of the other coparceners, could, by setting up an intention to separate followed by a demand for partition, convert his joint share into a tenancy in common, so as to destroy the Defendants' right of survivorship therein; his title as coparcener, and the extent of his share being admitted by the Defendants. If this is the law, then the Plaintiff must succeed. If, on the other hand, agreement between all the coparceners in pursuance of an intention to divide was necessary to cause the severance of interest claimed by the Plaintiff, then the appeals of the Defendants now before us must prevail."

Their Lordships regret they cannot assent either to the inferences of law sought to be derived from the undisputed facts in the case, or to the principle on which the learned Judges purport to base their judgment.

Their Lordships think it necessary to refer again briefly to some of the circumstances with regard to which the Appellate Court appears to be under a misapprehension. As already stated, Atmaram, the eldest brother, who, on Bapuji's death, became manager, died in 1899. Disputes in the family, as Harihar alleged in his plaint, arose shortly after his death. On the 14th February 1902, Harihar and Jageswar, who was alive at the time, wrote to Dhundiraj, who had become manager in his adoptive father's place, intimating their wish to separate themselves from the joint family, and asking him to have a division of the family property made by arbitrators. Matters seem to have remained in a quiescent stage for the next six years, although Harihar alleged that two shops and business accounts had been opened in his and the first Defendant's separate names.

Jageswar died in 1906, and on the 1st October 1908, Harihar sent to Dhundiraj the registered letter already referred to. In that letter he says in explicit terms that his desire is to get partitioned his one-third share, and asks Dhundiraj to take the matter in hand "soon after the receipt of the letter" and to make a division of the joint estate, and adds, "but do not delay partition." On the

19th October the Defendant sends a reply through a pleader; he first tries to persuade Harihar to abandon his intention of getting the joint estate divided, and then goes on to say: "If you, nevertheless, intend to have a partition made, it is better you should yourself make it, since you are senior." And the mode in which this should be done is suggested.

Harihar, evidently not satisfied with the delay that had taken place in the reply, brought his suit three days after the Defendant's letter. Written statements were filed on the 15th February 1909, and on the 9th March following the District Judge recorded the following additional statement, as he calls it, by the Defendants' pleader: "The Defendants do not deny the Plaintiff's right to claim one-third share in the joint family, both moveable and immoveable. The Plaintiff's suit is not premature, but he will not be entitled to his costs because we were ever willing to give him his share."

The District Judge's order made on that date is significant. After stating that neither the Plaintiff's right to claim partition nor the extent of his share is denied, he says: "Under these circumstances, I think it necessary to have the parties before me in person, so that I may ascertain from them how the partition is to be effected."

It appears to be absolutely clear that on the 9th March 1908, the parties were of one mind on the question of partition. The Plaintiff demanded a division of the joint family property. The Defendants had agreed, perhaps at first unwillingly, to the demand, which they could not resist. The only question that remained for the Court to determine was the best mode of effecting the division. Their Lordships are unable to see on that date any disagreement or averseness in fact to the Plaintiff's demand on the part of the Defendants. All his acts subsequent to the registered notice evince a fixed determination to sever himself from the joint family. With reference to these acts, the Judicial Commissioners say as follows:—

"Rao Bahadur Bapurao Dada, a well-known pleader of this Court, examined as the fourteenth witness for Harihar's widow, has proved that Harihar refused all proposals to continue in a state of jointness after he had sent the letter of 1st October 1908; that he persisted in his demand for a share; and that, his demand not being promptly complied with, he filed the present suit. He himself bought the stamp, and first asked Mr. Bapurao Dada, the family lawyer, to institute the litigation; but finding him disinclined to do so, because he was engaged in mediating to bring about a compromise, Harihar had the plaint presented by another legal adviser, leaving Mr. Bapurao Dada to appear for the Defendants."

And they go on to say—

"Upon these facts we have no hesitation in coming to the conclusions:—

"1. That before filing the suit Harihar did in clear and unequivocal terms communicate to the Defendants his earnest desire and his fixed intention to convert his estate from a joint estate into an estate in severalty."

The learned Judges, however, as already observed, held that this was not sufficient to constitute a severance of the joint status.

In the case of *Suraj Narain* v. *Ikbal Narain* (1), the rule of law applicable to cases of separation from the joint undivided family was laid down by their Lordships in the following terms:—

"What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family, and convert a joint tenancy into a

(1) L. R. 40 I. A. 4 : s. c. 17 C. W. N. 333 (1912).

tenancy in common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty, may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed."

It would probably be enough for the determination of this appeal to say that nothing could be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severalty by the notice of the 1st October 1908, coupled with this suit, and that these acts amounted to a separation with all its legal consequences.

But as the question of the effect on the joint status of such an intention has been raised in this case in a direct and concrete form, their Lordships think it fit to discuss the principle somewhat more fully than was necessary in *Suraj Narain* v. *Iqbal Narain* (1).

In the Hindu law, "partition" does not mean simply division of property into specific shares; it covers, as pointed out by Lord Westbury in *Appovier's* case (2), both "division of title and division of property." In the Mitakshara, Vijnaneswara defines the word *vibhaga* which is usually rendered into English by the word "partition," as the "adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate." Mitra Misra explains in the *Viromitrodaya* the meaning of this passage: he shows that the definition of Vijnaneswara does not mean exclusively the division of property into specific shares as alone giving right to property, but includes the ascertainment of the respective rights of the individuals, who claim the heritage jointly. He says (Sarkar's Translation, Chap. I, sec. 36): "For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary right into specific shares." The *Viromitrodaya* is a commentary on the Mitakshara, the value and importance of which have been repeatedly recognised by the Board. So far as their Lordships are aware, nowhere in the Mitakshara is it stated that agreement between all the coparceners is essential to the disruption of the joint status or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. If this were so and there were minors in a joint undivided family, partition would be impossible until they had all attained majority, a position which is expressly combated and negatived in the *Viromitrodaya* (Chap. II, sec. xxiii). In fact later writers leave no room for doubt that "separation" which means the severance of the status of jointness is a matter of individual volition. For example, Nilkantha, the author of the *Vyavahara Mayukha* (Chap. IV, sec. iii, Mandlik's translation, p. 38), expressly lays down that "even when there is a total absence of common property a partition is effected by the mere declaration 'I am separate from thee,' for partition is a particular condition of the mind, and the declaration is indicative of the same." The *Saraswati Vilasa* gives expression to the same view. After quoting the definitions of various earlier writers, it says: "from this it is known that without any formality partition can be effected by mere intention." (Setlur's Translation of Hindu

(1) L. R. 40 I. A. 40; s. c. 17 C. W. N. 393 (1912).

(2) 11 M. I. A. 75 (1866).

Law Books on Inheritance, p. 122). Their Lordships are aware that the *Vyavahara Mayukha* is not recognised as an authority in the Benares School; they refer, however, to the dictum of Nilkantha as showing the general conception of Hindu legists on the subject of severance from jointness. But the following gloss in the *Viromitrodaya* appears to their Lordships conclusive on the rule of law under the Mitakshara: "Here again," it says, "partition at the desire of the sons," which expression includes grandsons and great-grandsons (see sec. 23A), "whether in the lifetime of the father or after his demise, may take place by the choice of a single coparcener, since there is no distinction," (Chap. II, sec. xxiii).

Their Lordships do not think it necessary to examine further the law as laid down in the texts. They propose to refer shortly to the cases which establish clearly that separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his cosharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the cosharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well-founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others.

In *Madho Pershad* v. *Mehrban Sing* (3), Lord Watson delivering the judgment of this Board, declared in explicit terms, the nature of the right possessed by individual members of a joint and undivided Hindu family: "Any one of several members of a joint family," he said, "is entitled to require partition of ancestral property, and his demand to that effect, if not complied with, can be enforced by legal process." Partition does not give him a title or create a title in him, it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers. Lord Watson makes this perfectly clear in the passage that follows:—

"So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes; but as soon as partition is made he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property."

In this connection their Lordships desire to refer to the language used by that distinguished Hindu Judge, Mr. Justice Dwarkanath Mitter, in *Dco Bunsee Kooer* v. *Dwarka Nath* (4), a Mitakshara case:—

"Now it is a settled doctrine of the Hindu law," said that learned Judge, "that every member of a joint undivided family has an indefeasible right to demand a partition of

(3) L. R. 17 I. A. 194, 199; s. c. I. L. R. 18 Cal. 157 (1890).

(4) 10 W. R. 270 (1868).

his own share. The other members of the family must submit to it whether they like it or not."

It appears to their Lordships that the Appellate Court has, in this case, confused the two considerations to which reference has been made above, *viz.*, the severance of status which is a matter of individual volition, with the allotment of shares which may be effected by different methods: by private agreement, by arbitrators appointed by the parties, or, in the last resort, by the Court.

In *Appovier* v. *Rama Subha Aiyan* (2) this Board had to deal with an argument based on a similar notion that a deed of division between the members of an undivided family "which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, was ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds." Lord Westbury, delivering the judgment of the Board, pointed out that the argument advanced before their Lordships proceeded "upon error in confounding the division of title with the division of the subject to which the title is applied." Then, after stating "the true notion of an undivided family under Hindu law," he proceeds thus:

"But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

And in another place, he adds, "it is necessary to bear in mind the twofold application of the word 'division.' There may be a division of right, and there may be a division of property."

Some of the Courts in India have supposed Lord Westbury's expressions to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view. The Board there was dealing with a case in which division of right had already taken place, as evidenced by the "deed of division." The right which each individual member had in his joint property did not spring from the deed or the agreement of the parties to which it gave expression; the agreement only recognised existing rights in each individual member which he was entitled to assert at any time he liked.

The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct it will be for the Court to determine whether it was unequivocal and explicit. In *Joy Narain Giri* v. *Grish Chunder Mytee* (5), their Lordships regarded the conduct of one of the two cosharers who constituted the joint family "when he left the joint residence and withdrew himself from commensality as indicating a fixed determination henceforward to live separately from his cousin," and treated "the fact of his borrowing money for his maintenance, as well as making a will, as indicating, at all events, that he himself considered that a separation had taken place." The conclusion was based on the inference of intention derivable from the acts and declarations of the member who it was alleged had separated himself, and not

(2) 1] M. I. A. 75 (18[illegible].

(5) L. R. 5 I. A. 228 (1878).

from the conduct or attitude of any other party.

As early as 1867, shortly after the judgment of the Judicial Committee in *Appovier's* case (2) Mr. Justice Kemp, one of the most eminent Judges of the Calcutta High Court, sitting with Mr. Justice Glover, in *Vato Koer* v. *Rowshun Singh* (6), a case governed by the law of the Mitakshara, expressed himself thus on this question of separation :—

"Taking then the admitted facts of the case before us, we find that Sohun did publicly and unequivocally by petition presented in Court declare his intention to become from that date divided in estate. Such an intention amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. The acts and declarations of Sohun Singh, showing an unmistakeable intention to hold and enjoy his own estate separately, and to renounce all rights upon the shares of his coparceners, constitute, in our judgment, a complete severance or partition."

With that view of the law their Lordships entirely concur.

In the present case, Harihar, the husband of the Appellant, unequivocally and unmistakably manifested his intention to separate himself from the Defendants, and to hold, possess, and enjoy his unquestioned interest separately from them. In their Lordships' judgment, this was sufficient, under the Hindu Law, to constitute a separation and to divide him in estate from his coparceners.

Their Lordships are accordingly of opinion that the decrees of the Judicial Commissioners should be reversed, and those of the District Judge should be restored.

The Respondents must pay the costs of this appeal and of the appeals in the Judicial Commissioner's Court. And their Lordships will humbly advise His Majesty accordingly.

Solicitor : *Mr. Edward Dalgado* for the Appellant.

Solicitors : *Messrs. Downer* and *Johnson* for the Respondents.

B. D. *Appeal allowed with costs.*

(2) 11 M. I. A. 75 (1866).
(6) 8 W. R. 32 (1867).

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 114 OF 1915.

WOODROFFE, J. CHAUDHURI, J. 1916, Heard, 19 and 23, May. Judgment, 23, May.	DWARKA NATH CHOWDHURI and ors., Plaintiffs, Appellants, *v.* TAFAZAR RAHMAN SARKAR and anr., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 116 and Sch. 3, cl. 1 (a)—Khas khamar *land held by tenant under lease for term - Suit for* khas *possession brought more than six months after expiration of lease—Limitation—Heading of Chapter if may be looked at for construing sections*

The Plaintiffs sued for khas *possession of land held by the Defendants under a lease for five years on the ground that they were entitled to re-entry at the expiration of the agreement. It was found that the Defendants were not in possession of the land before they entered it under their lease and that the land in suit was* khas khamar. *The suit was brought more than six months after the expiration of the lease:*

Held—*That the Defendants were not included in the term "non-occupancy raiyat" within cl. 1* (a), *Sch. 3 of the Bengal Tenancy Act and the suit was not barred.*

That the Court could look at the heading of Chap. XI of the Bengal Tenancy Act for the purpose of construing the sections.

This was an appeal under sec. 15 of the

DWARKA NATH CHOWDHURI *v.* TAFAZAR RAHMAN SARKAR.

Letters Patent preferred against the judgment of Newbould, J., dated 28th June 1915, passed in Second Appeal No. 991 of 1914 which had been preferred against a decree of Mr. B. V. Nicholl, District Judge of Zillah Dinajpur, dated the 28th February 1914, reversing a decree of Babu Rebati Ranjan Mukherjee, Munsif at Raigunge, dated 31st March 1913.

The facts of the case will appear from the judgment of Newbould, J., which was as follows :—

NEWBOULD, J.—This appeal arises out of a suit for *khas* possession brought by the Plaintiffs landlords on the ground that the Defendants had taken settlement of the land in suit for five years and the Plaintiffs were entitled to re-enter at the expiration of the agreement. The suit was dismissed by the Court of first instance and, on appeal, decreed by the lower Appellate Court. The lower Appellate Court has found, differing from the first Court, that the Appellants Defendants were not in possession of the land before they entered it under their lease for five years. He has further found agreeing with the lower Court that the land in suit is *khas khamar* land of the Plaintiffs.

The question for decision in this appeal is whether, having regard to those findings, the special limitation provided by Art. 1 (*a*), Sch. 3 of the Bengal Tenancy Act is applicable. That article provides that a suit to eject a non-occupancy raiyat on the ground of the expiration of the term of his lease must be brought within six months of the expiration of the term. The present suit was brought more than six months after the expiration of the term of the lease. On behalf of the Respondents it is contended that the provisions of sec. 116 of the Bengal Tenancy Act make the provisions of special limitation inapplicable. I cannot see that they do. My attention has been drawn to the heading of Chap. XI which contains sec. 116 and is in the following words :—" Non-accrual of occupancy and non-occupancy rights and records of proprietor's private lands." The heading cannot have any effect beyond that of the words of the sections in the chapter. Sec. 116 only bars tenants of *khas khamar* lands from obtaining the special rights of occupancy and non-occupancy raiyats provided in Chapters V and VI of the Act. It does not make the Act as a whole inapplicable to *khamar* lands. Under sec. 4 of the Act all tenants of agricultural lands fall within certain classes, and in the present case the only class the Defendants can possibly fall within is the class of non-occupancy raiyats. If they are non-occupancy raiyats, the suit is clearly one of the nature described in Art. 1 (*a*), Sch. 3 of the Bengal Tenancy Amendment Act. This article was inserted by the Bengal Tenancy Amendment Act, Act I (B. C.) of 1907 and Act I (E. B. C.) of 1908 and practically re-enacts sec. 45 of the former Act which was then repealed. By taking the provisions of sec. 45 out of Chap. 6 and putting them into the schedule, the legislature, whether intentionally or not, has compelled the landlord to bring a suit for ejectment of a tenant of *khas khamar* land on the termination of his lease within six months. As the suit was not instituted within this period the prayer for ejectment is barred by limitation. I accordingly allow this appeal and restore the decree of the Munsif. The Appellants will get their costs in this and the lower Appellate Court.

Dr. Sarat Ch. Bysack (with *Babu Kumar Sankar Ray*) for the Appellants.

Babu Jadu Nath Kanjilal for the Respondents.

DWARKA NATH CHOWDHURI *v.* TAFAZAR RAHMAN SARKAR.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—The District Judge allowed the Plaintiff's claim. On appeal to this Court Mr. Justice Newbould held that the suit was barred by limitation under the provisions of cl. 1 (*a*), Sch. 3 of the Bengal Tenancy Act. It has been found as a fact that the Defendants were not in possession of the land before they entered it under their lease for five years and that the land in suit is *khas khamar* land of the Plaintiffs. We must accept this finding and dispose of this appeal accordingly.

The question then is, do the Defendants come within the term " non-occupancy raiyat " as mentioned in the Schedule. It is admitted that if the Defendants are non-occupancy raiyats, then the suit is barred. If this portion of the schedule does not apply then the general law of limitation does and the suit is not barred. The contention that has been urged before us may be summarised thus :—

For the Respondents it is contended that by the term " non-occupancy raiyat " in the schedule is meant any person who is a tenant who has not acquired or cannot acquire occupancy rights and that as the Defendants have been in possession of *khamar* lands and could not acquire occupancy rights, they must be taken to be non-occupancy raiyats within the meaning of that article and accordingly the six months law of limitation applies.

On the other hand on behalf of the Appellants it is contended that a person in the position of the Defendants in occupancy of *khamar* land does not come within this article of the schedule and the learned Vakil relies upon the fact that sec. 45 of the Bengal Tenancy Act from which the present portion of the schedule is taken was originally in that portion of the Tenancy Act which deals with non-occupancy raiyats, and it is admitted that if the section had been left where it originally was then sec. 45 would not have applied to the case before us. But it is contended that by its transfer to the schedule it is given a wider application, which on the other hand is denied. Reliance also is placed on the amendment of the heading under Chap. XI of the Bengal Tenancy Act. In that heading it has been inserted "non-accrual of occupancy and non-occupancy rights." I think we may look at this heading for the purpose of interpreting the sections mentioned above, and on this it is contended on behalf of the Appellants that the Defendants holding *khamar* lands are not included in the term " non-occupancy raiyat " within the schedule. I think that this argument has force and I hold that the suit is accordingly not barred.

The decree of Mr. Justice Newbould must therefore be reversed and that of the District Judge restored.

The Appellants are entitled to their costs in this appeal and in the appeal before Mr. Justice Newbould.

CHAUDHURI, J.—I agree.

S. C. M. *Appeal allowed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 326 OF 1916

AND

APPEAL FROM APPELLATE DECREE NO. 1107 OF 1914.

SANDERSON, C. J.
MOOKERJEE, J.
1916,
Heard, 28, April, and 10 and 11, May.
Judgment, 11, May.

NURI MIAN, Defendant, Petitioner, Appellant,
v.
AMBICA SINGH, Plaintiff, Opposite Party, Respondent.

Pre emption—Property, partition of, after institution of suit but before decree—Plaintiff if en-

NURI MIAN *v.* AMBICA SINGH.

titled to decree—Court, if should take notice of matters which come into existence after suit— Talab-i-muasibat, *erroneous statement as to price in, if invalidates—Review on ground not before taken, when allowed—Suits Valuation Act (VII of 1887), sec 11—Valuation—Appeal—Jurisdiction.*

SANDERSON, C. J. *and* MOOKERJEE, J.—*The right of the Plaintiff to get pre-emption must exist not only at the time of the sale, but also at the time of the institution of the suit, and finally up to and at the date of the decree of the trial Court.*

A judgment passed by the High Court on second appeal was reviewed on a ground not taken at any previous stage of the proceeding, when the ground raised a pure question of law which did not depend for its determination upon the investigation of new facts and when the alleged error was apparent on the face of the record.

CONNECTICUT FIRE INSURANCE Co. *v.* KAVANAGH (2) *referred to.*

Per MOOKERJEE, J.—*The decree in a suit should ordinarily conform to the rights of the parties as they stood at the date of its institution. But there are cases when it is incumbent upon a Court of Justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties.*

Per SHARFUDDIN *and* ROE, JJ.—*For the performance of the* talab-i-muasibat *what is necessary is an expression by the pre-emptor in clear and explicit terms that he demands to make the purchase and it is not necessary that he should, at the time of the performance of the ceremony, make any mention of the price.*

Where in performing the talab, *the claimant, owing to mistaken information, understated the price, though the ceremonies required by law were fully performed,*

Held—*That the* talab *was validly performed.*

Plaintiff, suing for pre-emption valued his suit at Rs. 4,500, the price for which, according to his information, the property had been sold to the Defendant. The suit was dismissed by the Subordinate Judge but decreed on appeal by the District Judge who however found that the real value of the property was over Rs. 6,000. On second appeal it was urged that having regard to the value of property as found by the District Judge, appeal lay to the High Court and not to the District Judge, but the point was not taken in the memorandum of appeal.

Held, *per* SHARFUDDIN *and* ROE, JJ.—*That this objection should be overruled, in view of sec. 11 of the Suits Valuation Act, and that the decision in* RAJ LAKSHMI DASEE *v.* KATYAYANI DASEE (7) *was distinguishable from the present case as in that case the suit was intentionally and grossly undervalued.*

The Rule arose out of an application for review of the decision of Sharfuddin and Roe, JJ., dated the 19th January 1914, delivered in Appeal from Appellate Decree No. 1107 of 1914 which had been preferred against a decision of G. Rowland, Esq., District Judge of Saran, dated the 7th April 1914, reversing a decision of Babu Charu Chandra Mukerjee, Subordinate

(2) [1892] A. C. 473 at p. 480.

(7) I. L. R. 38 Cal. 637 (1910).

Judge at Saran, dated the 16th January 1914.

The judgments of Sharfuddin and Roe, JJ., were as follows :—

SHARFUDDIN, J.—This is an appeal by Defendant No. 1 named Nuri Mian against the appellate judgment of the District Judge of Saran, dated the 7th April 1914.

Ambica Singh the Plaintiff of the suit sued Nuri Mian and Bansidhar the two Defendants in the suit to establish his right of pre-emption. His case is that Bansidhar, Defendant No. 2, sold his shares in three villages, namely, Maritand, Tola Ghyaspur and Tola Pandaypur for Rs. 4,500 to Nuri Mian Defendant No. 1 on the 16th September 1912. In the plaint he alleged that Rs. 7,000 mentioned in the sale-deed as the consideration money is a fictitious amount and that he, on hearing from one Garju, one of his witnesses, for the first time on the 20th September 1912, performed the required ceremonies known as *talab muasibat* and *talab istishad*. The Defendant No. 1 contested the suit and traversed the allegations made in the plaint. The Subordinate Judge dismissed the Plaintiff's suit, upon which the Plaintiff appealed to the District Judge who allowed the appeal by decreeing the Plaintiff's suit. The lower Appellate Court further held that the consideration money, namely, Rs. 7,000 mentioned in the deed of sale, was the consideration money for the sale of the shares although it included a sum of Rs. 500 as arrears of rent from the tenants, and it was directed that the amount at which the Plaintiff might redeem was Rs. 7,000 and it is this judgment which is the subject of the present appeal.

Before I refer to the grounds urged before us it is necessary to state that there was a partition proceeding with respect to the *mahal* wherein the shares were situated, but the partition was not complete on the date of sale. The partition was completed on the 22nd September 1913 and the sale of the shares took place on the 16th September 1912, which means, that the *mahal* remained joint for a little over a year before the sale was made.

The grounds urged on behalf of the Appellant are :—

1. That having regard to the fact that the Plaintiff alleged to have offered to pay Rs. 4,500 and not Rs. 7,000 as stated in the deed of sale or the actual price to be found by the Court, the Plaintiff had no right of pre-emption.

2. That the *batwara* proceedings having been practically completed, before the sale in question, the Plaintiff had no right of pre-emption.

3. The first Court having found the value of the shares to be Rs. 6,000, the District Judge had no jurisdiction to try the question on appeal inasmuch as the appeal lay to the High Court.

It has been found that the Plaintiff and Defendant No. 2 were cosharers and the Plaintiff on hearing the news of the sale performed the required ceremony and that the value of the shares was Rs. 7,000 which included a sum of Rs. 500 as arrears of rent due from the tenants. On the above finding there can be no question that the Plaintiff is a *shafi* and that if he on hearing the first news of the sale performed the ceremonies in the ways required by the Mohammedan Law he is entitled to pre-empt.

Decision on the first ground.

There are three methods to claim *shufa*, the first of these methods called *talab muasibat*. This has to be done by making an immediate demand of purchase on

hearing the news of the sale. The second is what is called *talab istishad* which means an affirmation of the first method and asking people to witness and the third is by litigation.

In the present appeal we are concerned only with the first method, namely, *talab muasibat*. The contention on behalf of the Appellant is that the ceremonies of *talab muasibat* was not performed by the Plaintiff in the manner required by law. The defect pointed out is that, in the performance of the ceremony, the Plaintiff offered to pay Rs. 4,500 as the price of the share. He should have offered Rs. 7,000 which was the sum mentioned in the deed of sale. The question is as to whether it is necessary to mention any sum in the performance of the *talab muasibat*.

While dealing with the question the author of the Hedaya says that it is not material in what words the claim is preferred and it is sufficient that the words used should imply a claim. If a person says "I have claimed my *shafa*" or "I shall claim my *shafa*" or "I do claim my *shafa*" he has performed the ceremony as required by law.

In Ameer Ali's Mohammedan Law, (page 723, Vol. I, 4th Ed.), there is the following passage "a person who intends to advance a claim based on the right of pre-emption in respect of property which has been sold to another, must immediately on receiving information of the sale, express in explicit terms his intention to claim the property, the intention must be formulated in the shape of a demand. No express formula is necessary so long as the assertion of the right, or what is called a demand, is expressed in unequivocal language". This learned author relies on the Hedaya.

Another authority is that of Durul Mukhtar. This book is the well-known commentary of Tanwirul Absar. It has been translated into English by Babu Brij Mohan Dayal of Lucknow. This book is considered as an authority on Mohammedan Law. At p. 386 of this book there is this passage "demand should be made by using an expression from which demand may be clearly understood."

In Tyabji's Principles of the Mohammedan Law it is stated that the pre-emptor should assert his claim immediately on getting information of a sale.

From the above authorities it is clear that in the performance of this ceremony what is necessary is an expression by the pre-emptor in clear and explicit terms that he demands to make the purchase and it is not necessary that he should at the time of the performance of the ceremony, make any mention of the price.

Wilson in his Digest of Anglo-Mohammedan Law (at p. 418, 4th Ed.) says "it is not necessary that the pre-emptor should tender the price at the time of making the formal claim. It is sufficient that he should then state his willingness to pay either the price named in the sale-deed, or, if he suspects the price named as fictitious, such a sum as a Court may award."

There is no authority in Mohammedan Law that if the pre-emptor fails to state that he is willing to pay the price named in the sale-deed or such a sum as a Court may award, he loses the right of pre-emption. The passage quoted from Wilson's Digest has been relied upon by the Appellant. This learned author has only explained the intention of a pre-emptor. The pre-emptor in making the demand tacitly expresses his willingness to pay either the price mentioned in the deed or such a sum as a Court may award.

On a consideration of the various commentaries on Mohammedan Law I do not think that mention of any sum of money is a necessary condition in the due performance of the demand.

Reverting to the facts of the case I find that the first information of the sale that the Plaintiff got, was from one Garju, a witness examined on his behalf. That information was that Defendant No. 2 had sold his shares for Rs. 1,500 and had received a further sum of Rs. 2,500 from his vendee as arrears of rent due from the tenants. On receiving this information the Plaintiff performed the ceremony of demand and in the performance thereof, although it was not necessary, he mentioned the sum of Rs. 4,500 as the price he was willing to pay for the purchase. The Plaintiff believed his informant and said he would pay Rs. 4,500 for the purchase. There can be no doubt that there is no right of pre-emption against conveying the right of realisation of the arrears of rent from the tenants. In the plaint also he claimed to have purchased the property for Rs. 4,500 and further says that he is willing to pay any consideration that may be found by the Court.

For the above reasons I am of opinion that the *talab muasibat* was duly performed. This ground therefore fails.

Decision on the second ground.

Batwara proceedings are completed on the service of notice as required by sec. 94 of the Estates Partition Act. The sale in question having taken place more than a year before the partition was complete the pending *batwara* proceedings were no bar to the claim. The sale in question took place when the estate was joint and it being joint the Plaintiff being a cosharer in the joint estate was fully entitled to claim his right of pre-emption. This ground also fails.

Decision on the third ground.

It is contended that when the Subordinate Judge found that the value of the shares was over Rs. 6,000, the District Judge had no jurisdiction to try the appeal and he should have stayed his hands and directed the Appellant to prefer his appeal to the High Court. In this connection reliance is placed on the case of *Raj Lakshmi Dassee* v. *Katyayani Dassee* (7). I must observe here that this objection was not taken before the lower Appellate Court, nor does it find a place in the Memorandum of Appeal to this Court. Sec. 11 of the Suits Valuation Act (VII of 1887) provides that such an objection if not taken in the Memorandum of Appeal to the Appellate Court it cannot be taken at all.

Under sec. 21 of the Civil Courts Act (XII of 1887) it is provided that an appeal should lie to the District Judge where the value of the original suit in which the decree was made, did not exceed Rs. 5,000. The plaint shows that the suit was valued for Rs. 4,500 and therefore the appeal lay to the District Judge. On behalf of the Appellants it is conceded that the appeal no doubt lay to the District Judge but the District Judge on finding the value of the shares to be more than Rs. 5,000 should not have recorded any judgment but should have directed the Appellant to prefer his appeal to the High Court. It is for this purpose that the authority reported in *Raj Lakshmi Dassee* v. *Katyayani Dassee* (7) is relied upon. But the facts of that reported case are quite distinguishable from the facts of the present case. In the reported case it was found that the suit was intentionally undervalued and it was further found that the value of the property in the reported case was over a lac of rupees but it was grossly under-

(7) I. L. R. 38 Cal. 888 at p. 897, 898 (1910).

valued at Rs. 2,100. In the present case, however, there was no intentional undervaluation. The Plaintiff's informant had told him that the shares were sold for Rs. 4,500. He honestly believed that the value of the shares were Rs. 4,500. I am of opinion that this reported case does not help the Appellant. This ground also fails. The appeal is dismissed with costs.

Roe, J.—I agree for the reasons given by my learned brother that this appeal must be dismissed. In the second and third grounds urged in support of the appeal there is no substance.

The first ground is based upon a misconception of Sir Roland Wilson's commentary. It is clear from the Hedaya that it was recognised that the Kazi must always be called in to settle the price to be paid. Sir Roland Wilson cannot be understood to mean more than that on appearance before the Kazi, the *shafi* must be willing to pay the price fixed by the Kazi.

[After these judgments were delivered, a High Court having been established at Patna, and both learned Judges having left this Court upon appointment as Judges of the Patna High Court, the application was moved before the Court over which his Lordship the Chief Justice presided and the present Rule was issued.]

Moulvi Khurshed Hussain and *M. A. S. M. Akram* for the Petitioner, Appellant.

Babu Sarat Chandra Roy Chowdhury for the Opposite Party, Respondent.

The Judgment of the Court was as follows :—

Rule No. 326.

Sanderson, C. J.—In this case the action was for pre-emption. The suit was dismissed by the Court of First Instance on the 16th of January 1914. But on appeal to the District Judge, that decision was reversed, and the District Judge decreed the suit, holding as a matter of fact that the ceremonies had been duly performed, that the Defendant purchaser was not a co-sharer and that the property was joint property at the time of the institution of the suit. From that, the Defendant appealed to the High Court, and that appeal was dismissed by the two learned Judges who constituted the Bench on that occasion. Then a Rule was obtained by the Defendant calling upon the Plaintiff to show cause why that judgment shou'd not be reviewed upon three grounds, the main ground being that the conditions which were necessary to give a right to the Plaintiff to pre-emption did not exist at the date of the decree: and, that is the point which has been mainly argued, and if I may say so very well argued, by the learned Vakil for the Plaintiff on this occasion. In order to appreciate the point it is necessary to state three or four facts. One Bansidhar sold his interest in the property on the 12th of July 1912 to the first Defendant whose name was Nuri Mian, and at that time there were partition proceedings pending. On the 8th of October 1912, the Plaintiff instituted the present suit to assert his right of pre-emption. The partition proceedings were completed on the 2nd of December 1913, by reason of the issue of the notice under sec. 92 of Estates Partition Act. The first decree in the suit, as I have already mentioned, was on the 11th of January 1914, after the date when the partition proceedings were completed. In that decree, the Defendants succeeded, and it was not until the 7th of April 1914, when the District Judge's decision was given, that the Plaintiff got his decree for pre-emp-

tion. I do not think it matters which of the dates is taken, whether the 16th of January 1914, or the 7th of April 1914, because both of them are subsequent to the 2nd of December 1913, when the partition proceedings were completed.

Now, the point taken by the learned Vakil on behalf of the Defendants is that in such a case as this, namely, in a suit for pre-emption, the right of the Plaintiff to get pre-emption must exist not only at the time of the sale, but also at the time of the institution of the suit, and finally up to and at the date of the decree. The principle is thus stated in Sir R. K. Wilson's Digest of Anglo-Mahommedan Law at p. 400 :—" The co-sharership, participation in appendages, or ownership of contiguous property, as the case may be,"—this being a case of co-sharership—" must not only exist at the time of the sale which gives rise to the claim of pre-emption, but must continue to exist down to the time when the suit is instituted, and (it seems) even down to the decree." Of course, that is not an authority, and I do not refer to it as an authority, but I only refer to it for the purpose of stating what is considered by the Text-Writers as the principle. The question remains whether that principle is right.

Now, both on the ground of principle and also by reason of the authorities to which Mr. Roy Chowdhury has very rightly drawn our attention, although some of them are in my opinion directly against him, I think this Rule must be made absolute. The principle, I think, cannot be better stated than it is, in the case of *Tafazzul Husain* v. *Than Singh* (1). That was a case in which partition proceedings had taken place, and at the time of the decree the property was no longer a joint property. The learned Judges said there, " We think that the decisions of the Courts below were correct. The Plaintiff's right was based upon the fact that he was partner with the vendor. To quote Hamilton's Translation of the Hedaya *shafa* relates to a thing held in joint property and which has not been divided off. The right of *shafa* is founded on a precept of the Prophet who had said, " the right of *shafa* holds in a partner who has not divided off and taken separately his share." I pause there to say that I think that is the principle which applies to this case: the Plaintiff's right was based upon the fact that he was a partner with the vendor; at the time of the sale he was a partner with the vendor; at the time of the institution of the suit he was a partner with the vendor; but at the time the decree was made, in 1914, the joint property had ceased to exist, for the property had been divided into different shares which had become the separate property of the individuals who were entitled to the shares under the partition proceedings: and, it seems to me it would be impossible to make a decree upon the basis upon which the Plaintiff's claim was put forward in this action. Then the learned Judges went on to say, " Having regard to what has happened, the Plaintiff's property has been divided off. He is no longer a partner with the vendor. It is argued that inasmuch as the Plaintiff was a partner at the time of the institution of the suit, it therefore does not matter that a partition has since taken place, particularly if the Plaintiff was not the person who sought partition. Evidently the Plaintiff did feel that if he had prosecuted the partition, it would be fatal to his suit, and this perhaps explains why he withdrew from the application for parti-

(1) [illegible] I. L. R. 32 All. 567 at p. 570 (1910).

tion which he himself made in the first instance. It is expressly laid down in the Hedaya, Chap. IV, Book 38, that it is a condition that the property of the *shafa* remain firm until the decree of the Qazi be passed; and for this reason if the *shafi* previous to the decree of the Qazi sell the house from which he derives his right of *shafa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated. Applying the same principle to the present case, Plaintiff's right of *shafa* was founded upon the fact that he was a partner, that is to say, a co-sharer in the *mahal*. He has ceased to be such co-sharer. Therefore the reasons or grounds of his right had been extinguished before the decree of the Court, and therefore the right itself is also extinguished." I think that those words apply directly to this case, and I propose to follow the decision in that case and also to say that in my judgment that decision is based upon sound reason and principle, and therefore I think this Rule must be made absolute.

[His Lordship then proceeded to dispose of the appeal in these terms.]

This is now to be taken as the hearing of the appeal, and I would like to say this about that matter to show that I have not overlooked the point taken by the learned Vakil for the Plaintiff. It was clearly within our jurisdiction to hear the Rule, and the hearing of the appeal is a natural consequence, under the Rule, as was mentioned by my learned brother Mr. Justice Mookerjee and of the fact that we made the Rule absolute. In my opinion, we have jurisdiction to hear it, but if there is any doubt about it, I give direction under the second proviso of cl. 39 of the Letters Patent of the Patna High Court that this appeal should be heard in this Court.

With regard to the costs we have considered the matter carefully, and we think that the proper order to make is that the appeal will be allowed and the judgment of the Court of first instance by which the suit was dismissed will be restored. The Plaintiff will pay the Defendant's costs incurred in the Court of first instance and in the first Appellate Court, but there will be no costs with regard to the proceedings in the High Court either with regard to the appeal or with regard to the Rule with the exception that we think that the Plaintiff should pay the Court-fee which was paid on the memorandum of appeal, which we understand is Rs. 150.

The money deposited by the Plaintiff will be returned to him.

Mookerjee, J.—I agree that this Rule issued on the application for review, which raises an important question of law of first impression, so far as this Court is concerned, must be made absolute.

The Plaintiff seeks to enforce his right of pre-emption under the Mahomedan law in respect of shares in three villages sold on the 12th July 1912, by his co-sharer, the second Defendant, to the first Defendant. He instituted this suit on the 8th October 1912 on the allegation that he had performed all the ceremonies requisite under the Mahomedan law. The Subordinate Judge dismissed the suit on the 16th January 1914. Upon appeal the District Judge gave the Plaintiff a decree on the 7th April 1914. An appeal from the decree of the District Judge was dismissed by this Court (Sharfuddin and Roe, JJ.,) on the 19th January 1916; and this is the judgment we are now invited to review.

The ground on which the application for review is made was admittedly not taken at any stage of the proceedings and it has been argued on behalf of the op-

posite party that the petitioner should not be allowed to base his application on a ground never taken before. In my opinion, there is no force in this contention. In the first place, as was pointed out by the Judicial Committee in the case of *Connecticut Fire Insurance Co.* v. *Kavanagh* (2) " when a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position that the Courts below." Here the ground assigned in support of the application for review raises a pure question of law, and its determination does not depend upon the investigation of new facts. In the second place, the alleged error, if it be an error, is apparent on the face of the record. The Petitioner contends that the suit should not have been decreed, inasmuch as the right of pre-emption had been lost before the date of the decision of the Subordinate Judge in the Court of first instance. This argument is based on admitted facts. The case was decided by the Subordinate Judge on the 16th January 1914. The District Judge made his decree on the 7th April 1914; that decree may by a fiction be deemed to have been made as early as the 16th January 1914, inasmuch as the District Judge only made that decree which, in his opinion, should have been made by the trial Court. The property was the subject of a proceeding for partition under the Estates Partition Act, 1897, instituted before the Collector, on the 15th May 1909. The partition proceedings were completed on the 2nd September 1913; and consequently on that date, the subject-matter of the litigation ceased to be joint property. The petitioner contends in essence that as the Plaintiff ceased to be a co-sharer in the joint property, on the 2nd September 1913, his right of pre-emption was extinguished on that date and consequently no decree for pre-emption could be made thereafter on the 16th January 1914. If this argument is well founded on principle, the error assigned is apparent on the face of the record. I hold accordingly that the application for review must be entertained and considered on its merits.

The substance of the argument for the Petitioner is, that any person who seeks the assistance of a Court with a view to enforce a right of pre-emption is bound to establish that the right existed at the date of the sale, at the date of the institution of the suit and also at the date of the decree of the trial Court. In support of this contention, reliance has been placed upon the decisions in *Ram Gopal* v. *Piari Lal* (3) and *Tafazzul Husain* v. *Than Singh* (1). On behalf of the Opposite Party the correctness of these decisions has been called in question, and we have been invited to apply the rule that the decree in a suit should conform to the rights of the parties as they stood at the date of its institution. Now, it may be conceded that ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But this principle is not of universal application, and in a long series of decisions, which will

(2) [1892] A. C. 473 at p. 480.

(1) I. L. R. 32 All. 567 at p. 570 (1910).

(3) I. L. R. 21 All. 461 (1899).

be found reviewed in the case of *Rai Charan Mandal* v. *Biswa Nath Mandal* (4), the doctrine has been recognised that there are cases where it is incumbent upon a Court of Justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. In my opinion, the case before us falls within this exception to the general rule, and the decree herein should be made in accordance with the circumstances as they stood at the date of the decree of the trial Court, because otherwise the decree if made in conformity with the prayers in the plaint would be inappropriate and would not do complete justice between the parties. This may be well illustrated by a reference to the prayer in the plaint itself. The Plaintiff seeks a declaration of his title to specified shares in the three villages mentioned in the Schedule, and prays that he may be placed by the Court in possession of such shares. The decree of the District Judge is in strict conformity with these prayers in the plaint. But it has not been seriously disputed that the decree so awarded to the Plaintiff is incapable of execution, by reason of events which have happened since the institution of the suit. The joint property has, during the pendency of the litigation in the trial Court, become transformed into several separate estates, and it is impossible in execution of the decree awarded to the Plaintiff to place him in possession of a share in the joint property as claimed by him in the plaint. It was, indeed, faintly suggested on his behalf that the decree might be modified so as to entitle him to recover possession of the allotment made in favour of the first Defendant. The obvious answer is that such relief, if awarded, would be inconsistent with the prayer in the plaint, and with the fundamental notion of pre-emption which lies at the root of that prayer. This, then, is obviously a case where a decree cannot be made in favour of the Plaintiff in strict accord with the terms of the prayer in the plaint. The question, consequently, arises, what decree should be made in favour of the Plaintiff; is he entitled to the specific relief claimed by him or to any substituted relief. In my opinion, the answer must be in the negative.

The true foundation of the right of pre-emption is explained in two passages in Book XXXVIII of the Hedaya. The first of these passages is in these terms: "Shaffa" in the language of the law signifies the becoming proprietor of lands sold for the price at which the purchaser has bought them, although he be not consenting thereunto. This is termed "shaffa" because the root from which shaffa is derived signifies conjunction and the lands sold are here conjoined to the land of the *shafi* or person claiming the right of pre-emption." This indicates that the right of pre-emption is a right of substitution. The Plaintiff complains that his co-sharer has transferred his share in the joint property to a stranger, and claims to be substituted in the place of the purchaser of the share of the joint property. If before this can be effected, the property ceases to be joint property,

(4) 20 C. L. J. 107 (1914).

it is obvious that the foundation of the right of pre-emption disappears. This view is fortified by the second passage which is in these terms: "It is an express condition of *shafa* that a man be firmly possessed of the property from which he derives his right of *shafa* at the time when the subject of it is sold, a condition which does not hold on the part of his heirs." (The author here deals with a case where the person claiming the right of pre-emption has died before a decree is made in his favour by the Kazee). "It is moreover a condition that the property of the *shafi* remains firm until the decree of the Kazee be passed; and, as this does not hold on the part of the deceased *shafi*, the *shafa* is therefore not established with respect to any one of his descendants, because of the failure of its conditions." It has not been seriously disputed by the Plaintiff that the right of pre-emption, in order that it may be enforced by a Court, must not only arise on the sale, but be also existent at the date of the institution of the suit; for, it is unquestionable upon the authorities that if a person who claims a right of pre-emption, ceases to be interested in the joint property before the institution of the suit, he cannot obtain assistance from the Court. Consequently, the view cannot be maintained that the right of pre-emption which arises from the moment the sale is effected by the co-sharer, is enforceable as it stands at the time of its origin; it is liable to be extinguished by events subsequent. The only point of difference between the Plaintiff and the Defendant is, whether the point of time with reference to which the existence of the right is to be determined is the date of the institution of the suit or the date of the decree by the trial Court. In my opinion, for the reasons already assigned, it is plain that the right must exist and retain its enforceable character when the decree is made by the Primary Court. This view was adopted in *Ram Gopal* v. *Piari Lal* (3) and *Tafazzal Hussain* v. *Than Singh* (1); these decisions are mentioned without dissent by well-known text-writers such as Ameer Ali, Tyabji and Wilson. It is also worthy of note that the Chief Court of the Punjab has accepted the same view in *Sanwall Das* v. *Gur Prosad* (5), though a contrary view had been adopted in an earlier case. *Faiz Baksh* v. *Ramjidas* (6). In the case just mentioned, which was decided by a Full Bench of eight Judges, the nature of the right of pre-emption was fully analysed by Chief Justice Clark and Mr. Justice Chatterjee. Mr. Justice Chatterjee observed as follows: "A pre-emptor is bound to show that he was clothed with the right at the date of sale and also at the date of suit and up to the time of the final decree or should have his claim dismissed. If the pre-emptor loses his right within the period mentioned above, whether by his own act or from causes beyond his control, his suit fails. The pre-emptor cannot get a decree unless he maintains the right on which he sues to the end." Chief Justice Clark added that "conceding that the plaintiff pre-emptor must retain the prior right up to time of institution of suit, and even up to decree, a Plaintiff must have a subsisting cause of action up to the time of the decree. The possession of the property in which the right of pre-emption inheres is a part of his cause of action, and if he loses that property either voluntarily or involuntarily before decree, his suit must fail." This is obviously consistent with sound sense;

(1) I. L. R. 32 All 567 at p. 570 (1910).
(3 I. L. R. 21 All. 441 (1899).
(5) 10 Punj. Law Rep. 561.
(6) 4 Punj. Rec. 34.

for if the contrary opinion were accepted, the result would follow that relief by way of pre-emption may be awarded to a person who according to the altered circumstances as they exist at the date of the decree, can show no reason whatever why he should be placed in that position of advantage.

Accordingly I agree that this Rule must be made absolute, and the decree of this Court discharged. I also concur in the order which the Chief Justice proposes to make in the appeal and in respect of the costs of the Rule and the appeal.

N. G. *Appeal allowed.*

[CIVIL REVISIONAL JURISDICTION.]

Ref. No. 6 of 1916.

D. Chatterjee, J.
Newbould, J.
1916,
8, May.

Sheikh Ratan Bepari and others, Petitioners,
v.
Hira Lal Sarkar and others, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. XLVI r. 7—Reference by District Judge of cases tried by Small Cause Court—Sec. 115, C. P. C., sec 25, Small Cause Courts Act (IX of 1887)—Interference by High Court on question of fact.

The Plaintiff brought his suit in the Court of Small Causes for recovery of damages against the Defendant who was said to have held some land under a contract to take half the proceeds as remuneration for his labour and expense. The Small Cause Court found that the Defendant was a servant remunerated by the receipt of half the produce and decreed the suit. On a reference by the District Judge recommending the setting aside of the decree of the Small Cause Court Judge on the ground that the Defendant should have been held to be a tenant against whom the suit could not be entertained:

Held—*That the Court of Small Causes was a Court subordinate to the District Judge and Or. XLVII, r. 7 contemplated a reference by the District Judge of cases tried by such Court.*

That in cases of revision under sec. 115, C. P. C., or under sec. 25 of the Small Cause Courts Act the High Court does not generally interfere with findings of fact arrived at by the first Court if those proceedings are supported by evidence before the Court.

No case having been made out for interference on a question of fact the reference was discharged.

This was a Reference under Or. XLVI, r. 7, C. P. C., made by Mr. M. Smither, District Judge of Dacca, on the 15th February 1916, recommending that the decision of the Small Cause Court Judge, Dacca, dated the 7th December 1915, be set aside for the reasons given in the letter of reference.

The letter of reference was as follows:—

"The plaint alleges that Defendant's father executed a *kabuliyat* for one year in 1307, and that since that year Defendant's father, and after his father the Defendant himself, have been cultivating the land and delivering half the produce to Plaintiff, and keeping half as remuneration for their labour. Then the Palintiff alleges that Defendant is a mere servant of the Plaintiff, and not a tenant of the land.

The Defendant admits delivering half the produce to the Plaintiff up to 1318, and says that since then he has been delivering it to one Abdul Aziz, as this man and not Plaintiff is really the landlord: and the Defendant says that he has kept half the produce under "his right as *bargadar*," not admitting that he was ever a mere servant of the Plaintiff.

SHEIKH RATAN BEPARI v. HIRA LAL SARKAR.

In the *kabuliyat* of 1307, there was a stipulation that the executant should have no right on the land. It was for one year only: the executant was to pay Rs. 32 for the crop he would take from the land. The stipulation would not prevent Defendant from acquiring occupancy rights in the land if in fact, in spite of the words used to describe the position, he was a tenant on the land.

The Small Cause Court Judge has held that the Defendant was a mere labourer on the land, to be remunerated with half the produce. The Plaintiff did not supply seed, or ploughs, or plough cattle. The Defendant supplied them.

In my opinion, the Defendant was a tenant on the land, and not a mere servant, and the case was therefore not triable by the Small Cause Court Judge.

It was argued that the finding of fact of the Small Cause Court Judge must be accepted, and that therefore there can be no reference. If this were so, then if the Small Cause Court has before it a suit which, on a right determination of the facts, cannot be tried by it, it may yet, by wrongly deciding the facts, take jurisdiction. I do not think this contention can stand. In cases dealt with on the High Court rulings, I find this very question, as to whether the party is a mere servant, or a tenant, gone into and decided by the High Court, and a decision then given accordingly, as to whether the Small Cause Court had jurisdiction.

I think the case of *Biroje Mohammad* v. *Mohabat Mohammad* (1) shows that the Defendant was a tenant, not a mere paid labourer. The tenant's case was not so strong there as it is here. There the landlord supplied the seed, ploughs and cattle. The case considers the case in *Kade Mandal* v. *Ahadali Molla* (2) on which the Plaintiff relies. In the present case, the substance of the position was that the Defendant was cultivating the land as an ordinary *barga* tenant, but the landlord was trying by the use of names and words, to deprive him of the rights the position gave him. In substance the position was that the Defendant was to enjoy the land, so long as he paid half the produce to the Plaintiff: but the Plaintiff called Defendant a labourer and called half the produce which Defendant kept, the Defendant's remuneration for service. In *Kade Mandal* v. *Ahadali Molla* (2) the Defendants denied interest and said that they never cultivated the land, and the Court held that the relationship of landlord and tenant had not been made out. In *Shyama Churn Ghosh* v. *Mahomed Ali* (3), the seed was supplied by the landlord: yet it was held to be a tenancy.

I recommend that the decision of the Small Cause Court Judge be set aside as made without jurisdiction."

Babu Monmotha Nath Ray opposed the Reference.

The JUDGMENT OF THE COURT was as follows:—

This is a Reference from the District Judge of Dacca under Or. XLVI, r. 7.

A suit was brought in the Small Cause Court for recovery of damages against the Defendant who is said to have held some land under a contract to take half the proceeds as remuneration for his labour and expense. That was the case of the Plaintiff. The Defendant said that the case could not be tried by the Small Cause Court but he did not set up any special plea as to his being a tenant and therefore

(1) 11 Ind. Cas. 89 (1911).

(2) 14 C. W. N. 629 (1910).

(3) 13 C. W. N. 655 (1909).

not amenable to the jurisdiction of the Small Cause Court. Upon the evidence, the learned Small Cause Court Judge found that the Defendant was a servant who was remunerated by the receipt of half the produce. Upon that finding, he gave a decree to the Plaintiff.

There was an application to the District Judge for making a reference and he has made this reference. According to the learned Judge, the finding of the trial Court as regards the nature of the suit is erroneous and the Defendant ought to have been held to be a tenant against whom the present suit could not be entertained.

It has been contended by the learned Vakil who appears against the reference, *first*, that the reference is incompetent; and *secondly*, that the reference ought not to have been made under the circumstances of the case.

As regards the first point we do not think it can be maintained that the Court of Small Causes was not a Court subordinate to the District Judge; and Or. XLVI, r. 7, contemplates a reference of cases tried by the Small Cause Court, by the District Judge.

As regards the second point, we see that the trial Court, upon evidence, came to the conclusion that the Defendant was a servant remunerated by a part of the proceeds of the land. That was a finding of fact upon evidence before him; and unless we deem it expedient and proper to set aside that finding, we do not see our way to accept the reference by the learned District Judge. In cases of revision under sec. 115, C. P. C., or under sec. 25 of the Small Cause Courts Act, we do not generally interfere with findings of fact arrived at by the first Court if those findings are supported by evidence before the Court: and in this particular case, we do not think that any case has been made out for our interference on a question of fact.

In this view of the case, we discharge the reference with costs, one gold mohur.

S. C. M. *Reference discharged.*

[CRIMINAL REVISIONAL JURISDICTION]

REV. No. 379 OF 1916.

CHITTY, J.
WALMSLEY, J.
1916,
28, April.

NRISINGHA KUMAR MUKERJEE, Accused, Petitioner,
v.
KUMUDENDU MUKERJI, Complainant, Opposite Party.

Indian Penal Code (Act XLV o, 1860), sec 417 —Cheating, complaint of—Proceeding quashed as primâ facie *case not made out—Pleader's promise to persuade client to give undertaking—Undertaking not given—Pleader, if may be proceeded against for cheating.*

In a proceeding under sec. 107, Cr. P. C., the Opposite Party undertook not to go to the property, the subject-matter in dispute, or to do any act that was likely to involve a breach of the peace, on the pleader for the complainant agreeing to persuade complainant's master to file an undertaking that he would protect the property from sale. The undertaking which the latter offered to file, not having been approved of by the Opposite Party, was not filed, whereupon the Opposite Party started proceedings against the pleader under sec. 417 of the Penal Code:

Held—*That the proceedings should be quashed as no* primâ facie *case of cheating had been made out.*

This was a Rule granted on the 3rd of April 1916, against an order of Babu Braja Durlabh Hazra, Deputy Magistrate of Howrah, dated the 27th of March 1916.

The facts were as follows:—

The Petitioner Nrisingha Kumar

NRISINGHA KUMAR MUKERJEE *v.* KUMUDENDU MUKERJI.

Mukerji was a pleader practising in the District Judge's Court at Alipore. The complainant Kumudendu was the Opposite Party in a proceeding under sec. 107, Cr. P. C., between one Misrilal Manna, *gomasta* of Babu Rajani Kanta Bhattacharji, Trustee of the estate of Makhanlal Mukherji and brothers. In the sec. 107 proceedings, Babu Nrisingha Kumar had been acting as the pleader for Misrilal. Kumudendu expressed his willingness to withdraw from the property, the subject-matter of the sec. 107 proceedings, and demanded that Rajani Kanta should give an undertaking that he would do his best to protect the property from sale. Babu Nrisingha Kumar agreed to try to persuade Rajani Kanta to file an undertaking as desired by Kumudendu, whereupon Kumudendu undertook not to interfere with the property, and the pleader, Babu Nrisingha Kumar, on behalf of his client Misrilal, withdrew the sec. 107 proceedings against Kumudendu. Rajani Kanta, being spoken to by Babu Nrisingha Kumar, wanted to file an undertaking to protect the property from sale, which, however, was not accepted by Kumudendu, and the undertaking could not consequently be filed. Thereupon, Kumudendu applied for summons against Babu Nrisingha Kumar for having falsely represented that he would file the undertaking on behalf of Rajani Babu, and thereby induced him to withdraw from the property. Babu Braja Durlabh Hazra, Deputy Magistrate, Howrah, issued summons under sec. 417, I. P. C., against Babu Nrisingha Kumar, by his order, dated the 27th March 1916.

Babu Nrisingha Kumar moved the High Court for quashing the proceedings under sec. 417, I. P. C., and obtained a Rule on the 3rd of April 1916.

Babus Manmatha Nath Mukerjee and *Mrityunjay Chatterji* for the Petitioners.

The JUDGMENT OF THE COURT was as follows :—

In this case we have read the explanation of the Magistrate; but, we are of opinion, that no *primâ facie* case of cheating has been made out against the Petitioner. The proceedings against the Petitioner are accordingly quashed, and his bail-bond will be discharged.

K. C. *Rule made absolute.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 810 OF 1915

MULLICK, J. KINGSFORD, J. 1916, 18, May.	}	AMBICA PROSAD SINGH and ors., Plaintiffs, Appellants, *v.* BALDEOLAL and anr., Defendants, Respondents.

Suit for ejectment—Lease of land for residential purposes—Law before the Transfer of Property Act (IV of 1882)—Onus to prove transferability—Presumption of transferability, if arises from long continued possession.

The effect of the recent decisions is that when a landlord sues a person on the allegation that he is a trespasser and that person sets up a transfer from a tenant, it is for the latter to prove, first of all, the tenancy and, secondy, the validity of the transfer.

With regard to tenancies of homestead land created before the Transfer of Property Act, the tendency of these decisions has been to establish that in the absence of evidence to the contrary, the burden of proof being upon the tenant, these tenancies are non-transferable.

BENEE MADHUB *v.* JOYKISSEN (1) *and*

(1) 12 W. R. 495 (1869).

AMBICA PROSAD SINGH *v.* BALDEOLAL.

DURGA PERSHAD MISSER *v.* BINDABAN SOOKUL (2) *referred to and doubted.*

The only exception made to the above rule is when there has been an erection of pucca buildings or a standing by on the part of the landlord while the tenant spends a large sum upon the land.

MADHU SUDAN SEN *v.* KAMINI KANTA SEN (3) *and* NABU MONDAL *v.* CHOLIM MULLIK (4) *relied on.*

Mere long continued possession cannot give rise to a presumption of transferability.

This was an appeal against the decision of H. Foster, Esq., District Judge of Gya, dated the 18th March 1915, reversing the judgment of Babu Romesh Chandra Sur, Munsif of Aurangabad, dated 29th June 1914.

The facts out of which the appeal arises are briefly as follows :—

The Plaintiffs are the admitted proprietors of Mauza Mawahar. Defendant No. 2 holds a *jagir* tenure in the said Mauza. The Plaintiff's case is that there is a piece of homestead land upon which there stands a hut made of mud walls and thatched roof outside that *jagir* of Defendant No. 2 and that Kuber Misser, one of the successors of the original tenant who was holding the land for about 50 years made a gift of it to Defendant No. 2, who in his turn sold it to the Defendant No. 1 and that as the original tenant had no transferable interest in the land, Defendant No. 1 is liable to ejectment. The Defendant contended *inter alia* that the original tenant had a perfect right to transfer the land and the house. It is admitted that the original lessee was admitted into the land by Plaintiff's ancestor about 50 years ago and that the tenancy is heritable and that no rent was ever paid for the lands. The Munsif held that the original tenant had no transferable interest in the land and gave a decree in favour of the Plaintiff. The District Judge on appeal reversed the judgment and dismissed the suit. The Plaintiffs thereupon preferred this second appeal.

Messrs. Gangadhar Das and *Sivanandan Ray* for the Appellants.

Mr. Ganesh Dutt Singh for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MULLICK, J.—The Defendant No. 2 holds a Jagir tenure in Mauza Mawahar of which the Plaintiff is the admitted proprietor. Outside that Jagir is a piece of homestead land upon which there stands a hut consisting of mud walls and thatched roof. The Plaintiff alleges that Kuber Misser, one of the successors of the original tenant, made a deed of gift of this land to the Defendant No. 2, that Defendant No. 2 sold it to Defendant No. 1 and that as neither the original tenant nor Defendant No. 2 had any transferable interest in the land, Defendant No. 1 is liable to be ejected. It is admitted before us that no rent has ever been paid for the land, that the original lessee was admitted into the land by Plaintiff's predecessor about 50 years ago, *i.e.*, before the Transfer of Property Act came into operation and that the tenancy is heritable.

The Plaintiff's case is that the original lessee was a tenant-at-will. The Defendant No. 1 in his written statement made an allegation that Saligram Misser, one of the successors of the original tenant, became absolute owner of the house

(2) 15 W. R. 274 (1871).
(3) I. L. R. 32 Cal. 1023 : s. c. 9 C. W. N. 895 (1905).
(4) I. L. R. 25 Cal. 896 : s. c 2 C. W. N. 405 (1898).

and sold it to him. He denies the title of Kuber Misser but asserts that even if Kuber Misser transferred the house to Saligram by a deed of gift, as alleged by Plaintiff, he had a perfect right to do so as the tenancy is transferable. The learned Munsif found that Saligram had no transferable interest in the land, and decreed the suit.

In appeal the learned District Judge adopted a line of reasoning which does not commend itself to us. He found that Kuber Misser transferred his Jagir tenure to Saligram by a deed of gift, dated the 13th September 1911, together with the homestead land in suit. He was of opinion that on the analogy of sec. 182, Bengal Tenancy Act, which empowers a raiyat who holds homestead land in a village otherwise than as a part of his holding to acquire occupancy right in that homestead now in suit is entitled to hold it on the same terms as the Jagir tenure. He accordingly held that in the absence of evidence to the contrary, the onus in respect of which was upon the Plaintiff, Kuber Misser's interest was transferable. It is admitted on both sides that this argument is fallacious. Before us the case of adverse possession weakly suggested in the written statement has been abandoned and the parties have narrowed the dispute to the issue whether the original lessee had a transferable interest. According to Plaintiff Kuber Misser was the last heir of the original grantee and made a deed of gift in favour of Saligram. According to Defendant No. 1 Kuber Misser had no title at all and Saligram was the last heir.

The learned Munsif has not considered it necessary to determine whether Kuber or Saligram was the last representative but he has decreed the suit on the ground that the original grantee had not a transferable interest. In my opinion this decision is right.

The cases of *Benee Madhub* v. *Joykissen* (1) and *Durga Pershad Misser* v. *Bindaban Sookul* (2), are in favour of the Defendant and would support the argument that before the Transfer of Property Act a lease of a plot of land given for residential purposes was by the custom of the country transferable, but the correctness of this proposition which is based on a dictum of Sir Barnes Peacock is now doubted and the effect of the recent decisions is that when a landlord sues a person on the allegation that he is a trespasser and that person sets up a transfer from a tenant, it is for the latter to prove, first of all, the tenancy and secondly the validity of the transfer.

With regard to tenancies of homestead land created before the Transfer of Property Act the tendency of these decisions has been to establish that in the absence of evidence to the contrary, the burden of proof being upon the tenant, these tenancies were non-transferable. The decision of Maclean, C. J. in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (3), is clear authority upon this point. The only exception made to the above rule is when there has been an erection of *pucca* buildings or a standing by on the part of the landlord while the tenant spends a large sum upon the land. See the reference and judgment of Rampini, J., in *Nabu Mondal* v. *Cholim Mullik* (4), where the previous authorities are fully reviewed. In any event mere long continued posses-

(1) 12 W. R. 485 (1869).
(2) 15 W. R. 274 (1871).
(3) I. L. R. 32 Cal. 1023 : s. c. 9 C. W. N. 895 (1905).
(4) I. L. R. 25 Cal. 896 : s. c. 2 C. W. N. 405 (1898).

sion cannot give rise to a presumption of transferability.

In the suit before me although possession and heritability for more than 50 years has been proved, there is no evidence of custom or of the building of permanent buildings or a standing by to take the case out of the operation of the ordinary rule. I think therefore that the decree of the learned Munsif is right and that the original tenant had no transferable interest. Defendant No. 1 is therefore a trespasser and is liable to be ejected. I would decree the appeal and restore the judgment of the Munsif with costs throughout.

KINGSFORD, J.—I agree.

A. K. R. *Appeal allowed.*

PATNA HIGH COURT.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 7 OF 1916.

ROE, J
JWALA PRASAD, J.
1916,
25, May.

DEBI MAHTO, Petitioner,
v.
KING EMPEROR.

Application for succession certificate—Allegations false—Enquiry under sec. 476, Criminal Procedure Code (Act V of 1898)—Order for prosecution under secs. 193 and 209, Indian Penal Code (Act XLV of 1860)—Appeal pending in High Court—Stay of criminal proceedings.

In the course of a proceeding upon an application for revocation of the grant of a succession certificate, the District Judge found that D, the Applicant for the certificate, was not, as he alleged, related to the deceased in any way and ordered his prosecution under secs. 193 and 209, I. P. C. D then filed an appeal to the High Court and asked for stay of criminal proceedings pending the hearing of the appeal:

Held—*That to make a declaration in the rule for stay of proceedings as to the correctness or otherwise of the order of the District Judge would be to prejudge an issue which is likely to come before the Bench who will hear the appeal. The proceedings against the Appellant under secs. 193 and 209, I. P. C., were stayed pending the hearing of the appeal.*

This application was for stay of criminal proceedings directed to be taken against the Petitioner by an order of G. T. Monahan, Esq., District Judge of Saran, dated 16th March 1916.

The facts out of which this case arises are shortly as follows:—

On the death of one Raghunath Mahto, Debi Mahto applied to the District Judge of Saran for getting a certificate under the Succession Certificate Act of 1889 for the purpose of collecting the debts due to the deceased and he obtained it on 21st June 1915. Thereupon one Sadhu Mahto applied to the said Court for the revocation of the certificate granted to Debi Mahto on the allegations that Debi Mahto was in no way related to the deceased and was not entitled to get the certificate. The District Judge of Saran revoked the certificate already granted to Debi Mahto by his order, dated the 16th March 1916, and he further passed an order under sec. 476 of the Code of Criminal Procedure directing the prosecution of Debi Mahto under sec. 193 of the Indian Penal Code read with sec. 6 (2) of the Succession Certificate Act (VII of 1889) and 209 of the Indian Penal Code. Debi Mahto preferred an appeal F. A. No. 108 of 1916 to the High Court against the order revoking the grant of certificate and obtained the present rule for stay of criminal proceedings pending the disposal of the appeal.

Mr. Rajendra Prasad for the Appellant, Petitioner.

The JUDGMENT OF THE COURT was as follows:—

In this case one Debi Mahto applied

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REPORTS (See Index).

Id-ul-fitr.

The High Court will be closed on account of Id-ul-fitr on Tuesday and Wednesday the 1st and 2nd August.

Title in Government Currency Notes by delivery.

A Government currency note is in legal view money and does not stand upon the footing of other chattels; it is like the current coin of the realm a legal tender and a person receiving it *bonâ fide* acquires a perfectly valid title to it, the property passing by mere delivery. In the interests of commerce and the security of human dealing nothing short of fraud in taking an instrument payable to bearer will engraft an exception upon this rule. This question was judicially determined by the Madras High Court as far back as the year 1873 in the case of *The Collector of Salem*, 7 Mad. H. C. R. 233.

The same question arose in a recent Bombay case decided by Batchelor and Hayward, JJ., I. L. R. 40 Bom. 186. One Peter George, who was the Judicial Clerk in the Court of one of the Presidency Magistrates of Bombay, in his official capacity, came into possession of property which consisted of Government currency notes and cash. He abstracted nine currency notes of the value of Rs. 100 each. He purchased gold ornaments from a goldsmith and tendered in payment one of the one hundred rupee notes which he had stolen. The goldsmith not having sufficient money to cash the note took it to a neighbouring shopkeeper who cashed it in good faith. In the course of the investigation the note was attached by the police from the custody of the shopkeeper, and the Magistrate, who tried and convicted Peter George, ordered it to be delivered to the Crown. Their Lordships held that there being no allegation of any bad faith or fraud on the part of the shopkeeper, it was a case for the application of the general rule that property in a currency note passes by mere delivery and the shopkeeper obtained a good title to the note notwithstanding that Peter George had no title.

The same view was taken by the Calcutta High Court in the case of *Empress* v. *Joggessur Muchi*, I. L. R. 3 Cal. 379. Here a Government currency note was stolen from A and cashed by B in good faith for C. On the conviction of C for theft the Magistrate ordered the note to be given to B. Their Lordships Ainslie and McDonnell, JJ., held that as the note in question came honestly into the hands of B, the Magistrate was right in ordering it to be delivered to him. It is worthy of note in this connection that there are cases in which money cannot be recovered by the rightful owner from a person who has obtained possession of it. The passing of property by mere delivery is one of the incidents attaching to a payment of current coin and the rule cannot apply where the money passing from one hand to another is not current coin of the realm and is neither by statute nor by the law of merchants a legal tender. *In re Mathur Lalbhai*, I. L. R. 25 Bom. 702.

Lawyers in Politics.

An outcry has been raised in England by some interested persons against the influence of lawyers in the Councils of the Empire and an echo of the same prejudice is voiced in this country as well amongst the same class of people. The following extract from the

English *Law Journal* will show that in all constitutional countries the influence of lawyers is bound to grow in the ordinary fitness of things.

"Of more than usual interest to English lawyers is the nomination of Mr. Hughes as the Republican candidate for the Presidency of the United States. Not only is he, like Dr. Wilson, a lawyer; he has resigned his seat in the Supreme Court of America—probably the most powerful judicial tribunal in the world—to accept the candidature. This is the first time in American history that a member of the highest Court in the country has abandoned his judicial duties to fight the Presidential battle. It shows that the American people have not been affected by the recent criticisms of the 'lawyer-politician' in England. They have always shown, indeed, a remarkable readiness to entrust their destinies to legal hands. The United States have had twenty-seven Presidents, and no fewer than eighteen have been lawyers. These lawyer-presidents, to give their names in chronological order, are: John Adams, Thomas Jefferson, James Monroe, John Quincey Adams, Andrew Jackson, Martin Van Buren, John Tyler, J. K. Polk, Franklin Pierce, James Buchanan, Abraham Lincoln, R. B. Hayes, C. A. Arthur, Grover Cleveland, Benjamin Harrison, William McKinley, W. H. Taft, and Woodrow Wilson. Nearly all the men who have exercised a strong influence upon the destinies of the American people have been members of the legal profession. Alexander Hamilton, James Wilson, John Marshall, Daniel Webster, and James Colborne, who, though they never occupied the office of President, played a conspicuous part in the history of the United States, were all lawyers. In no country, indeed, have the creative qualities of the legal mind been better displayed."

PLEADINGS AND PROOF IN CONSPIRACY CASES.

It is a well-established principle of criminal law that the object of a conspiracy must be proved as laid in the indictment. So pleadings in a conspiracy case are always of great importance. Chief Justice Tindal held that if a conspiracy is indefinite or unascertained, *e.g.*, to cheat such persons as they may chose, the accused are entitled to be acquitted. But although the object of a conspiracy must be definitely pleaded, it is not necessary to plead the particulars of the means by which the object of the conspiracy was sought to be accomplished. This principle is well illustrated by some leading English cases.

The case of *R.* v. *Gill*, 2 B. and Ald. 204 at 206 deals more with the pleadings in cases of conspiracy than with the other elements of the law of conspiracy. It is laid down there that conspiracy being the gist, it is the end that has got to be proved and the means is but a matter of evidence. In this case the conspiracy was alleged to be one for the obtaining of money by false pretences. It was held there that it is not necessary to set out the false pretences in the charge, for such pretences did not constitute the offence, the offence being the end agreed upon, *i.e.*, the criminal combination to cheat.

R. v. *Aspinall* (2 Q. B. D. 48) lays down the law in similar terms. It says that "the offence of criminal conspiracy is complete the moment agreement is made." As to pleadings it lays down that although pleading in general terms such as "conspiracy to cheat by false pretences (without getting out particulars) is good yet that "total omission of essential averments" is fatal to the case for the prosecution. Further that when the averment has not been proved, the charge will fail.

Evidence of Conspiracy. Sec. 10, Evidence Act.

As regards the proof of conspiracy, the Indian Evidence Act no doubt makes a specific provision, but furnishes little guidance to the procedure to be followed by the prosecution in proving a case of conspiracy.

Sec. 10 contemplates that general evidence of conspiracy to commit an offence must be given to start with and if such evidence furnish "reasonable ground for the belief that two or more persons have conspired" then you can give evidence of anything said done or written by any one with reference to the common intention of the conspiracy both for proving the conspiracy as also for connecting persons with the conspiracy.

Woodroffe in his Commentary says that the preliminary issue in every case of conspiracy is "are there reasonable grounds for its existence" and if there is a sufficient ground to believe in its existence then evidence to connect other persons with the conspiracy may be given.

This has been expressed by other learned authors of the law of evidence by saying that the conspiracy is the *corpus delicti*, the participation of accused persons is independent matter which may or may not exist (see Best, Russel, Taylor).

Woodroffe says again " after the existence of conspiracy has been established the particular defendants must be proved to be parties to it (Evidence Act, 5th Ed., p. 155, also see Roscoe, 12th Ed., 374).

Mayne also quotes in his Criminal Law (3rd Ed., p. 514) with approval from Archbold (p. 1422) the rule of evidence that " before you give in evidence the acts of one conspirator against another, you must prove the existence of the conspiracy and that the act was done in furtherance of the conspiracy."

The only difference between the English Law relating to conspiracy and the provision in sec. 10 of the Indian Evidence Act consists in the expression " in reference to " being substituted for " in furtherance of." The former makes the scope of sec. 10 somewhat wider but that does not make any difference in the mode of proving a conspiracy (see Encyclo : Laws of England, Vol. III, " Conspiracy," p. 289.) Intercommunication of intention is the *sine qua non* of conspiracy.

When existence of conspiracy is proved, the acts, writings, words of one conspirator in reference to the common purpose are admissible against others even if absent (Encyclo : Laws of England, 86). But detached declarations of strangers or others than the Defendants is hearsay and inadmissible.

General evidence of conspiracy must precede and connection of each accused with the conspiracy must be proved then (*R.* v. *Queen Caroline*, 2 Brod. and Bing. 284 at p. 310).

An inversion of the procedure is sometimes permitted as a matter of convenience but the chief essential, the proof of preconcert, can never be dispensed with.

It is also permissible to prove conspiracy against persons other than Defendants first but Defendant's complicity with it must be proved then by act or declaration. (Roscoe, p. 371).

In *Queen Caroline's* case above referred to (2 Brod. and Bing., p. 310) it is laid down that if the opening of the counsel for the prosecution does not disclose that there is evidence of conspiracy or complicity of the accused with it, the Judge ought to stop the case for, says Abbott, C. J., it would be waste of time to proceed with the trial.

So it is not merely a matter of pleading but it is no less a rule of law that *the object of the conspiracy must be proved as laid down in the indictment* (see Roscoe, p. 377).

CURRENT INDIAN CASES.

(CRIMINAL.)

Criminal Procedure Code, Act V of 1898, sec. 403.

EMPEROR *v.* JIVRAM DANKARJI, I. L. R. 40 Cal. 97.

The accused was convicted under sec. 471, I. P. C., of using as genuine a forged document. He was previously tried and acquitted under secs. 467 and 109, I. P. C., on a charge of abetment of forgery in relation to the same document in respect of which he was subsequently charged under sec. 471, I. P. C.

Held—That the case fell under sec. 235, sub-sec. (*1*) of the Code of Criminal Procedure and consequently under sub-sec. (*2*) of sec. 403 and the previous acquittal was no bar to the subsequent trial.

Indian Penal Code—Right of private defence.

EMPEROR *v.* BECHUR ANOP, I. L. R. 40 Bom. 105.

When both sides voluntarily and deliberately engage in fighting, it is not open to a member of either party to claim the right of private defence.

(CIVIL.)

Transfer of property—Vendor and purchaser.

GANGABAI *v.* SONABAI, I. L. R. 40 Bom. 69.

When a person has two estates, one larger and the other smaller, and purports to convey the entire property without any words of limitation, he must always be taken to convey the highest estate he has.

Civil Procedure Code, sec. 115.

BAI ATRANI *v.* THAKUR KUNUER, I. L. R. 40 Bom. 86.

In a suit pending before him the Subordinate Judge on the application of the Plaintiff granted a temporary injunction against the Defendant but afterwards dissolved it. Against this order the Plaintiff appealed to the District Judge who granted a temporary injunction. Against this order of the District Judge an application in revision was filed in the High Court.

Held—That the application was competent under sec. 115, C. P. C.

Indian Divorce Act (IV of 1869).

MINNIE WALLACE *v.* SERGEANT-MAJOR ARTHUR WALLACE, I. L. R. 40 Bom. 109.

The proper Court to entertain an application

for alimony or maintenance and education of children by the successful Petitioner in a suit for dissolution of marriage under the Indian Divorce Act in which the District Judge's decree *nisi* was confirmed by the High Court is the Court of the District Judge and not the High Court.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before WOODROFFE and CHAUDHURI, JJ. APPEAL FROM APPELLATE DECREE NO. 1398 OF 1914. SRIMATI DASYA, Plaintiff, Appellant *v.* UMA CHARAN DAS TIKADAR AND ORS., Defendants, Respondents. 6th June 1916.

Adverse possession—Co-owner—Mere exclusive possession for statutory period by one co-owner, if amounts to adverse possession against other co-owner.

This appeal arose out of a suit brought by the Plaintiff-Respondent for recovery of possession of land on establishment of Plaintiff's title thereto. Sarup Chandra Das died leaving three sons, *viz.* Sadhuram, Madhusudan and Dwarka. They lived in joint mess and jointly possessed the properties inherited from their father; they died without leaving any children and their properties were inherited by their respective widows, *viz.*, Tirthamoni, Santamoni and Nrityamoni, who too lived in joint mess and *ijmali* possession of those properties. Plaintiff based her title upon a *patta*, dated the 20th April 1906, executed in her favour by the two elder widows by which Plaintiff got two-thirds share of the lands in suit and other lands. The present suit was instituted on the 9th January 1912. The defence, *inter alia*, was that Dwarka and after his death his widow Nrityamoni had been in exclusive possession of the lands in dispute and that Sadhuram and Madhusudan predeceased their father and they had no title to these lands.

It was proved on Plaintiff's side that all the three widows granted a *patta* to one Jadab Chandra Das, on the 18th March 1905, in respect of a portion of the lands in suit.

The Court of first instance found in favour of the Plaintiff both on the question of title and limitation, and held that Sarup died leaving three sons and the three widows jointly possessed this *jama* and that the transactions in the name of Dwarka alone could not take away the right of the widows Tirthamoni and Santamoni as Dwarka worked as their representative in all matters connected with the properties left by Sarup; the learned Munsif further held on the question of limitation as follows: "the *patta* in favour of Jadab Das was executed on 5th Chait 1311 (B. S.). The question of limitation, therefore, does not arise." The learned Munsif, therefore, decreed Plaintiffs' suit and held "Plaintiff is entitled to a decree for two-thirds share of the entire land but as Defendant No. 1 has been found to be the common tenant, Plaintiff will not get *khas* possession but will get possession through Defendant No. 1."

The learned District Judge, on appeal, agreed with the findings of the Munsif but dismissed the Plaintiffs' suit on the question of limitation and held as follows: "If the cosharers were in active joint possession certainly no limitation would run and if there had been a partition it might run against one and not against another. But the point in this case is, that though the family was joint, the Plaintiff and her predecessors have shewn, that for over 12 years, another sharer the widow of Dwarka has held in the particular land in suit a sole possession which can only be treated as adverse."

The Plaintiff then preferred this second appeal to High Court; and in support of the arguments on her behalf the case of *Jogendra Nath Roy* v. *Baladeb Das Marwari*, 12 C. W. N. 127 : s. c. I. L. R. 35 Cal. 916 was cited.

Held, that the Court of Appeal below had taken an erroneous view of the law, that mere exclusive possession by one co-owner for over 12 years would not amount to adverse possession against other co-owners and such possession, under the common title of one co-owner, would not be presumed to be adverse to other co-owners but would ordinarily be held to be for the benefit of all. Plaintiffs' suit was decreed and the decree of the Munsif was restored.

Babu Hemendra Chandra Sen for the Appellant.

None appeared for the Respondents.

H. C. S. *Appeal allowed.*

for a succession certificate in the matter of the estate of one Raghubir Mahto. This certificate was granted *ex parte*, but upon the application of one Sadhu Mahto was subsequently revoked. In the course of proceeding upon Sadhu Mahto's application for revocation, the learned Judge found, not only that Debi's allegation that he was the nearest heir of M. Raghubir was not proved, but also that it was conclusively shown that Debi Mahto was not related to Raghubir in any way. He therefore ordered enquiry under sec. 476 to be made and, on the result of that enquiry, directed the prosecution of Debi Mahto under secs. 193 and 209.

Debi Mahto has filed an appeal to this Court, one of the grounds of the appeal being, that the finding of the learned District Judge on the essential issue of fact was an erroneous finding. He now comes to this Court with a prayer that the proceedings in the Magistrate's Court at Saran in the matter of the prosecution of Debi Mahto be stayed, pending the result of the appeal to this Court. No one appears against the rule issued upon the District Magistrate. The District Magistrate has himself written showing cause why the application should not be granted. In the course of that letter he says that in view of the fact "that justice delayed means too often justice denied," and in view of the fact that there is a danger of Debi Mahto's tampering with the witnesses for the prosecution, this Court should not interfere with the present proceedings, unless it is patent upon the face of the record that the decision of the learned Judge is wrong. While fully sympathising with the learned Magistrate in his desire to dispose quickly of the cases in the Courts subordinate to him, we must point out that the point of view of the learned Magistrate is clearly a wrong point of view. It may be that this Court should not postpone a prosecution of this nature, if it is satisfied that the finding of the District Judge is clearly right. But to make such a declaration would be to pre-judge an issue which is likely to come before another Bench. That Bench may decide that Debi Mahto's story is true and that he is the nearest heir. Debi Mahto may succeed in his Civil appeal and take out a succession certificate and also suffer rigorous imprisonment for having made an application to do so. We are not prepared to pre-judge the issue by saying that Debi Mahto's appeal has no chance of success. We order that the proceedings against him under secs. 193 and 209 be stayed, pending a final finding of fact by this Court.

That this was the view taken by the District Judge is clear from the order made by him on the 14th April 1916, in which he says that Debi Mahto, if he wishes the proceedings to be stayed, should appeal and obtain an order from the Appellate Court staying proceedings.

We note that proceedings in regard to this matter have also been taken against Ambica Lal and Mahadeo Rai, on a charge of abetting the institution of a false proceeding under sec. 209 read with sec. 100. We direct that this proceeding be also stayed, pending the hearing of the appeal of Debi Mahto.

We direct the Registrar to take such steps as may be necessary for expediting the Civil Appeal of Debi Mahto.

A. K. R. *Rule made absolute.*

PRIVY COUNCIL.

[Appeal from the Chief Court of Lower Burma.]

Viscount Haldane. Sir John Edge. Mr. Ameer Ali. Sir Lawrence Jenkins.	1916, Heard, 23, 24, 28, 29, February, and 1, March. Judgment, 15, May.	Mahomed Ismail Arif and others, Appellants, *v.* Hajee Ahmed Moolla Dawood and another, Respondents.

Mosque for public worship, established by people of particular locality, and controlled by them—Court's functions in settling a scheme for carrying on the trust—Wide discretion of Kâzi in cases of public trusts—Exclusive control of public trust, if may be claimed by any particular group of worshippers—Founder's wishes and history of trust, and changing conditions, effect to be how far given to each—Control by indeterminate and fluctuating body, if desirable—Court's power to establish a committee of control appointed by itself—Court's power to frame rules for their guidance and for appointment of mutwallis—Civil Procedure Code (Act XIV of 1882), sec. 539—Court's power under—Question for consideration in such suit—Public interest to be preferred to individual claims to management.

The Mussalman law, like the English law, draws a wide distinction between public and private trusts. Generally speaking, in case of a wakf *or trust created for specific individuals or a determinate body of individuals, the Kâzi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kâzi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.*

In giving effect to the provisions of sec. 539 of the Civil Procedure Code of 1882, and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future:

Held *(on the evidence)—That the mosque in Rangoon, commonly known as the Sunni Juma Musjid, was a public mosque, dedicated at its original foundation to the performance of worship by all Sunni Mahommedans.*

That a trust deed of 1872 which provided inter alia *that its management should remain exclusively in the hands of people who came from Randher (Randherias) did not create a new dedication, but the mosque remained as before a public mosque.*

That in a suit under sec. 539 of the Civil Procedure Code, for settling a scheme of worship in respect of the mosque, the matter for the Court's consideration was not the determination of conflicting rights of management of Randherias and other

MAHOMED ISMAIL ARIF *v.* HAJEE AHMED MOOLLA DAWOOD.

sections of Mahommedans, but what would be the best method for fully and effectively carrying out the purpose for which the trust was created.

That having regard to the fact the mosque was originally founded by a Randheria, that the bulk of the money for the purchase of land had come from Randherias, that the management of the mosque had been throughout in the hands of Randherias and it was not shown that the latter had mismanaged the trust or committed any dereliction of duty or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers, the Randheria section of the worhippers—all other conditions being equal—were, in the discretion of the Kâzi, preferably entitled to the mutwalleeship *of the mosque.*

In view of the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, such as a Punchayet or Jamaet, the Judicial Committee directed that the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which should be in the discretion of the Judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances did not vary, a majority of such committee should be Randherias; and that in settling the scheme, the Judge should lay down rules for their guidance in the discharge of any supervisitorial functions that it might appear necessary to confide to them and for filling up vacancies on their body subject to his control.

Appeals from the Chief Court of Lower Burma (Sir Charles E. Fox and Hartnoll, JJ.), reversing a judgment of Robinson, J.

The suit was instituted under sec. 539 of the Code of Civil Procedure for the settlement of a scheme to manage a Mahommedan mosque. The Plaintiffs claimed that the management ought to be vested in a Committee of Randheria Mahommedans only. The Defendants on the other hand claimed that all Sunni Mahommedans residents in Rangoon were entitled to have a voice in the administration of the mosque. The facts of the case are fully stated in their Lordships' judgment. The trial Judge allowed the Plaintiffs' claim but the Appellate Court dismissed it and gave effect to the Defendants' pleas.

Sir Robert Finlay, K. C., Mr. Arthur Page and *Dr. Abdul Majid* for the Appellants submitted that it was the intention of Moolla Hasim the founder of the mosque that the mosque should be managed entirely by the Randherias and that the provisions of the indenture of the 16th March 1872 were in furtherance of that intention. The founder was a Randheria; the lands on which the mosque was built were purchased by the Randherias, the bulk of the fund for the mosque was almost wholly provided by the Randherias and from the date of the construction of the mosque in 1854 up to the date of the suit the mosque has always been managed and controlled by the Randherias alone. If framing a scheme of management the Court ought not to depart from the intention of the founder and the unbroken usage. The Appellants conceded that it was a public mosque in which all Sunni Mahommedans had the right to worship without restriction. But such worshippers had no right in the management of the mosque. The Court was doing what a Kazi would have done if he were administering the Mahommedan law. Reference

was made to the following authorities: *Gulam Rahumtulla* v. *Mahomed Akbar* (2) and *Advocate-General* v. *Fatima Sultani Begam* (3). Ameer Ali's Mahomedan Law, pp. 337-8, 452 and 476.

The case of *Ibrahim Ismail* v. *Abdul Karim* (1) had no application to the facts of the present case.

Mr. A. M. Dunne and *Mr. Coltman* for the Respondents submitted that the view taken by the Appellate Court was right. The case now made on behalf of the Appellant was new. In the Courts below the Plaintiffs claimed an absolute right under the deed of 1872. There was no suggestion that there was a usage or rule of succession which regulated the appointment of the managers of the mosque. Assuming that the point was open to the Appellants there was no such rule of succession proved as confined the management to the Randherias only. The *wakf* was not made for Randherias only, but it was a trust for the benefit of all Sunni Mahommedans. The whole congregation for the time being ought to have a voice in the management. The case was not distinguishable from that of *Ibrahim Ismail* v. *Abdul Karim* (1).

Mr. Page replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—The suit which gives rise to these consolidated appeals was brought in the Chief Court of Lower Burma in its original civil jurisdiction, under the provisions of sec. 539 of Act XIV of 1882, for the appointment of trustees and the settlement of a scheme of management in respect of a mosque, situated in the city of Rangoon. The Plaintiffs in the action are five Mahommedan worshippers at the mosque, who trace their origin to a place called Randher, said to be a suburb of the city of Surat in the Bombay Presidency, and in the earlier stages of these proceedings they appear to have claimed it as a Randheria mosque. It is, however, conceded now that it is a public mosque dedicated to the performance of religious worship by all Sunni Mahommedans without restriction as to place of origin, and that it is commonly known as the Sunni Juma Masjid.

To explain the contest between the parties it is necessary to give a short summary of the circumstances that have led to this unfortunate litigation. Like many other places in Burma, Rangoon is inhabited by a large number of Mahommedan emigrants from various parts of India who have domiciled themselves in the country for purposes of trade, and are generally known by the names of the towns or villages whence they originally came. For example, the Plaintiffs, as already stated, derive their origin from Randher and, therefore, call themselves Randherias; whilst the larger community of Suratis or Soortees come either from the city or district of Surat. It is necessary to bear this in mind, as the mosque in question is sometimes called the Surati mosque. The Randherias, though trying to differentiate themselves from the others, form in reality a section of the Surati community. They are mostly Voras, and they all profess the Sunni doctrines.

It appears that the site of the present mosque was formerly occupied by a bamboo structure built in 1854 by one Moolla Hashim, a native of Randher. It was dedicated to the same purpose, and bore the same name as the present masonry mosque. Divine worship was performed here by all Sunni Mahommedans

(1) L. R. 35 I. A. 151 (1908)
(2) 8 Mad. H. C. R. 63—67 (1875).
(3) 9 Bom. H. C. R. 19 (1872).

until it was burnt down three years later, when Moolla Hashim replaced it with a building made of wooden planks. This continued to be the public place of worship until 1872, when the masonry mosque was erected.

The land on which the mosque was first built appears to have been afterwards added to by purchases made by Moolla Hashim or by his fellow-townsmen, who made the same over to him as the custodian of the mosque. In 1862 one Moolla Ibrahim, a brother of Moolla Hashim, and two persons of the names of Golam Moideen Moollah and Cassim Azim, obtained from the Government a grant in respect of certain other plots on the express trust "to build and maintain thereon a mosque or place of worship for and to the use of all persons professing the Sunni sect of the Mahommedan religion."

These lands were also added or attached to the existing mosque, and shops were built there to yield an income for its maintenance.

In 1864, Moolla Hashim went on a pilgrimage to Mecca, leaving the management of the mosque in the hands of Moolla Ibrahim and the two persons already mentioned. He returned to Rangoon in 1866, but never resumed his management of the mosque. At this time the person in charge was one Mahommed Hashim Mehtar, who also is said to have been a native of Randher.

In 1870, the Government, finding that no mosque had been built on the lands granted in 1862, and that on the contrary shops had been erected thereon, issued a notice on the grantees to show cause why those lands should not be resumed. A meeting was thereupon held, apparently at the instance of the Randherias, of all the Sunni Mahommedans entitled to worship at the mosque, and it was decided to buy outright from the Government the land, and build on it a proper masonry structure suitable to the growing needs of the community. Although there is some dispute with regard to the contributions of the general body of Sunnis apart from the Randherias, it may be taken as fairly uncontroverted that the bulk of the fund was subscribed by the Randheria section of the worshippers. The conveyance was taken in the names of five persons, named respectively Dooplay, Ariff, Pattal, Mohammed Hashim and Ebrahim Ali Moolla, and these men in 1872, whilst the masonry mosque was in course of building, purported to create a new dedication.

The trust deed bears date the 16th March 1872, and after reciting that it was made between the persons named above, of the one part, and one Mohammed Hashim, representing the general Sunni Mussulman community, of the other part, proceeds to declare that "the pieces or parcels of land upon a certain portion of which the Sunni Jamaet Musjid is erected or is in the course of being built, together with the godowns attached thereto, are solely dedicated for the purpose of divine worship." It then goes on to provide *inter alia* that its management shall remain exclusively in the hands of the Randheria Jamaet (people or assembly).

The five persons in whose names the conveyance stood and who had executed the trust deed appear to have carried on the management for several years; in course of time some dropped out and others came in as trustees. How these men were placed in charge of the management of the mosque is not clear, for apparently no meeting of the Randheria Punchayet was held until 1894, and none between 1894 and 1906, nor in fact had the Ran-

dherias any " organised association " with written rules for the purpose of giving effect to the wishes of their section of the community.

Matters remained in this condition until 1908, when disputes arose regarding the validity of the election of one Hashim Yacub Ally as a trustee in place of another Randheria, who had died the year before. It was in consequence of the quarrels among the Randherias themselves in connection with the election or appointment of this man, that the present suit was launched in the Chief Court of Lower Burmah. The original Defendants to the action were four persons who were actually managing the mosque as trustees, but the validity of whose appointment as such was impugned by the Plaintiffs. In addition three others were joined as Defendants ostensibly to represent the Randheria section, but in reality, as the trustee Defendants charge, to represent the Plaintiffs' faction.

On the institution of the suit notices were issued by the Court under sec. 30 of the Civil Procedure Court to all persons entitled to worship at the mosque. Thereupon Defendants 12 and 13, representing the general body of Sunni worshippers, and Defendants 8 to 11 claiming to represent the Surati community, and 14 to 17 the other Randherias appeared and applied to be joined as parties. Each set of Defendants has filed a separate defence. Although the trustee Defendants deny the Plaintiffs' allegation that the mosque in question is a Randheria mosque, and affirm the validity of their and Hashim Yacub Ally's appointment as trustees, they associate themselves with the Plaintiffs and their Randheria co-Defendants in claiming that the right of management of the mosque belongs exclusively to their party. And they ask that the scheme, if any is to be framed, should be framed on that basis.

The Defendants 12 and 13, who represent the general body of worshippers, controvert in substance the right of the Randherias to a monopoly of the management as opposed to the whole nature of the trust; and they claim that as the mosque is dedicated to the performance of public worship by all Mahommedans of the Sunni persuasion, now that a scheme is proposed to be settled under the direction of the Court they should be allowed a voice in its administration.

The suit proceeded to trial before Mr. Justice Robinson, and the whole dispute centred round two points, *viz.*:—

1. The effect of the trust deed of 1872, and

2. Whether the Randherias should or should not have the sole and exclusive charge and management of the mosque.

The Randherias rested their case on the trust deed of 1872; they contended that it created a new trust and that the founders, namely, the five persons in whose names the land had been purchased from the Government, were entitled to provide that the management should remain exclusively in the hands of their own section of the community. The learned trial Judge states their contentions in the following terms:—

" It is urged that the original mosque was created by a Randheria; that the original grant was revoked and the lands sold outright to Randherias, that they thus became the creators of the trust and were at liberty to make any lawful condition they pleased as to the management of the trust."

And his decision is expressed in these words:—

" The position in 1871, then, was that the five vendees became the absolute and untraminelled owners of these two plots and could do with them as they pleased. . . . They became the owners of the mosque,

shops, and lands, and created a trust of them. It was undoubtedly open to them to manage the trust themselves or to lay down the manner in which it was to be managed, and this they did in Exhibit C."

He accordingly came to the conclusion that the Randheria party were exclusively entitled to the management of the mosque.

On appeal by the Respondents in the first and second appeals respectively, the learned Judges of the Chief Court, differing from the Trial Judge, held in substance that the lands which were purchased by or in the names of the five persons in 1871 were acquired by them as trustees for the purposes of the existing mosque and subject to the trust therefor; and that nothing that took place in 1871 or 1872 had the effect of cancelling, or could in law cancel, the original trust; and that as the original trust was for the benefit of all persons "professing the Sunni sect of the Mahommedan religion," they thought that "all Sunni Mahommedans were entitled to a voice and control of the Juma Masjid, of Rangoon."

The Plaintiffs and the trustee Defendants have appealed to His Majesty in Council, and the same contention that was put forward in the Courts below, based on the document of 1872, has been urged on their behalf. It has further been contended that under the Mahommedan law the Court has no discretion in the matter and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or *mutwallees*. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the Appellants is based on a misconception. The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in case of a *wakf* or trust created for specific individuals, or a determinate body of individuals, the Kâzi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kâzi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.

Illustrations of this rule are to be found in almost every work on Mussulman law. And the authorities lay down that, "were the *wâkif* (the founder) to make a condition that the King or Kâzi should not interfere in the management of the *wakf*, still the Kâzi will have his superintendence over it, for his supervision is above everything."

Their Lordships agree with the Chief Court that the transactions which took place in 1871 and 1872 in no way affected the existing trust, and that the trust deed of 1872 did not create a new dedication; the mosque remained as heretofore a public mosque, dedicated to the performance of worship by all Sunni Mahommedans as originally founded.

In their Lordship's opinion, the real point in issue in the case, owing probably

to the nature of the pleadings, has to some extent been missed by the Courts in India. It has been treated as a question involving the determination of conflicting rights rather than a consideration of the best method for fully and effectively carrying out the purpose for which the trust was created. The suit is brought under section 539 of the Code, which vests a very wide discretion in the Court. It declares (omitting the parts not material to this case) that—

"whenever the direction of the Court is deemed necessary for the administration of any express or constructive trust created for public, charitable, or religious purposes, the Advocate-General, acting *ex officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court, or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

"(*a*) Appointing new trustees under the trust;

"(*e*) Settling a scheme for its management; or granting such further or other relief as the nature of the case may require."

In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future.

In the present case, Moolla Hashim, although he was assisted by several of his compatriots in acquiring the land on which the bamboo mosque was built, was to all intents and purposes its original founder; in 1857, when the bamboo structure was burned down, he replaced it with a plank building; he and his Randheria fellow-townsmen held the *mutwallecship* until 1871. Since that date also the management has been carried on by people belonging to Randher. In 1862, the lands were purchased with money supplied by them; and in 1871 the bulk of the money appears to have come from the same source. It is not alleged that they have mismanaged the trust or committed any dereliction of duty, or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers. In these circumstances it seems to their Lordships, in the exercise of the discretion which the Mussulman law vests in the Kâzi, that the Randheria section of the worshippers, all other conditions being equal, are preferably entitled to the *mutwallecship* of the mosque. With regard to the case of *Ibrahim Ismail* v. *Abdul Karim Peermamode* (1), which has been relied upon on behalf of the Respondents, their Lordships deem it sufficient to say that the facts to which they have referred differentiate it widely from the present case.

The present case, however, in their Lordships' opinion, illustrates the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, whether they call themselves *punchayet* or *jamaet*. In order to avoid so far as possible a recurrence of the trouble that has brought about this long-drawn litigation, their Lordships think it desirable, in the interests of the institution which form the primary matter for con-

(1) L. R. 35 I. A. 151 (1908).

sideration, that the appointment of future trustees should be entrusted to a committee of the worshippers the composition of which should be in the discretion of the Judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias, and that in settling the scheme the Judge should lay down rules for their guidance in the discharge of any supervisitorial functions that it may appear necessary to confide to them and for filling up vacancies on their body subject to his control.

Their Lordships are accordingly of opinion that the orders of the Courts of India should be discharged and that the case should be remitted with the following declaration and directions to the Chief Court of Lower Burma to deal finally with the matter That all other conditions being equal, the Randheria section of the worshippers are preferably entitled to manage and act as trustees of the Sunni Juma Musjid of Rangoon; that the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which committee should be in the discretion of the Court, with due regard to local needs and conditions, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any supervisitorial functions that it may appear necessary to confide to them, and for filling up vacancies on their body subject to its control

As regards the costs in the Courts below, the trustee-Defendants will have their costs out of the funds of the institution, the rest of the parties will bear their own costs.

The parties will bear their own costs of these appeals

And their Lordships will humbly advise His Majesty accordingly

Solicitors *Messrs Bramall* and *White* for the Appellants

Solicitors *Messrs Arnold & Son* for the Respondents

B D *Appeals allowed*

[CIVIL REVISIONAL JURISDICTION]

RULE No 454 OF 1916.

FLEICHER, J.
TEUNON, J.
1916,
30, June.

In re SAROJE BASHINI DEBI, Petitioner.

Succession certificate—Grant to widow—Death of widow—Fresh certificate, application by daughter for—Court fee if must be paid again—Analogy of administration de bonis non, if applies Fiscal statute interpretation of—Succession Certificate Act (VII of 1889), sec 14—Court Fees Act (VII of 1870), Sch I, Art 1

Whenever a fresh succession certificate is taken, even though it is to collect debts for which a succession certificate has already been taken out and the duty paid, the duty prescribed by the Court fees Act must be paid.

R, the widow of a deceased Hindu, took out a succession certificate in respect of certain debts due to the deceased After her death, S, the daughter of the deceased, applied for a succession certificate in respect of the same debt and urged that stamp duty upon the debts having once been already paid by R, she was not bound to pay duty again:

Held—*That it was an application for a certificate within the meaning of sec. 14 of the Succession Certificate Act and Court-fee was payable on it as such:*

One fiscal act cannot be construed by another fiscal act.

IN RE SAROJE BASHINI DEBI.

This was a Rule granted on the 5th June 1916 against an order of A. M. Cuming, Esq., District Judge, 24-Perganahs, dated the 8th May 1916, demanding stamp duty on the certificate in question.

The facts of the case will appear from the order of the District Judge which was as follows :—

" This is an application under Act VII of 1889 by one Sm. Soroj Bashini Debi for a succession certificate in order to collect debts due to the estate of her late father Kedar Nath Banerjee who died on the 29th May 1911, at Baraset, and she further asked for certain reasons, which I will deal with presently, that this certificate should be granted without paying any stamp duty. The facts would appear to be these :—Babu Kedar Nath Banerjee died on the 29th May 1911, leaving surviving his widow one Raksha Kali Debi and the present petitioner. Sm. Raksha Kali Debi the widow took out a succession certificate from this Court in case No. 159 of 1911 to collect the debts due to the estate of the deceased Kedar Nath Banerjee. Sm. Raksha Kali Debi the certificate-holder died on the 28th April 1915 at Bhawanipore and the present application for succession certificate is made by Sm. Soroj Bashini Debi the daughter of late Kedar Nath Banerjee.

" She contends that as stamp duty has already been paid when the first succession certificate was taken out she is not liable to pay stamp duty. She first of all asked that the certificate might be granted by substituting her name for that of her mother. The Succession Certificate Act, as far as can be seen, makes no provision for amending a certificate by substituting the name of a different person. Sec. 12 of the Succession Certificate Act, the only section which deals with the question of amendment, lays down the circumstances in which a succession certificate can be amended. It does not provide for the substitution of one certificate-holder for another. I was therefore compelled to reject the application for the amendment of the certificate by the insertion of the name of the present applicant in the place of the petitioner's mother and to direct her to apply for a fresh certificate.

" There is no question that this certificate should be issued to the present applicant. There is indeed no opposition on this point. The only question to be decided is whether this certificate should now be granted free of duty or whether stamp duty is necessary on the new succession certificate.

" The learned pleader who has appeared for the applicant has contended that the certificate should be granted free of duty under sec. 19 (*c*) of the Court Fees Act (Act VII of 1870). As far as I can see sec. 19 (*c*) far from assisting the case of the applicant is distinctly against her. Sec. 19 (*c*) provides that whenever a grant of probate or letters of administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid therein, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate. It will be noted that sec. 19 (*c*) refers only to grants of letters of administration and probate and as far as I can see it deliberately omits the succession certificate. The reason is not difficult to see. A succession certificate is necessary only for the debts actually due to the estate and it does not cover the whole of the estate. In many cases the debts would probably be small and the whole estate might be very large.

IN RE SAROJE BASHINI DEBI.

and it certainly would not be the policy of the Government to encourage the taking out of succession certificates in cases where the proper course is to take out probate or letters of administration. The fact that the legislature has by express provision exempted a second grant of probate or letters of administration from paying the full fee when the full fee has already been charged but has deliberately made no mention of the certificate granted under the Succession Certificate Act leads me to the conclusion that the legislature did not intend to exempt such certificate from paying proper Court-fee each time that a fresh succession certificate is taken out. It would seem to me to be immaterial that the certificate is taken out for the collection of debts due to the same estate or even for the same debts. Looking at sec. 19 (*c*) of the Court Fees Act, I am of opinion that whenever a fresh succession certificate is taken even though it is to collect debts for which a succession certificate has already been taken out and the duty paid, the duty prescribed by the Court Fees Act must be paid.

"The succession certificate will therefore be granted to the applicant on paying the necessary stamp duty."

Babus Jatish Chunder Hazrah and *Mohesh Chunder Banerjee* for the Petitioner.

Babu Ram Churn Mitter for the Government.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is a Rule calling on the Collector of Alipore and the Government pleader to show cause why, in the circumstances set out in the petition, the order of the District Judge of the 24-Pergunnas demanding stamp duty on the certificate ordered to be granted to the petitioner should not be set aside. The applicant applied to the learned District Judge for a certificate under the Succession Certificate Act in succession to her mother with respect to some Government promissory notes. The mother acquired those promissory notes from the father of the applicant and had taken out a certificate and paid the stamp duty under the terms of the Succession Certificate Act. The argument that has been addressed to us in this case does not turn upon the wording of the statute imposing a duty in favour of the Crown but on a comparison of the duties payable under the Succession Certificate Act and the duties payable on grants of probate or letters of administration under the Court Fees Act. It is said that because in this case a grant *de bonis non* to the daughter could have been made in respect of the property remaining unadministered by the mother if she had obtained letters of administration to the estate of her deceased husband the Court should issue to the daughter a certificate under the Succession Certificate Act free of duty. The short answer to that is that one fiscal act cannot be construed by another fiscal act. The second answer to that is that, under the Court Fees Act, in cases of grant of probate or letters of administration, the Government receives from the applicant a tax upon the whole of the value of the estate passing on the death of the deceased and, therefore, full tax having once been paid on the whole of the estate, the issue of a further grant in respect of the same property or a portion thereof is made without charging any further duty. In the case of a certificate under the Succession Certificate Act, the duty is paid to the Crown only in respect of such debts as the applicant requires the certificate to enforce or collect; no duty is

IN RE SAROJE BASHINI DEBI.

payable to the Crown on the whole value of the estate but usually on the value of a small portion that cannot be got in without the assistance of the Court or without the production of a succession certificate; such as Government promissory notes, stocks in shares in joint stock companies, and similar things. Under the terms of sec. 14 of the Succession Certificate Act, "every application for a certificate or for the extension of a certificate must be accompanied by a deposit of a sum equal to the fee payable under the first schedule to the Court Fees Act, 1870, in respect of the certificate or the extension applied for." It cannot be doubted that the present application comes under those words exactly. It is an application for a certificate and, therefore, a further Court-fee has to be paid. It may be, as the learned Judge pointed out, that the legislature recognising that in cases coming under the Succession Certificate Act, the Crown becomes entitled to a duty on a very small portion of the estate, deliberately drew a distinction between the duties payable on grants of probate or letters of administration and on grants under the Succession Certificate Act. I agree with the view adopted by the learned District Judge. The present Rule must, therefore, be discharged with costs. We assess the hearing fee at two gold mohurs.

TEUNON, J.—I agree.

N. G. *Rule discharged.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 552 OF 1916.

SANDERSON, C. J. WALMSLEY, J. 1916, 23, June.	THE KING-EMPEROR v. NANDA GOPAL ROY, Accused.

Criminal Procedure Code (Act V of 1898), sec. 439—Presidency Magistrate, order of discharge by—Revision by High Court.

The High Court has power under sec. 439 read with sec. 423 of the Criminal Procedure Code to revise an order of discharge passed by a Presidency Magistrate and to direct a further enquiry if there are good reasons for doing so although no question of jurisdiction arises in the case.

Where N, one of several accused persons, was discharged by the Magistrate under sec. 253, Cr. P. C., and the High Court at the hearing of the appeal of the other accused persons who were convicted by the Magistrate directed that the evidence of N should be recorded and in disposing of the appeal took into consideration the evidence so recorded and being of opinion that that evidence could not in some respects be accepted, issued a rule to show cause why the order of discharge should not be set aside:

Held—*That the mere fact that N was called upon to give his evidence in the case did not convert the order of discharge into one of acquittal and did not deprive the High Court of its revisional jurisdiction.*

That in the circumstances of the case the High Court should not set aside the order of discharge inasmuch as the evidence of N which was recorded under orders of the High Court and which was used by that Court for the purpose of coming to the conclusion as to the guilt of the other accused might afford material to the prosecution to support or frame the charge against N and to allow this would

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be contrary to the traditions of justice in criminal cases.

This was a Rule issued on the 23rd May 1916 against an order of discharge under sec. 253, Cr. P. C., passed in the above case by the Presidency Magistrate of Calcutta, Northern Division, on the 23rd November 1915.

Mr. N. G. Roy and three other persons were summoned before the Northern Division Presidency Magistrate who discharged the former under sec. 253, Cr. P. C., and convicted the latter of cheating and conspiracy to cheat. The persons convicted appealed to the High Court. On the appeals coming on for hearing before Chitty and Walmsley, JJ., their Lordships being of opinion that the evidence of Mr. N. G. Roy should be recorded, remanded the case to the trying Magistrate for the purpose. The evidence was duly recorded by the Magistrate and transmitted to the High Court. Their Lordships Chitty and Walmsley, JJ., took into consideration this evidence along with the other materials on the record and dismissed the appeals and passed the following order :—

" In connection with Appeals Nos. 1063 of 1915 and 105 of 1916 disposed of by us to-day we have had to consider the part which Babu Nunda Gopal Roy is said to have taken. We fail to understand how the learned Magistrate came to discharge him before framing charges in this case, and that without giving any reasons for so doing. He has now been examined on oath and has had an opportunity of stating his version of the case in the witness-box; but much of his evidence cannot possibly be accepted. There are strong grounds for suspecting that he was a party to the conspiracy to which we have alluded and we think that it should be properly decided whether he was, in fact, guilty or not. We accordingly issue a Rule upon Babu Nunda Gopal Roy calling upon him to show cause why the order of discharge of 23rd November 1915, should not be set aside and further enquiry made into the case against him."

The Rule came on for hearing before Sir Lancelot Sanderson, C. J., and Walmsley, J.

Preliminary objection was taken on behalf of Mr. N. G. Roy as to the jurisdiction of the High Court.

Babu Atulya Charan Bose for the Crown.

Mr. Chuckerbutty and *Babus Monmotha N. Mukherjee* and *Sailendra Nath Mukherjee* for the Accused.

The JUDGMENT OF THE COURT on the preliminary objection was as follows :—

SANDERSON, C. J.—The facts which are necessary to be stated in order to deal with the point that the learned Counsel has raised are these : This is a Rule which was granted calling upon Mr. N. G. Roy to show cause why the order of the Magistrate discharging him should not be set aside and a further inquiry held with regard to his alleged guilt. It appears that the charge originally made was against Mr. N. G. Roy and three others —as I understand, the charge was, amongst others, a conspiracy to cheat. After hearing the evidence the Magistrate under sec. 253, Cr. P. C., discharged Mr. N. G. Roy. That section runs in this way : "If, upon taking all the evidence referred to in sec. 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

Nothing in this section shall be deemed

to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless." The proceedings went on with regard to the other three accused and in due course they were convicted. They then appealed to the High Court against their conviction, and during the course of the appeal apparently the learned Judges who heard it thought that it was desirable that the evidence of Mr. N. G. Roy should be taken; and, therefore, they remanded the case in order that his evidence should be taken. That evidence was taken and then the hearing of the appeal was continued in the High Court. And, amongst the materials which were considered by the High Court, was the evidence of Mr. N. G. Roy; and, upon considering the materials and the evidence, the High Court dismissed the appeal of the three accused. Then exercising the jurisdiction which had been exercised on previous occasions under sec. 439 the learned Judges directed that a Rule should issue calling upon Mr. N. G. Roy to show cause why the order of discharge should not be set aside and the case against him should not be enquired into again.

Now, those being the facts, it is urged by the learned Counsel Mr. Chuckerbutty, that this Court has no jurisdiction to make the Rule absolute, which means that the Court has no jurisdiction under the circumstances of this case to direct that the order of discharge should be set aside and that the case against Mr. N. G. Roy should be enquired into again.

In our judgment the Court has jurisdiction. We think that as soon as the Magistrate discharged Mr. N. G. Roy, he ceased to be an accused person, and he never would have been an accused person again until proceedings in some form or other had been taken against him. If this Rule were to be made absolute and we were to direct that the order of discharge should be set aside and the case should be inquired into again, then he would become an accused person again. It was admitted, and it could not be denied in view of the decisions—that an order of *discharge* does not operate as an *acquittal*, and I do not understand how the mere fact of Mr. N. G. Roy being called upon to give his evidence in this case can convert the order of discharge into one of acquittal: and, for these reasons I am of opinion that the Court has not been deprived of the jurisdiction which it has under sec. 439 as interpreted by the decision in the case of *Malik Pratap Singh* v. *Khan Mahomed* (1). That case decides that "The High Court has power, under sec. 439 read with sec. 423 of the Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further enquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case."

Therefore, in my opinion, the preliminary point which Mr. Chuckerbutty has taken is not a good one.

I desire to add that his argument really amounted to one contention which was well summarised in the course of his argument, *viz.*, that the calling of Mr. N. G. Roy as a witness amounted to giving him an assurance that no further proceedings should be taken against him in respect of the same charge. We shall have to consider when we hear the case upon the merits whether that is the correct interpretation of what was done in this case and, I am of opinion, that the fact to

(1) I. L. R. 36 Cal. 994; s. c. 13 C. W. N. 1221 (1909).

which Mr. Chuckerbutty has drawn our attention will be one of the materials which we shall have to consider upon the question whether we should in the exercise of our discretion make the Rule absolute.

WALMSLEY, J.—I argee.

[After hearing both sides on the merits of the case their Lordships passed the following JUDGMENT :—]

SANDERSON, C. J.—In this case in my judgment the Rule should not be made absolute.

I think this is a case of considerable importance, although it is not likely that many similar cases will arise in the future. We have already expressed our judgment that this Court would have jurisdiction to make the rule absolute, if we thought right in our discretion to make it absolute. We have given our reasons for that judgment. But under the circumstances of this case, in my jdugment, it will not be right in the exercise of our discretion to make the Rule absolute: and, the reasons for that conclusion may be shortly stated as follows: I do not think that Mr. Chuckerbutty put it much too high, when he summarised the position by saying that in directing this evidence of Mr. N. G. Roy to be taken, in this case, the Court was to a certain extent impliedly informing him that he would not be prosecuted in respect of the charge any further. It must be remembered that the object of the remand was as follows: Mr. N. G. Roy had made a statement before he was discharged by the Magistrate, giving a long account of these somewhat complicated circumstances. Apparently, though I have not read his judgment, the learned Magistrate had relied to a large extent upon that statement in coming to the conclusion that the other three accused were guilty of conspiracy. The learned Judges of the High Court thought that he was not entitled to use that statement made by one who was an accused person at that time against the other three accused, and therefore they directed the case to be reheard and the evidence of Mr. N. G. Roy to be taken on oath: and, if I remember rightly what was read by Mr. Bose as to the directions with regard to the remand, it was expressly stated that Mr. N. G. Roy should be called as a witness, and then he could be cross-examined by the accused or those representing them upon his statement in the witness-box, in order that the Court might be in full possession of the evidence to enable it to do justice in the case. It was not remanded in any sense whatsoever in order to enable Mr. N. G. Roy to try to exculpat himself, because he had already been discharged by the Magistrate, and at that time there was no charge hanging over his head at all. Now, under those circumstances would it be right for this Court to make this Rule absolute? First of all, I have this fact in my mind that when the hearing of the appeal was continued the High Court was in possession of the evidence which had been given by Mr. N. G. Roy. I cannot disguise from myself the fact that in the judgment of the learned Judges reference is made to the evidence of Mr. N. G. Roy, and the conclusion is arrived at that the evidence which he had given could not in some respects be accepted. Further, at the time of granting the Rule it was stated that 'Mr. Roy had been examined on oath and had had an opportunity of stating his version of the case in the witness-box, but much of his evidence could not possibly be accepted.' I think it would be hard for any learned Judge to say whether the evidence given under those circumstances and with such a view expressed about it had or had not any

influence upon his mind when he directed the Rule to issue. At all events, in view of the fact that the evidence was before the learned Judges when the Rule was issusd, can I say that it is clear that the Rule would have been issued just the same if that evidence of Mr. N. G. Roy had not been before them. I am not satisfied that I can say so. Then there is what seems to me a more important view of this case and that is this: although the evidence of Mr. N. G. Roy, given under the direction of the Court, could not be used against him if he were to be retried, there is no doubt whatever that the prosecution are in possession of the evidence which he gave. They know exactly what he said and it may well be that the evidence which he has given may be of considerable assistance to them in framing a case of complicity in the conspiracy against him—I do not say it would; I do not say it would not; it is sufficient for me to say that it may be of considerable assistance in framing their case against him. There is also the other point that his evidence was used by the Division Bench of the High Court for the purpose of coming to the conclusion that a conspiracy had in fact taken place between the three accused who were convicted. The learned counsel for Mr. N. G. Roy has argued that if further proceedings are directed against Mr. N. G. Roy the prosecution would start with this important fact in their favour that a conspiracy between the three convicted men had been established: and, when that fact has been established apparently to some extent by the evidence which Mr. N. G. Roy has himself given under the direction of the Court, I do not think that it would be right under those circumstances to make this Rule absolute.

One further point which I desire to mention is that it is admitted that the statement which Mr. N. G. Roy made before he was discharged could be put in evidence against him, if he were to be tried again, and it is possible, though again I do not say that it would follow as a necessary consequence that some of the answers which he has given in examination by the prosecution or cross-examination by the accused may have afforded material for the prosecution to show that some part or parts of his statement made before he was discharged were unreliable; that is one instance I had in my mind when I said that the evidence may have afforded material for the prosecution for supporting or framing the charge against Mr. N. G. Roy. This, in my opinion, would be contrary to the traditions of justice in criminal cases.

For these reasons I think that this Rule should be discharged.

WALMSLEY, J.—As I was one of the Judges who issued the Rule, I should like to add a few remarks. After thinking over the case I have come to the conclusion that I ought to agree with the learned Chief Justice in holding that the Rule should be discharged. Mr. Chuckerbutty's main argument on behalf of Nundo Gopal Roy, broadly stated, is that under the circumstances it would not be fair to Nundo Gopal Roy for this Court, after having directed him to be examined as a witness, to order him to be prosecuted in the same matter, and it is not possible for me to hold that there are no grounds for taking the view that it would be unfair to the accused, for the reasons which have been given by the learned Chief Justice; I do not wish to repeat them. One other remark I wish to add and that is that in issuing the Rule we had no intention of suggesting that the evidence given by Nundo Gopal, when he

was examined as a witness, was to be used in the proceedings that might be taken against him; and, I very much regret, that the learned Vakil who appeared in support of the Rule should have argued as though he was under the impression that that was our intention. I agree that the Rule should be discharged.

S. C. M. *Rule discharged.*

[CRIMINAL REFERENCE]

REF. No. 73 OF 1916.

MOOKERJEE, J.
SHEEPSHANKS, J.
1916,
24, May.

RAYAN KHAN and anr.
v.
THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec. 122—Surety, enquiry into sufficiency of—Want of sufficient control over accused if good ground for rejecting surety—Delegation of enquiry, if legal.

The question whether a particular person who is offered as a surety is or is not fit within the meaning of sec. 122, Cr. P. C., must be decided by the Magistrate himself and his decision must be based upon evidence taken for the purpose; sureties offered should not be refused except after judicial enquiry.

Sureties should not be rejected merely if they do not show that they have sufficient control over the accused. That is not a valid ground for rejection of a surety.

This was a Reference under sec. 438, Cr. P. C., by C. Tindell, Esq., Sessions Judge, Bankura, dated 13th May 1916, recommending that the order of Mr. H. K. Mullick, Sub-divisional Magistrate, Bankura, dated 11th February 1916, in the above matter, be set aside and the case remanded for judicial inquiry as to the fitness of the sureties offered.

The JUDGMENT OF THE COURT was as follows:—

In a proceeding under sec. 110, Cr. P. C., the Petitioners were directed on the 1st December 1915 to execute bonds for Rs. 200 with two sureties each, to be of good behaviour for one year in some cases, and for three years in other cases—in default to undergo rigorous imprisonment for their respective periods. This order was made by Mr. H. K. Mullick, Sub-divisional Magistrate, Bankura. On the 24th and 26th January 1916, the Petitioners produced two sureties each, who offered to stand as sureties and filed documents of title relating to their properties. On the 28th January the Magistrate recorded the following order: "To Police for enquiry if the surety is fit; forward documents also." As the Police did not submit the report on the day fixed, the case was adjourned. The Sub-Inspector of Police subsequently reported in the following terms: "The proposed sureties are not fit. They have not sufficient control over the accused and they have no sufficient (property) to pay the amount in case of default; so under the circumstances, I cannot recommend this." The Inspector of Police forwarded this report to the Magistrate with the note "not recommended." The Magistrate thereupon recorded the following order on the 11th February 1916. "Rejected. Let them furnish other good surety." The result was that the Petitioners were all lodged in jail. The Sessions Judge has now forwarded the records to this Court with the recommendation that the order of the Magistrate be set aside, on the ground that the sureties were rejected without judicial enquiry by the Magistrate himself.

It is well settled that the question whether a particular person who is offered as a surety is or is not fit, within the meaning of sec. 122, Cr. P. C., must be decided by the Magistrate himself,

and his decision must be based upon evidence taken for the purpose; sureties offered should not be refused except after judicial enquiry. This view is supported by a long line of cases in this Court which are binding upon us and our subordinate Courts. [*Suresh Chandra* v. *Emperor* (1), *In re Abdul Khan* (2), *Akbar Ali* v. *King-Emperor* (3), *Kalu Mirza* v. *Emperor* (4)]. In the case last mentioned, Coxe, J., doubted whether the enquiry might not be delegated to a Subordinate Magistrate. Ryves, J., however, followed what has undoubtedly been the consensus of opinion in all the superior Courts in this country, namely, that the Magistrate should himself hold the enquiry into the fitness of the proposed sureties and cannot call upon other persons to exercise the functions which are entrusted by law to him alone. Amongst the cases in Allahabad, reference may be made to the decisions in *Queen-Empress* v. *Prithi Pal* (5), *Emperor* v. *Tota* (6), *Emperor* v. *Ghulam Mustafa* (7), *Emperor* v. *Balwant* (8) and *Bhabani* v. *King-Emperor* (9). The same view has been adopted in the Court of the Judicial Commissioner of Oudh. *Emperor* v. *Parmeshur* (10), *Ramanand* v. *Emperor* (11) and *Jaygovind* v. *Emperor* (12). A similar view has been adopted by the Chief Court of the Punjab [*King-Emperor* v. *Kaim Khan* (13)] and also by the Court of the Judicial Commissioner of Sind [*Emperor* v. *Mahro* (14), *Emperor* v. *Kamal* (15), *R.* v. *Allahdino* (16), *Emperor* v. *Haji Usman* (17), *Piru Abdullah* v. *Emperor* (18) and *Mahomed Ibrahim* v. *Emperor* (19)]. We accordingly accept the recommendation of the Sessions Judge, set aside the order of the Magistrate dated the 11th February 1916, and remand the case to him in order that he may enquire into the fitness of the sureties offered upon such evidence as may be adduced before him on behalf of the accused. It may be added that as there are several accused persons, each of whom has offered two sureties, the fitness of each person must be separately determined; a general order without investigation of the circumstances of each of the sureties is obviously not contemplated by the law.

As the question of fitness of each surety will be determined by the Magistrate after enquiry, it is not necessary for us to specify the elements to be taken into consideration by him; but with reference to the observation in the Police report that sureties should be rejected if they do not show that they have sufficient control over the accused, we may draw the attention of the Magistrate to the fact that according to the decisions of this Court, this is not a valid ground for rejection of a surety [*Kalu Mirza* v. *Emperor* (4)]. The same view has been adopted by the Bombay High Court in a recent case [*Jivanatha* v. *Emperor* (20)] though a somewhat different view is possibly in-

(1) 3 C. L. J. 575 (1904).
(2) 10 C. W. N. 1027 (1906).
(3) I. L. R. 42 Cal. 706 : s. c. 19 C. W. N. 220 (1914).
(4) I. L. R 37 Cal. 91 : s c. 14 C. W. N. 49 (1909).
(5) [1898] All. W. N. 154.
(6) I. L. R. 25 All. 272 (1903).
(7) I. L. R. 26 All. 371 (1904).
(8) I L. R. 27 All. 293 (1904).
(9) 12 All. L. J. R. 1004.
(10) 7 O. C. 118 ; 1 Cr. L. J. 459.
(11) 11 O. C. 267 ; 8 Cr. L. J. 344.
(12) 15 O. C. 268 ; 13 Cr. L. J. 760.
(13) [1906] P. R. 18 ; 3 Pun. Cr. R. 29[illegible]0.
(14) 2 S. L. R. 11 ; 10 Cr. L. J. 225 (1908).
(15) 2 S. L. R. 15 ; 10 Cr. L. J. 230 (1908).
(16) 5 S. L. R. 57 : 12 Cr. L. J. 410 (1911).
(17) 4 S. L R. 18 ; 11 Cr. L. J. 497 (1910).
(18) 7 S. L. R 94 ; 15 Cr. L. J. 378 (1913).
(19) 8 S. L. R. 178 ; 16 Cr. L. J. 100.
(20) 16 Bom. L. R. 188 ; 15 Cr. L. J. 268 (1914).

dicated in *Queen-Empress* v. *Rahim Baksh* (21) and *Zikri* v. *Emperor* (22).

Let the records be returned.

S. C. M.

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 401 OF 1913.

ATKINSON, J.
KINGSFORD, J.
1916,
11, May.

NAWAGARH COAL COMPANY, LIMITED, Plaintiff, Appellant,
v.
BEHARILAL TRIGUNAIT and ors., Defendants, Respondents.

"Moguli" *rent, meaning of—Presumption of lost grant, in absence of proof of legal title, on the basis of user exercised and enjoyed—Surface rights and subsoil and mineral rights—Distinction between copyholders and tenants of freehold land in England—Construction of the terms "Restrictions and conditions as to the exercise of the power" in mining lease—Limitation—Adverse possession.*

"Moguli" *is a word of doubtful meaning and at the best imports no more than that the rent assessed represents a proportion of the Government revenue.*

Where a Court is asked to presume a grant in favour of a party in the nature of a lost grant, i.e., *a lawful origin of a long and continuous user and enjoyment of property in the absence of legal proof of title, it should presume a grant on the basis of the user exercised and enjoyed by that party.*

Where the mineral rights were never in contemplation of the parties when the lease was granted in 1830 and the lessees never exercised any mineral rights whatsoever barring taking small quantities of coal from the outcrop for domestic purposes and burning lime and the zemindar by the lease granted a village containing 380 bighas at the abnormally low rent of Rs. 17 per annum, the presumption made, in the absence of the original document, was that only the surface rights were conveyed to the grantees.

In such a case the mines and minerals and the property in the subsoil remained the property and in the possession of the zemindar. The surface rights with their incidents became vested in the grantees as tenure-holders.

HARI NARAIN SINGH DEO BAHADUR *v.* SRIRAM CHUCKERBUTTY (1) *and* DURGA PRASAD SINGH *v.* BRAJA NATH BOSE (2) *relied on.*

KUNJA BEHARI SEAL *v.* DURGA PRASAD SINGH (4) *referred to.*

If the mines are presumed to be vested in, and to be the property of, the zemindar, his rights must be just the same as those of a fee-simple freehold owner of land according to English Law, who makes a grant with an express reservation of the mines to himself together with the incidents that follow therefrom. By reason of that presumption and by reason of the severance of the tenement and the reservation that must be deemed to arise in favour of the Raja, the latter has as incident to his right of property and ownership in the mines the right by implication of law to enter upon the surface of the tenure-holder's mouzah for all reasonable and necessary purposes to enable him to work the mines and exercise his mineral rights.

The case of PRINCE MAHOMED BURTYAR SHAH *v.* RANI DHAJAMONI (5) *in so far*

(21) I. L. R. 20 All. 206 (1898).
(22) 8 All. L. J. 785 ; 12 Cr. L. J. 472 (1911).

(1) L. R 37 I. A. 136 : s. c. I. L. R. 37 Cal. 723 ; 14 C. W. N. 746 (1910).
(2) I. L. R. 39 Cal. 696 : s. c. 16 C. W. N. 482 (1912).
(4) I. L. R. 42 Cal. 346 : s. c. 19 C. W. N. 203 (1914).
(5) 2 C. L. J. 20 (1905).

NAWAGARH COAL COMPANY, LIMITED *v.* BEHARILAL TRIGUNAIT.

as it decided that the owner of a limited estate in possession can prevent the grantor or his lessee to work and appropriate the mineral during the existence of such limited estate unless the grantor had expressly reserved the mineral right in his own favour, was wrongly decided by the misapplication of the English Law of copyholds to the case of owners and tenants of freehold land.

The distinction between freehold and copyhold law is that under the latter there is no division into strata and the tenant obtains possession of the entire surface and subsoil to the centre of the earth, so that the lord of the manor cannot work the mines unless he proves a right or custom to that effect. It is only under the copyhold law and where there is no reservation of custom proved that a deadlock occurs and neither landlord or tenant can work the mines. Under the law applicable to freehold land there can be no deadlock, for if the mines be excepted the grantor has an implied right to work them incidental to such exception; if there be no exception then that right is with the grantee as owner of the surface and subsoil.

Where a tenement is severed the person in whose favour the reservation is made is the absolute owner of the subsoil and the rights of such a person are that he has by implication of law the power to go upon the surface and do all things reasonably necessary in order to exercise the enjoyment of his property.

BATTEN POOLL *v.* KENNEDY (7) *and* RAMSAY *v.* BLAIR (8) *referred to.*

Held, *on the construction of a mining lease, that under cl. (3) of Part II of the lease, the lessees had merely power and liberty to enter upon lands in direct possession of the Raja himself in order to exercise the mineral rights vested in them. The implied liberty to enter and work the mines subject to reasonable restrictions is not to be curtailed by the express conditions of the lease unless the intention is apparent. Part III of the lease headed "Restrictions and conditions as to the exercise of the above liberties, powers and privileges" must be construed as only restricting the liberties and privileges expressly conferred by Part II and not as any restriction upon the general right of access which is implied by law.*

EARL OF CARDIGAN *v.* ARMITAGE (9) *referred to.*

Held *also—That the Defendant acquired no title by adverse possession to the mines and minerals of the land in question.*

This was an appeal from the judgment and decree of Babu Prabha Chandra Singh, Additional Subordinate Judge of Manbhum, dated the 4th June 1913, dismissing the Plaintiff company's suit with costs.

The facts of the case were as follows :—

By a registered indenture of lease dated the 2nd October 1899, the Deputy Commissioner of Manbhum as Manager, under the provisions of the Chota Nagpur Encumbered Estates Act, 1876, of the zemindari and estate of Raja Gunga Narain Singh of Katras demised to the Plaintiff company the mines, beds, veins and seams of coal lying and being within and under (*inter alia*) Mouza Kumarjuri. The material portion of the said lease was as follows :—Rights and privileges to be exercised and enjoyed by the lessees but subject to the restrictions and conditions next hereinafter mentioned :

(7) [1907] 1 Ch. 256 (1906).
(8) L. R. 1 A. C. 701 (1876).
(9) 2 B. & C. 197 ; 107 Eng. Rep. 361 (1823).

NAWAGARH COAL COMPANY, LIMITED *v.* BEHARILAL TRIGUNAIT.

1. Liberty and power for the lessees at all times during the term hereby granted to work the said mines and to win and get from the said mines and premises the produce thereof.

2. Liberty and power to dig, sink, drive, make, repair and use all such pits, shafts, drifts, levels, water-gates, water-courses, air-gates and other works as may be necessary or proper for searching for coal, working and getting the said mines and premises and for ventilating and draining the same.

3. Liberty and power to enter upon and occupy such portion of any lands in the direct possession of the lessor as may reasonably be required for the due exercise of the rights conveyed by this lease on payment for permanent occupation of 20 times the annual value of such lands, and for temporary occupation, of such annual value, year by year, as may be determined by the Deputy Commissioner; provided that the lessees will be allowed to hold free of cost all lands being the *khas* property of the lessor which were in possession of the late lessees (the Katras Jherria Coal Company) for the purpose of pits and inclines, the boundaries of such lands in case of dispute to be determined by order of the Deputy Commissioner: Provided further that in case of any other lands being acquired by the lessees from under-tenure-holders in the estate they shall be liable to the lessor for the rents paid to him in respect of such lands at the date of these presents.

4. Liberty and power to take, lead and carry away the coal to be gotten as aforesaid, and the coke to be made and manufactured, under the liberties and powers hereinafter granted and to dispose of the same at will and pleasure and for the said purpose to use any of the private roads of the lessor whether on the lands demised or otherwise.

5. Liberty and power to search for, dig, excavate and remove fire-clay with power to manufacture the same into bricks and with power to sell the same, whether manufactured or not and the lessees shall pay for such fire-clay a royalty of 2 as. per ton.

Restrictions and conditions as to the exercise of the above liberties, powers and privileges:

No buildings or things shall be erected or set up and no other surface operations carried on by the lessees by virtue of the liberties and privileges above granted in or upon any place of worship, sacred grove, burial ground, house, village, site, public road and other place in respect of which on public ground it appears to the Deputy Commissioner of Manbhum that objections exist to so doing, nor in such a way as to injure and affect any building or other works, property or rights of private individuals, nor shall any land be taken or occupied for surface operations if the same is already in the occupation of, or used by, persons other than the lessor for other works, or purposes not included in the present demise if any other lands not so occupied and used are suitable and convenient and equally available for such surface operation.

The Plaintiff company alleged that upon the commencement of the lease the Plaintiff company obtained and had since remained in possession of the premises comprised in the said lease including Mouza Kumarjuri, but that on the 21st March 1911 when the Plaintiff company with a view to extend their coal mining operations in Mouza Kumarjuri proceeded to make borings therein they were forcibly and illegally obstructed by the Defendants from working such borings and from exer-

cising their right of access to their underground rights. Upon these allegations the Plaintiff company asked for the following reliefs :—

(1) That it may be declared that the Plaintiff company is entitled to the underground coal and mineral rights in Mouza Kumarjuri all in accordance with the said indenture of lease of the 2nd October 1899 and that the Plaintiff company, its servants, agents, officers and contractors are entitled to enter upon the said mouza and to prospect for and work coal and do all things needful to ascertain the existence and the limits of the coal under the said Mouza Kumarjuri and work the same.

(2) That the Defendants may be restrained by injunction from hindering or interfering with the Plaintiff company in entering on Mouza Kumarjuri and in prospecting for coal under the said village and doing all things needful for ascertaining the existence and limits of such coal and for working such coal on such terms as this Court thinks fit.

(3) For the costs of this suit.

The Defendants by their written statement denied that the Plaintiff company was ever in possession of the surface or the underground rights in Mouza Kumarjuri and submitted that their claim was barred by limitation. They claimed that the entire Mouza Kumarjuri together with the surface and underground rights was an ancestral revenue-paying *brahmottar* property of the Defendants and they rested their claim on an alleged lease, dated the 9th Choitra 1236 (21st March 1830) executed by Raja Godadhur Singh of Katras, a predecessor in title of the present Raja in favour of Ram Chunder Trigunait, the ancestor of the Defendants. They alleged that by the said lease which was a *moguli brahmottar* grant of the entire Mouza Kumarjuri, they became permanent tenure-holders and that all rights in the surface and in the subsoil in this village were vested in them under and by virtue of that grant and that they had for all purposes in this mouza a permanent and hereditary interest subject to the payment of a small quit-rent of Rs. 17 per annum, and that by that grant they were entitled to exercise all mineral rights in the subsoil and that they were in fact owners of the mines. They also submitted that their underground rights in the mouza were at least not excluded by the said lease and that even assuming that only the surface right was conveyed to the grantee even then the Raja of Katras had no right to limit the Defendant's right of enjoyment of the surface.

At the trial of the suit before the Subordinate Judge the following issues were framed :—

1. Has the Plaintiff any cause of action for this suit?

2. Was the Plaintiff in possession of the underground rights in Mouza Kumarjuri within 12 years from the suit?

2*a*. Is the Plaintiff's claim for declaration of title and injunction barred by limitation?

3. Is the East India Coal Co., Ld., a necessary party to the suit? Can the suit proceed in its absence?

4. Is the Receiver to the estate Behari Lal Trigunait a necessary party and was the Plaintiff bound to obtain permission of the Court?

5. Is the suit maintainable in its present form, regard being had to the provisions of secs. 42 and 54 of the Specific Relief Act?

6. Has the Plaintiff any right to the underground coal and other minerals of Mouza Kumarjuri?

Have the Defendants got any right to the disputed mouza?

7. Has the Plaintiff any right to enter upon any portion of the Mouza Kumarjuri and make boring or other works in connexion with the prospecting for coal and other minerals without the permission of the Defendants?

8. Is the Plaintiff entitled to any relief in this suit?

9. Whether the Defendants or their predecessors had acquired any right or title to the underground minerals in the disputed mouza under the alleged grant or by adverse possession.

The Additional Subordinate Judge held that according to para. 3 of Part II of the schedule attached to the lease the Plaintiff company had liberty to enter upon and occupy such portion of the land as was in the direct possession of the lessor, but as there was no evidence to prove that the lessor was in possession of any portion of the mouza the Plaintiff company was not entitled to enter upon and occupy any portion of the mouza to conduct their mining operation, thereby admitting by implication that otherwise they would be so entitled. Turning next to the question of title the Additional Subordinate Judge refused to admit in evidence the copy of the *brahmottar patta* dated the 9th Choitra 1236, inasmuch as the loss of the original had not been accounted for, but from the evidence of the user he came to the conclusion that the Defendants had *brahmottar* rights to the surface only and not to the minerals. He further came to the conclusion that the Plaintiff company had acquired a title to the minerals in and by virtue of the lease in their favour, but not to the surface.

On an examination of all the circumstances of the case the Additional Subordinate Judge came to the following conclusions, *viz.*, that the minerals belong to the zemindar and any person who derives his title from the zemindar under a lease or grant would not be entitled to the minerals unless there is an express demise of the mines, but in such cases if there is no special reservation in favour of the zemindar to the effect that the minerals would continue to be his or that he would be entitled to work the same, the zemindar though owner of the minerals cannot work the same. The result of this is that where there is an express transfer of the minerals, the lessee or the grantee can work the same and where there is an express reservation of the minerals or their working in favour of the zemindar he would be entitled to work the minerals, but where there is no such provision one way or the other, neither of them would be entitled to work the minerals. It has become the settled law that in the absence of any contract or reservation in the lease the person who is entitled to the minerals would be entitled to work the same only if he is the occupier of the surface and if the owner of the mine is different from the owner of the surface the former cannot work the mines without the consent of the latter. In the present case the Plaintiffs were the lessees of the zemindar and even if they are entitled to the minerals they could not work the mines without the consent of the Defendants who were in occupation of the surface of the mouza under a grant from the same zemindar.

It is settled law that the minerals belong to the zemindars unless expressly demised to another by a grant. In the present case there was no evidence of any such grant to the Defendants, so it followed that the property in the minerals continued with the zemindar and as the Plaintiffs had acquired a lease from him they had acquired a right to the minerals. But even if the Plaintiffs were entitled to the underground minerals they were not entitled to

work them from the surface of the mouza in the occupation of the Defendants without their consent and therefore the suit must fail and the Plaintiffs would not be entitled to the relief prayed for. The learned Additional Subordinate Judge also came to the conclusion that the Plaintiff company's suit was barred by limitation. From this judgment the Plaintiff company appealed.

Sir S. P. Sinha (with *Messrs. N. N. Sircar, P. R. Das, Durga Charan Banerjee, Uma Charan Laha* and *Panna Lal Chatterjee*) for the Plaintiff-Appellants.

Mr. N. N. Sircar.—On the finding of the lower Court that the minerals belong to us, we have a right to win the minerals by working on the surface. No grant in favour of the Defendants has been proved and the lower Court had no power to presume a lost grant in their favour. If the Court goes out of its way to presume a lost grant in favour of the Defendants, it ought to have presumed a grant reasonable under the circumstances, that is to say, a grant of the surface only with a reservation in favour of the grantor to enter upon the surface to work the minerals.

It is conceded that if there was an express reservation in favour of the grantor, he could have entered upon the land to work the minerals notwithstanding the fact that he had granted the surface rights to the Defendants. If he had such a right he could have transferred that right to the Plaintiff company. The lower Court says that the grant in favour of the Defendants not having been proved, it cannot be said that the grantor expressly reserved the power to himself to enter upon the surface and work the mines. But it was not necessary to have an express reservation of this nature because unless there was an express grant in favour of the Defendants, there is an implied reservation in favour of the grantor, *Hari Narain Singh* v. *Sriram Chuckerbutty* (1) and *Durga Prasad* v. *Braja Nath* (2). If the mines belonged to the grantor he had as incident to it the right to get the minerals.

[ATKINSON, J.—The difficulty is that the grantor had parted with the possession of the mines. All that *Hari Narain Singh* v. *Sriram Chuckerbutty* (1) and *Durga Prasad* v. *Braja Nath* (2) decide is that the minerals remain the property of the grantor, but it does not decide that the grantor has the right to get the minerals.]

Mr. N. N. Sircar.—But the Privy Council cases decide that there need not be an express reservation of the minerals. We must take it as if there was a reservation in favour of the grantor, for it would be an unnecessary formality to have an express reservation when the law implies a reservation in my favour.

[ATKINSON, J.—Referred to *Prince Mahomed Buktyar Shah* v. *Rani Dhajamoni* (5).]

Mr. L. P. E. Pugh (with him *Messrs. A. Sen, K. P. Jayaswal, Lalit Kishore Mitra* and *Sisir Kumar Mitra*) for the Defendants-Respondents. The first question for decision is whether the Trigunaits had acquired the mineral rights either under the grant or by adverse possession. The actual grant is not proved and therefore has to be inferred from the state of things as existed. In the documents produced on behalf of the Plaintiffs are *jamabandi* papers in which an entry is made that the *brahmottar mokurari* documents having been seen it is admitted. The Trigunaits have been asserting since 1880 that they have a permanent tenure and in India you can acquire by prescrip-

(1) L. R. 37 I. A. 186 : s. c. I. L. R. 37 Cal. 723 ; 14 C. W. N. 746 (1910).
(2) I. L. R. 39 Cal. 696 : s. c. 16 C. W. N. 482 (1912).
(5) 2 C. L. J. 20 (1905).

tion or limitation a particular form of tenure against your landlord. The holding is not a mere surface grant, for the Trigunaits have built pucca houses, excavated tanks and raised surface coal for fuel and lime-burning, and have also taken the trees. If it was a mere right to cultivate the landlord would be entitled to the trees, he could object to the digging of tanks and building of houses. As regards the trees *Ganga Dei* v. *Badam* (10) referred to. These considerations point to the fact that the tenure is not a mere surface grant and the present case is distinguishable from the Privy Council cases referred to which decide that the minerals belong to the landlord as zemindar. If it be held that the mineral rights do not pass to the *brahmottardar* still he has undoubtedly the surface right and the zemindar has not the right to take the minerals but only a right to prevent the tenant from taking it as in the Allahabad case already referred to with regard to trees. In none of the cases have the zemindars actively claimed the direct right to take the minerals by suing for possession of the mines. In every case except one they have merely sued for an injunction to prevent the tenants from working the mines and have never sued for ejectment. In one case only there was a decree for *khas* possession of the mineral rights, which, I submit, means nothing more than establishing their rights to the minerals, but does not mean possession of the mines with the mines in them. In *Tituram* v. *Cohen* (11) the person who had the maintenance grant was recognised as having some right in the minerals and it is said he would have had a cause of action if he had sued for damages. If, as contended for by the Plaintiffs, the grant to him conveyed nothing but a mere right to receive rents from the surface tenants he could under no circumstances have a right of action. *Tituram's* case (11) therefore is an authority for holding that a *brahmottardar* has some interest in the minerals. The result of this position is that it is necessary before you work minerals that you settle both with the zemindar and the surface tenants. This is exactly the position in the case of a copyholder in England. Vide *Lewis* v. *Branth-Waite* (12). The position is the same *primâ facie* in the case of a tenant under the Transfer of Property Act, sec. 108. Some interest in the minerals must pass to the tenants for otherwise he could not work open mines.

The suit itself does not claim ejectment. The contention of the Plaintiffs being that the land is divided into a series of strata, the strata above the mines being in the tenants and the strata including the mines being in the landlord, the appropriate remedy for the landlord is to sue in ejectment for possession of the mines, and under sec. 42 of the Specific Relief Act, you cannot obtain a declaratory decree when you could sue in ejectment but have failed to do so. By the terms of the grant from the zemindar to the Coal Company the right to enter upon land in the occupation of the tenant is excluded. If minerals are either granted or reserved there is an implied right to enter upon the surface or cut the surface for the purpose of getting the minerals. But there is no authority for the proposition that, when the land is granted, the minerals do not pass with the grant because nobody

(10) I. L. R. 29 All. 484 (1907); on app. I. L. R. 30 All. 134 (1908).

(11) 9 C. W. N. 1073: s. c. 2 C. L. J. 403 (1905).

(12) 2 Barn & Adol. 437; 20 R. R. 613 (1831).

thought of it then; a right to enter upon the land for the purpose of getting minerals which no one thought of can be implied.

Sir S. P. Sinha in reply.—The case of *Prince Mahomed Buktyar Shah* v. *Rani Dhajamoni* (5) has been wrongly decided. Mookerjee, J., in that case wholly misapplied the English Law governing copyholds to that applicable to freehold tenures in England. The case *Eardley* v. *Granville* (6) upon which *Prince Mahomed Buktyar Shah* v. *Rani Dhajamoni* (5) is based distinguishes clearly between the two estates. In copyholds there is no division into strata and the tenant obtains possession of the entire surface and subsoil to the centre of the earth, but in freeholds and leaseholds there is a severance and the grantee of the surface does not get possession of the subsoil. Therefore possession of the subsoil always remained with the grantor, and as admittedly he is also the owner of the minerals, he has, as incident to his ownership, the right to go upon the surface to work the minerals.

Next it has been argued that we cannot rely on our implied right to enter upon the surface to conduct our mining operations because the lease expressly defines our rights in Part II, cl. 3. Now on this point the law is clear that if the lease gives me larger powers than I would have under the law, then the express liberties given to me cannot take away the power I have under the law. On the other hand if the express liberties curtail the liberty I enjoy under the law, then I can no longer claim my right under the law. It is also clear that under the law I have a very limited right to enter upon and occupy the surface and only for a limited period. The express liberties given to me under Part II give me far larger powers than I would have under the law. Therefore these express liberties have not taken away my right under the law, *viz.*, the right which the law gives me as incident to my ownership of the minerals.

(5) 2 C. L. J. 20 (1905).
(6) 3 Ch. Div. 826 (1876).

The JUDGMENT OF THE COURT was as follows:—

This is an action in which the Nawagarh Coal Company, Limited, as Plaintiffs, claim a declaration of their title in the underground mines and mineral rights in the Mouza of Kumarjuri, which rights they allege became vested in them under a lease dated the 2nd of October 1899. This lease was granted to Plaintiffs by the Deputy Commissioner of Manbhum as Manager on behalf of the Raja of Katras and it purports to demise to the Plaintiffs all the mines and the mineral rights in the subsoil of 22 mouzas which are set forth in the lease itself, subject to the restrictions and conditions therein contained. The second part of the Plaintiffs' claim is conversant with a claim for a declaration that they should be entitled to enter upon the Mouza of Kumarjuri and prospect for and work all such mines and minerals as may be found there; and that the Defendants may be restrained by injunction from hindering or preventing them from exercising the legal rights which they claim to possess relative thereto. The Raja of Katras is the zemindar or proprietor of parganna Katras and that fact is not disputed. At the time when this lease was granted, in 1899, his property was being administered under the Encumbered Estates Act and the lease was granted by the Deputy Commissioner of Manbhum under the Act as the Manager on behalf of the Raja. It was the duty of the Deputy Commissioner to manage the estate until such

time as the Raja himself was released from his disqualification, and became entitled to enjoy the rents and profits of his property; and it appears that immediately after the Estate had been discharged from the operation of the Encumbered Estates Act, the Raja himself approved of and confirmed the lease of the 2nd of October 1899 granted by the Manager in favour of the Plaintiffs.

We have stated shortly what the Plaintiffs' case is, and we shall now set forth similarly the various defences put forward. The Defendants' first claim is that they were granted by one of the Raja's predecessors in title, by a document dated the 21st of March 1830, a *moguli brahmottar* grant of the Mouza Kumarjuri; and that by that grant they became permanent tenure-holders; and that all rights in the surface and in the subsoil of this village were vested in them under and by virtue of that grant; and that they had for all purposes in this mouza a permanent and hereditary interest, subject to the payment of a small *moguli* rent of Rs. 17 per annum; that by that grant they were entitled to exercise all the mineral rights in the subsoil and that they were in fact the owners of the mines. They also claim to be owners of Mouza Chaitudih but as to this mouza we can find no document of title. They claim that they have been in possession of Chaitudih in the same way and under the same tenure as Kumarjuri. This will be apparent in the first place from the statement in Ex. R, the *patta* of 1891 made by the Trigunaits in favour of Doctor Saise at line 5, page 691 of the paper-book, and in the second place from the deposition of Behari Trigunait at line 12, page 763. However the significant thing is that with regard to Chaitudih they do not claim the mineral rights; and for fifteen or sixteen years the Plaintiffs in this suit have been, as admitted by Behari, at line 10, page 763 of his evidence, in possession of that village by working coal there without let or hindrance from the Defendants.

The Sanad of 1830 upon which the Defendants base their claim is not forthcoming. It appears from the judgment of the year 1890 by the Road Cess Deputy Collector, Exhibit 6, at page 40, that the document was produced before him and that he disbelieved its genuineness. His judgment was upheld by two Appellate Courts. The Trigunait witnesses affirm that this *sanad* was made over to the agents of the East India Coal Co. in 1899; according to one witness it was made over to Messrs. Smith and Trumbull: according to the other it was made over to Kapileswar and Makhan. None of these four persons have been called to corroborate that evidence, and if it were true, the Assistant Manager of the East India Coal Co., who was a witness for the Defendants, would undoubtedly have been in a position to produce the document. What he did produce was the copy, Exhibit L, and it is clear from his deposition at page 749 that it was this copy and not the original *sanad* which was made over to his company by the Defendants. This copy was made in the year 1891.

The conclusion from these facts is that the original document was suppressed by the Defendants. In any case there being no evidence of its loss, the Subordinate Judge rightly refused to admit the copy as evidence, or to allow secondary evidence of its contents to be given.

Now as to the nature of the interest of the Defendants in Kumarjuri it was contended by the Appellants that the Defen-

dants were merely tenants of the cultivated land.

There is however no suggestion throughout the evidence, oral and documentary, to the effect that the Raja was ever in possession of any portion of the village during the last 80 years, with the exception of an obviously unreliable statement by the witness Darpan Lal at page 790. There can be no doubt whatever that throughout this period the Defendants and their predecessors have held the entire village as a tenure under the Raja. The *phaisala* of 1835, Exhibit T—1 at page 206, the Raja's Goshwara paper of 1843, [illegible] at page 36, and the Raja's Road Cess returns of 1898 and 1910 are conclusive upon this point. The documents indicate that since the year 1855 the Trigunaits have consistently claimed the village as their *brahmottar*, whereas the Raja has variously described the tenure as "*ijara*" and "*jima*" and the village as "*mal*" or rent-paying in contradistinction to *brahmottar*.

It appears clear that the rent has remained the same throughout the period of the Defendants' occupation.

There is no plea in the Defendants' written statement of a lost grant; and we are asked now by reason of their failure to establish legal proof of their title, to presume a grant in their favour on the basis of a lost grant. They have never asked that their written statement might be amended with reference to any such claim and the fact that the learned Subordinate Judge found a lost grant in favour of the Defendants was the work of his own fertile imagination rather than the wish and desire of the Defendants. However, if we are asked now, as we have been asked and pressed strongly by Mr. Pugh, to presume a grant in favour of the Defendants in the nature of a lost grant, which means presuming a lawful original to support long and continuous user and enjoyment of property, we are of opinion that we should presume a grant on the basis of the user exercised and enjoyed by the Defendants. The alleged user of the Defendants of certain mineral rights is hazy, uncertain and unsatisfactory. However, fortunately documents do not lie; and as we have been pressed to presume a grant in Defendants' favour, we think we should presume the following grant; namely, a grant to the Defendants, as permanent tenure-holders, of the surface rights only of Mouza Kumarjuri. Whether they are *brahmottardars* or not is by no means certain. The papers indicate that almost continuously from 1835 this claim has been strenuously contested, and, except for one entry in the books of the Raja, there seems very little to show that they were *brahmottardars*. The jamabandi of 1890 has an entry in it in which mention is made of a *brahmottar* and, that it is admitted, and that seems to be the high water-mark of the strength of the evidence upon which the Defendants can rely in support of their claim. We shall not determine whether they are *brahmottardars* or not. Mr. Pugh attaches great significance to the use of the work *moguli* in some of the rent receipts. "*Moguli*" is a word of doubtful meaning and at the best imports no more than that the rent assessed upon the Defendants represented a proportion of the Government revenue.

The user which the Defendants have enjoyed is very accurately set forth in their own statement at pp. 663 and 664 of the paper-book. This document is dated the 12th June 1890 and is "the humble petition of Behari Lal Trigunait," one of the Defendants in this action. It was filed as an answer to the claim of the

zemindar at that time to the underground rights in both Kumarjuri and Chaitudih; and in para. 2 the Defendants carefully defines what their user has been, and they say that there are no coal mines in the said two mouzahs. "But it will be satisfactorily proved that the mouzas have all along been in our possession by the use and occasional sale of the coal that is seen on the surface." There is, however, no oral evidence of any sale. The Defendant Behari Trigunait while asserting that he takes coal for fuel admits at p. 763 of his evidence that the mouth of the pit has been closed. The evidence suggests at the most that the Defendants have taken small quantities of coal from the out-crop for domestic purposes and for burning lime alone; and for no other purpose. That does not to our minds appear to convey the impression that they ever exercised the mineral rights in the mouza. On the other hand it is clear that the coal they used was that seen on the surface of the incline near the River. We are satisfied that the Defendants' user of the mouza was merely confined to the enjoyment of the surface rights whether by cultivation of land or the building of houses or excavation of tanks. One other matter as to the user of the Defendants is of importance. On the 27th July 1890 a question arose as to who was liable to pay cess on the value of the minerals of this mouza, Kumarjuri. The Raja contended that he was the owner and liable for the cess; the Defendants contended that they were the owners and liable for the cess; and they relied, then as now, upon this grant of the 21st March 1830. Mr. Pugh wants us to refer to this judgment only to see what had been decided and not for the purpose of examining the grounds and reasons for the decision. We decline to yield to that contention and we consider we are entitled to look at the conclusions and reasons upon which that judgment was based. It was held by the Deputy Collector, twice affirmed on appeal, that the mineral rights of this Mouza Kumarjuri were not vested in the Defendants but that they were vested in the Raja, and that the Raja alone was liable for cess.

Defendants' second contention is that even if they have not got the mineral rights vested in them but merely the surface rights, and even if the mines and the minerals are vested in the Raja, he (the Raja) cannot work them—nor can his assignees work them—without the Defendants' consent because they being the tenure-holders of the surface have the right to exclude any person who enters upon their land without their consent. We shall deal with this aspect of the Defendants' case at a later stage.

The third defence put forth by the Defendants is that arising under the statute of limitation, but this has not been expressly pleaded.

Now prior to and at the time of the grant Mouza Kumarjuri was vested in the Raja and his predecessors as zemindars. If a grant is to be presumed in favour of the Defendants, it must be consistent with their user. The mineral rights were never in contemplation of the parties in 1830 nor do we believe the Defendants ever exercised any mineral rights whatsoever. Thus we have a grant by the zemindar of the surface rights of a village containing 380 bighas at the abnormally low rent of Rs. 17 per annum and we must presume, in the absence of the original document, having regard to the evidence before us, that only the surface rights were conveyed to the Defendants as presumed grantees. We think

that it has been conclusively held by the Privy Council that in such a case the mines and minerals and the property in the subsoil remain, and must be presumed to remain, the property and in the possession of the zemindar. At any rate prior to the date of the grant both the right of property and ownership in the surface and the right of property and ownership in the subsoil were vested in the zemindar.

At the time of the grant there must be presumed to have been a severance of the surface rights, from the property in the subsoil. The surface rights with their incidents became vested in the Defendants as tenure-holders; and the mines and minerals in the Raja as the owner of the subsoil. If there was any doubt as to the interpretation to be put upon the decision of the case of *Hari Narain Singh Deo Bahadur* v. *Sriram Chuckerbutty* (1), as decided by the Privy Council it has been entirely removed by the decision of the Privy Council in the later case of *Durga Prasad Singh* v. *Braja Nath Bose* (2), in which it was laid down finally and conclusively, in a case almost identical in its facts with the present one, that it must be presumed that the mines and mineral rights remain the property of the Raja as zemindar thereof and that the same are thus vested in him as such. In this connection it is of vital importance to notice that in the case of *Sriram Chuckerbutty* v. *Hari Narain Singh Deo* (3), the Subordinate Judge who tried the case made a declaration in favour of the Raja declaring him entitled to the underground minerals, and awarding him *khas* possession of the same. This was the order upheld on appeal by the Privy Council; and I think their Lordships clearly intended to decide that as the zemindar was entitled to the subsoil mineral rights he was also entitled to possession of the same. This is the law; and legal effect can only be given to it by holding that at the date when the grant was made, or is presumed to have been made, there was a severance of the rights and property in the surface from the right and property in the subsoil, both of which had antecedently been vested as one entire tenement in the Raja and his predecessors as zemindars. Mr. Pugh sought to contend that on the facts of this case the character of the Defendants' tenure is such that it could be distinguished from the cases of *Hari Narain Singh* v. *Sriram Chuckerbutty* (1) and *Durga Prasad* v. *Braja Nath* (2): but we think that the decision of Mr. Justice Fletcher in the case of *Kunja Bchari Seal* v. *Durga Prasad Singh* (4), prevents him from taking advantage of any such argument and that in fact, having regard to the Privy Council cases to which I have referred, permanent tenure-holders, even if their estate be hereditary, do not enjoy the mineral rights vested in them. Therefore if there be a severance in the tenement, the tenure-holder taking the surface rights, the rights in the subsoil must be taken to remain in the zemindar as if there had been a reservation of the mines in his favour, otherwise it would be impossible to give legal effect or meaning to the decision of the Privy Council. If the mines are presumed to be vested in, and to be the property of, the Raja, his rights must be just the same as those of

(1) L. R. 37 I. A. 136: s. c. I. L. R. 37 Cal. 723; 14 C. W. N. 746 (1910).
(2) I. L. R. 39 Cal. 696: s. c. 16 C. W. N. 482 (1912).
(3) I. L. R. 33 Cal. 54 (1905).
(4) I. L. R. 42 Cal. 346: s. c. 19 C. W. N. 203 (1914).

a fee-simple freehold owner of land according to English law, who makes a grant with an express reservation of the mines to himself together with the incidents that follow therefrom. We hold that by reason of that presumption and by reason of the severance of the tenement and the reservation that must be deemed to arise in favour of the Raja; the latter had as incident to his right of property and ownership in the mines, the right by implication of law to enter upon the surface of the tenure-holder's mouza for all reasonable and necessary purposes to enable him to work the mines and exercise his mineral rights. Mr. Pugh argued that even though we may hold that the mineral rights remain in the Raja, nevertheless his clients, the Defendants, being in possession of the surface, could prevent the landlord from working the mines without their (the Defendants') consent; and he has relied very strongly on Mr. Justice Mookerjee's judgment in *Prince Md. Buktyar Shah* v. *Rani Dhajamoni* (5) in support of that argument; and certainly that judgment at first sight would give one the impression that he was right. But we feel satisfied that the learned Judge in some way misapplied the English law governing copyholds to that applicable to the case of owners and tenants of freehold land in England. A copyholder has certain rights in excess of the ordinary tenant of freehold land. The case referred to *Eardley* v. *Granville* (6), clearly distinguishes between the rights of a copyholder and the rights of an ordinary lessee or tenant on a freehold estate. A virtual severance having been effected—by the exception of the mines, the lessee or grantee of the surface gets no possession of the subsoil. It is therefore the principles of freehold and not copyhold law which are to be applied, the distinction being that under the latter there is no division into strata and the tenant obtains possession of the entire surface and subsoil to the centre of the earth, so that the lord of the manor cannot work the mines unless he proves a right or custom to that effect. It is this distinction which appears to us to have been lost sight of by Mookerjee, J., in the ruling under reference. It is only under the Copyhold Law and where there is no reservation or custom proved that a deadlock occurs and neither landlord or tenant can work the mines [redacted] the law applicable to freehold land there can be no deadlock, for if the mines be excepted the grantor has an implied right to work them incidental to such exception; if there be no exception then that right is with the grantee as the owner of the surface and subsoil. The case in *Batten Pooll* v. *Kennedy* (7) clearly shows that where a tenement is severed the person in whose favour the reservation is made is the absolute owner of the subsoil; and in *Ramsay* v. *Blair* (8), the rights of such a person are clearly dealt with and laid down and it is there stated that he has by implication of law the power to go upon the surface and do all things reasonably necessary in order to exercise the enjoyment of his property. Sir S. P. Sinha's argument on the first aspect of the case has convinced us of its soundness and accuracy.

The third defence put forward by the Defendants was one of adverse possession. They claim to have been in adverse possession so long that even if they are not entitled by grant they have succeeded in prescribing a title for themselves as

(5) 2 C. L. J. 20 (1905).
(6) 8 Ch. Div. 826 (1876).
(7) [1907] 1 Ch. 256 (1906).
(8) L. R. 1 A. C. 701 (1876).

against the Raja as their landlord. However on the question of fact we have no difficulty in disposing of this issue. We think that the Defendants in December 1891 in making a lease of the mineral rights of Kumarjuri to Dr. Walter Saise, were demising property of which they were not the owners, and over which they had no control; and if his assignees, the East India Coal Company, did enter and work the coal mines, as they apparently did in 1895, they did so as trespassers and not under a legal claim or title. Thus up to 1899 they were in possession as trespassers and from 1899 onwards they were [illegible] possession of the mines or minerals up to March 1911 when the acts were committed giving rise to the cause of action in this suit.

The Subordinate Judge has, we think, dealt with the Plaintiffs' evidence of possession in a somewhat intemperate and unreasonable manner. The witness Fleischer was no doubt in some respects unreliable, but his evidence regarding the possession of the Nowagarh Company of the Mouza Kumarjuri from 1899 to 1904 as corroborated by the cash-books is of a most convincing nature. These books are clearly genuine and they exhibit a series of payments for excavation of inclines, erection of huts and other purposes indicative of occupation by the Plaintiff company during that period. There is documentary evidence showing that the Company was put into possession of the village under the orders of the Deputy Commissioner in March 1899, and the order of the High Court in April 1900 at page 710 indicates that the Company was at that time in possession. Subsequent to 1904 the Company do not appear to have exercised any possessory rights upon the surface of the village, but they were extracting the coal in Kumarjuri from an incline in the neighbouring village of Malkera.

Under these circumstances and in view of the fact that there was no adverse possession by the Defendants, no cause of action arose until the Plaintiff was obstructed in March 1911. The Defendants can only succeed in establishing adverse possession by the joint act of themselves and the East India Coal Company. Thus it will be seen that from March 1899 to March 1911 neither the Defendants nor the East India Coal Company worked or sought to work the coal or mineral rights in Kumarjuri. It appears to us therefore perfectly clear that the Defendants have acquired no title by adverse possession to the mines or minerals of Kumarjuri.

Are the Plaintiffs entitled to succeed in this action?

The Raja has the mineral rights as we have held, in the village of Kumarjuri; he has, as incident to that right, the right to go upon the land and take the minerals; and has by the lease of the 2nd of October 1899 assigned to the Plaintiffs all the rights which he himself possessed. That lease gives the Plaintiffs during the term to which it extends all the rights of the Raja to the mines and minerals coupled with the legal implication which should be attached to these rights, *viz.*, a right to enter on the surface of the mouza by a way of necessity to work the mines. It is contended for the Defendants that by the express terms of the lease itself there are certain restrictions and conditions imposed which prevent the Plaintiffs from working the mines; and that therefore they are not entitled to the declaration sought in this action.

The argument is that by cl. 3, Part II of the lease the Plaintiffs have merely power and liberty to enter upon lands in

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REPORTS (See Index).

Constitution of Benches.

The constitution of the Courts and distribution of business amongst them which take effect from Monday, the 7th of August, and until further order are as follows :—

PRIVY COUNCIL DEPARTMENT AND CRIMINAL BUSINESS.—The Hon'ble the Chief Justice and the Hon'ble Mr. Justice Richardson.

GROUP I and all Appeals under Or. 41, r. 11, C. C. P. (except in Appeals from Order of the Hon'ble Mr. Justice Cuming).—The Hon'ble Mr. Justice Mookerjee and the Hon'ble Mr. Justice Cuming.

GROUP II and Appeals from Orders of the Hon'ble Mr. Justice Cuming and the Hon'ble Mr. Justice Smither, and (Criminal) Defended Admitted Appeals.—The Hon'ble Mr. Justice Fletcher and The Hon'ble Mr. Justice Newbould.

GROUP III.—The Hon'ble Mr. Justice N. R. Chatterjea and the Hon'ble Mr. Justice Sheepshanks.

GROUP IV.—The Hon'ble Mr. Justice Teunon and the Hon'ble Mr. Justice Smither.

ORIGINAL SIDE.—The Hon'ble Mr. Justice Chaudhuri and (after Sessions) the Hon'ble Mr. Justice Chitty.

Criminal Sessions.

The fourth Calcutta Criminal Sessions commences its sitting from date, Mr. Justice Chitty presiding.

The Government of India Act (Amendment) Bill.

Last week, the cables made the welcome announcement that the provision in the Government of India Amendment Bill relating to the right of the subject to sue the Crown has been withdrawn and the Bill passed through the Committee of the House of Lords without discussion, the Amendments of the Joint Committee and those moved by Lord Islington being inserted. Reuter in addition wires the significant information that the withdrawal of "cl. 2 of the Bill [by which no doubt is meant the now notorious cl. 2 (2), (*d*)] was in accordance with the *unanimous* recommendation of the Joint Committee after hearing the statement of Mr. McLeod of the East India Section of the London Chamber of Commerce."

This indeed is in pleasing contrast with the frigid denial of all concession indicated in the reply of the Secretary of State for India and the laboured *apologia* from Simla. But the Burma Chamber of Commerce and other public bodies, to whose efforts the present withdrawal of the obnoxious measure is mainly due, must not rashly assume that it is dead. For, Reuter wires that "further legislation intended to remove administrative inconveniences arising from the *Mòment* decision must now wait till after the war." It is further stated that "it is regarded as certain that Indian opinion will be consulted before any such action is taken."

Gift by Hindu widow of husband's estate with consent of immediate reversioner, validity of.

What will be the effect of the decision of the Privy Council in *Chandrika Baboak Singh* v. *Raja Indar Bikram Singh* reported at p. 1149 of this issue upon the doctrine affirmed by the Full Bench in *Debi Prosad* v. *Golap Bhagat*, 17 C. W. N. 701 that the consent of the immediate reversioner to a sale by a Hindu

widow does not *ipso facto* convey to the purchaser an absolute title in the property, but only raises a rebuttable presumption in his favour that it was for legal necessity? The judgment certainly holds that such a transferee in possession is entitled to a declaration of his *proprietary* title as against a stranger. But it is a settled principle that a declaratory decree cannot be made unless the plaintiff establishes a legal title, in other words, even in such a case a plaintiff succeeds on the strength of his own title and not on the weakness of the defendant's.

Regard being had to this principle, the opinion expressed in the judgment that the discussion into which the Judicial Commissioners entered regarding the validity of the alienation by the widow was an academical one leaves us in much uncertainty as to the true *ratio* of the decision. Upon the [illegible] of the authorities in India, at any rate, it is not easy to see how they could well have avoided it. The Full Bench decision however can be reconciled with the decision of the Privy Council, as the alienation in the present case appeared to have been of the whole estate in which case the special rule laid down in *Nabakishore* v. *Harinath*, I. L. R. 10 Cal. 1102 based on the doctrine of relinquishment, which the Full Bench refused to disturb, would be applicable to confer absolute title on the alienee. But so far from basing their decision upon this special rule, the Privy Council do not even allude to this or any other rule of Hindu Law. They proceeded entirely upon their view of the pleadings, and so, it appears, that the value of the decision as a precedent, apart from the weight it is bound to carry as a decision of the Judicial Committee, is not likely to be very great.

Review.

INDIAN DECISIONS (Old Series) Vols. 12, 13 and 14. *Edited by the Lawyers' Companion Office, Trichinopoly and Madras. Published by the Law Printing House, Madras. 1916.*

The series to which the volumes under notice belong has been brought out with the object of furnishing lawyers with verbatim reprints of the reports of cases decided by the late Supreme Courts and the Sudder Dewany Adawluts in India. As many of the decisions of these now defunct Courts contain important judicial pronouncements which are constantly referred to by the Courts to-day and as the old reports are not easily available now-a-days, the publishers of these reprints have done a distinct service to the profession by placing those reports within the easy reach of Legal Practitioners in the shape of these attractive reprints. The present volumes contain reprints of Vols. 8 to 11 and Vol. 12, Part I (pages 1 to 490) of the Sudder Dewany Adawlut Reports, Bengal (1852-56). The volumes under review fully maintain the standard of excellence attained by their predecessors in respect of the accuracy of reprint and the neatness of get-up.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—Before THE LORD CHIEF JUSTICE, LORD JUSTICE WARRINGTON and MR. JUSTICE SCRUTTON. *Leiston Gas Co., Ld.* v. *Leiston District Council.* 9th June 1916.

Contract, its performance becoming impossible or illegal—Effect of the Defence of the Realm Act.

The Plaintiff Gas Company entered into a contract with the Defendants to provide gas standards with lanterns and burners and to supply gas to the standards and to keep the whole installation in repair, and the Defendants undertook to make an inclusive payment at a certain rate per lamp per annum, for five years from August 1911. Subsequently the military authorities forbade the lighting of any lamps whatever, within the Defendant's area, and the lamps had accordingly remained unlighted from 26th January 1915. The Plaintiffs sued to recover the price of gas, for the period, during which the order of the military authorities was in operation. Low, J., allowed the claim and the present appeal was dismissed.

The LORD CHIEF JUSTICE said :—

There is no doubt that when a party contracts to perform an act, lawful at the time of the making of the contract, which thereafter becomes impossible of performance by reason of a change in the law, he is discharged from the obligation under the contract, *Baily* v. *de Crespigny* (1869, L. R., 4 Q. B., 180). Again, the law is well settled that where the performance of the contract becomes impossible by the cessation of the existence of the thing which is the subject-matter of the contract, the contract is to be construed as "subject to an implied condition that the parties shall be excused in

case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor" (per Blackburn, J., in *Taylor* v. *Caldwell*, 1863 3 B. and S., 826, at pp. 833, 834). This principle is not confined to the cessation of the existence of the subject-matter of the contract, but applies equally to the cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract [*Nickoll* v. *Aston*, (1901) 2 K. B., 126, and *Krell* v. *Henry* (1903) 2 K. B., at p. 740].

The law on this subject was considered recently in the House of Lords in *Holock* v. *Beal* (1916, A. C., 486), and was summarized at page 525 by Lord Wrenbury, who said :—

Where a contract has been entered into, and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows:—If a party has expressly contracted to do a lawful act, come what will—if, in other words, he has taken upon himself the risk of such a supervening cause—he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding.

It is often difficult, when applying the principle above stated, to determine on which side of the line the particular case falls. The decision in this case must depend on the true effect of the contract. Under the memorandum of agreement the Plaintiffs undertook to perform various services for the Defendants in return for an agreed rate of payment to be made quarterly by the Defendants for every quarter in the five years' duration of the contract. These services included the provision and erection and maintenance of the column lamps and other plant for the supply of gas as stipulated, and the Defendants agreed to make these payments extending over five years as the remuneration to the Plaintiffs, not only for supplying and lighting the gas for the lamps, but also for providing and erecting and maintaining the plant.

In fact, the Plaintiffs had performed the various services under the contract for nearly three years and a half before the event under discussion happened. The column lamps remain their property under the contract, and the Defendants have had the advantage of them throughout the three years and a half. They have used them even in the three quarters of 1915, not, indeed, to the full extent, as the lamps were not lighted except for the 26 days of the first quarter, but to the extent that they remained there connected with the main and would be lighted immediately the prohibition by the military authority was relaxed or withdrawn. On these facts I cannot hold that the performance of the contract had become unlawful, or that the venture was frustrated by the act of the Executive in forbidding the lighting of the lamps. Part of the performance of the contract had become unlawful, but another part of the contract, which cannot be regarded as a trivial part, was lawful and could be performed. In these circumstances the Defendants are not justified in treating the contract as at an end, or in refusing to make the pay[illegible] agreed by them.

The Defendants also contend that the supply of gas and the lighting of the lamps is a condition precedent to the Plaintiffs' right to recover the quarterly payments. The answer to this contention depends upon the intention of the parties to be collected from the instrument and the circumstances legally admissible in evidence, with reference to which it is to be construed (per Parke, B., in *Graves* v. *Legg*, 9 Ex., at p. 716, and quoted by Blackburn, J., in *Bettini* v. *Gye*, I. Q. B. D. at p. 186). The observations I have already made on the facts demonstrate that this alternative contention of the Defendants must fail. It was not intended that the supply of gas should be a condition precedent to the right to recover the quarterly payments. Under the agreement there is an inclusive payment for all the services, and the consideration cannot be apportioned. The parties might have agreed to the payment for each service, but they have preferred to agree to quarterly payments for the whole service extending over five years.

I hold that the agreement by the Plaintiffs to supply the gas is to be regarded as an independent agreement and not as a condition precedent. The Defendants have received part of the consideration, and if the Plaintiffs had been in default the Defendants could have recovered compensation for the failure to supply the gas and light the lamps. (See the notes to *Pordage* v. *Cole*, Williams' Notes to Saunders, Vol. I, p. 552 (*c*). The Plaintiffs were not in default, and, therefore, the Defendants cannot

recover on a cross claim for damages, but as the supply of gas by the Plaintiffs was not a condition precedent to the right to recover, the Defendants cannot justify their refusal to make the quarterly payments under the contract.

Messrs. Hawke, K. C. and *Poyser* for the Appellants.

Messrs. Mathews, K. C. and *Goodard* for the Respondents.

B. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA and SHEEPSHANKS, JJ. APPEALS FROM ORIGINAL DECREES NOS. 211, 415 AND 416 OF 1912. SATISH CHANDRA [illegible]TT, Defendant, Appellant *v.* JATINDRA MOHAN CHOWDHURY AND ORS., Plaintiffs, Respondents. 20th June 1916.

Lease, construction—Cesses whether payable entirely by lessee—Stipulation by latter to pay cesses "according to law," if refers to lessee's share only under Cess Act—Lessor converting himself into an annuitant.

These appeals turned upon the construction of certain *kabuliyats* which were all in similar terms, and the only question was whether the Defendant was liable to pay the entire amount of cesses imposed on the land by Government. The Defendant held a *durputni* lease at a fixed *jama* of Rs. 3,950-12-3¾ gds. out of which Rs. 2,331-4 as. were to be paid to the superior landlord, the zemindar, and a sum of Rs. 1,160 odd to certain persons in respect of some other property not let out to the Defendant under this *kabuliyat* (a portion of which, however, was let out to the Defendant by another lease) and the Defendant agreed to pay the balance, *viz.*, Rs. 459-6 as. as the amount of profits to the lessee, the total being as stated above, *viz.*, Rs. 3,950-12-3¾ gds., which was stated to be the fixed *dowl jama*. The *kabuliyat* in one of these appeals, dated 15th Kartik 1312, proceeded to state: "Over and above the fixed *dowl jama*, I shall separately pay *kist* by *kist*, according to law, the Road and Public Works Cesses and Dak tax that are now prevalent and such cesses and taxes that may be imposed by Government in future, and in default of payment thereof I shall be held liable for interest and damages . . . . . If this property of yours is about to be sold or is sold in execution of rent-decree owing to default on my part to pay rent, etc., according to instalments and in such case if you preserve the property by paying in the money at the time of sale, I shall pay you the money." The Subordinate Judge of Dinajpur had held that under the *kabuliyat* the Defendant-tenant was liable to pay the entire cesses payable for the property and decreed the suit.

On appeal, it was argued (1) that all that the Defendant undertook to pay were the cesses according to law, which meant the cesses which the *durputnidar* was liable to pay under the Cess Act and not the cesses which were payable by the landlord, (2) that upon the construction adopted by the lower Court, the lessee would be bound to pay the cesses in respect of the amount which had to be paid for properties not let out to the Defendant under the lease.

Held, as to (1), that there was nothing to prevent a *durputnidar* from coming to an agreement that he should pay the cesses payable by him as well as the cesses payable by the *putnidar*: the words "according to law" signified the cesses payable according to law by the lessor as well as by the lessee: that the lessee had agreed to pay Dak tax although no portion of it was payable by the *durputnidar* nor even by the *putnidar* except under the agreement, and that in construing the lease it must be borne in mind that the lessor was virtually turning himself into an annuitant upon the land and assigning to the Defendant the land with all the prospects of a future increase of the land.

As to (2), *held*, that the Plaintiffs did not claim and could not claim cesses in respect of any *mouzah* not covered by the lease, as he only agreed to pay the whole of the cesses payable for the land demised including the share payable by the landlord.

Babus Brojolal Chakraburty and *Ramakanta Bhattacharjee* for the Appellant.

Babus Jogesh Chandra Ray and *Mukund Nath Ray* for the Respondents.

N. G.

direct possession of the Raja himself in order to exercise the mineral rights vested in them; and that accordingly by this clause the Plaintiffs' rights were strictly limited and by no means co-extensive with those the Raja enjoyed.

The implied liberty to enter and work the mines subject to reasonable restrictions is not to be curtailed by the express conditions of the lease unless the intention is apparent. That the intention was to enlarge and not to restrict is indicated by the fact that, if the lease were construed in the manner contended by Mr. Pugh, the lessees would obtain thereunder no rights whatever in the village by reason of there being no land in the Raja's *khas* possession. In our opinion cl. 3 of Part II merely determines the compensation to be paid to the Raja in the event of the Plaintiffs' acquiring land whether permanently or temporarily in connection with their mining operations. The clause therefore was inserted with a totally different object from that for which Mr. Pugh contends.

Part III is headed "Restrictions and conditions as to the exercise of the above liberties, powers and privileges." We think that Part III must be construed as only restricting the liberties and privileges conferred by Part II and not as any restriction upon the general right of access which is implied by law as between the Raja and the Defendants, and which right, so far as the Raja is concerned, is now vested in the Plaintiffs. The case of *Earl of Cardigan* v. *Armitage* (9) is clearly in point.

Therefore we think that the Plaintiffs are entitled to the mineral rights under the lease of the 2nd of October 1899 and that they are entitled to enter the Mouza of Kumarjuri to bore and do all acts reasonably incident to the enjoyment of their property in the mines and minerals, and that if in the development of the mines and the extraction of the minerals they cause damage to the Defendants or others by subsidence of the soil or injury to the houses or tanks therein and thereon, there is ample power to injunct them to prevent them from so doing. In our opinion neither the Raja or the East India Coal Company are necessary to be joined as parties to entitle the Plaintiffs to maintain this action.

On the 21st of March 1911, therefore, the Defendants illegally obstructed the Plaintiffs in the exercise of their lawful rights and the Plaintiffs are therefore entitled to the full measure of relief which they claim in this action. We accordingly set aside the judgment of the learned Subordinate Judge and decree the Plaintiffs' suit in the form of prayer (1) in the written plaint and grant an injunction in the form of prayer (2), with costs of this action against the Defendants in both Courts.

D. N. S. *Appeal allowed.*

A. K. R.

(9) 2 B. & C. 197; 107 Eng. Rep. 361 (1823).

[PRIVY COUNCIL.]

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD ATKINSON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1916,
Heard, 25 and 26, May.
Judgment, 22, June.

CHANDRIKA BAKHSH SINGH, Appellant,
v.
RAJA INDAR BIKRAM SINGH, Respondent.

Hindu widow—Gift of property with consent of reversionary heir expectant—Donee given possession—Suit for declaration of proprietary title in widow's life-time against strangers—Decree if may be made apart from proof of necessity.

The widow of P, the former owner of an

CHANDRIKA BAKHSH SINGH *v.* RAJA INDAR BIKRAM SINGH.

impartible estate, with the consent of the reversionary heir expectant on the death of the widow and his brother, made a gift of the estate to C. C's application for mutation of names was successfully opposed by I B, who claimed the estate under an alleged Will of P, and further denied that the persons who consented to the gift were related to P, and suggested two other persons as the reversionary heirs, whereupon C sued I B for a declaration of his title as proprietor of the estate. The trial Court found that P had made no Will as alleged, that the persons set up by I B as his reversionary heirs were fictitious persons and that the estate passed by the gift by P's widow with the consent of persons who were related to P in the manner alleged by the Plaintiff and accordingly decreed the suit. I B on appeal did not challenge these findings, but urged that the deed of gift did not represent a genuine transaction, and that the widow (who was a party to the suit and had died pending the appeal, the consenting reversionary heirs being substituted in her place in the records) had remained in possession and had no power to confer any valid title to C.

Held—*That the suit not being a suit for ejectment of a Defendant who was in possession, but a suit for declaration of title by a Plaintiff who was in possession, it was not incumbent on the Plaintiff to prove a better title in himself to possession of the property than the title of the Defendant.*

That on the findings I B was a mere impertinent intervener in another person's affair and had no right to contest the declaration of title which was obtained by C.

Appeal from a judgment of the Court of the Judicial Commissioner of Oudh (Evans and Lindsay, J. C.'s), dated 25th May 1911, which reversed a judgment of the Subordinate Judge, Barabanki.

The facts of the case sufficiently appear from their Lordships' judgment. Pirthipal Singh was the owner of the taluka in dispute. On the death of his son and son's wife, the taluka devolved on his widow Maharaj Rani. In 1904, the said widow made a gift of the entire estate in favour of the Appellant. At that time Mahabir Singh and Bechu Singh were the nearest reversioners, and the Appellant was a reversioner next after them. The gift was made and possession thereunder was delivered with the consent of the said Mahabir Singh and Bechu Singh who relinquished their rights in favour of the Appellant. The Appellant then applied for mutation or power to transfer the property and alleging that Pirthipal Singh had executed a Will in favour of the Respondents under which the estate would go to the Respondents after the death of Maharaj Rani. The Plaintiff instituted the present suit for a declaration of his title. The Respondent denied the Rani's title of power to transfer the property and alleged that Mahabir Singh and Bechu Singh were not legitimate and that there existed two reversioners, Girdhara Singh and Kalka Singh, also pleaded his own title under the said Will. The Subordinate Judge found all the material issues against the Defendant, and therefore allowed the Plaintiff's claim.

He held, *first*, that Musammat Maharaj Rani was not the absolute owner of the property but held a limited interest in the estate like a Hindu widow. *Secondly*, that she duly executed the deed of transfer dated the 13th December 1904 and the transfer created a good and absolute title in favour of the Plaintiff-Respondent. *Thirdly*, that Bechu Singh and Mahabir Singh were

the nearest reversioners to Jadunath Singh. *Fourthly*, that the Plaintiff-Respondent had been put in actual possession of the property. *Fifthly*, that the Will of 1866 set up by the Appellant was not proved. *Sixthly*, that it was not proved that any reversioners called Kalka and Girdhara were in existence. Upon these findings he held that the Plaintiff-Respondent was entitled to a declaration that he is the absolute owner of this property and he made a declaration accordingly.

Against this decision appeal was preferred by Raja Indar Bikram Singh, Talukdar of Itaunja. The other Defendants did not appeal and it was conceded that they did not contest the decision of the lower Court. Counsel who appeared on behalf of the Appellant did not wish to contest the decision of the lower Court as to the Will of 1866 or as to the existence of the alleged reversioners Kalka and Girdhara. Nor did he contest the decision of the lower Court as to the actual execution of the deed of transfer dated the 13th December 1904. He accepted the finding of the Court below that Musammat Maharaj Rani had only a limited interest in the estate such as is held by a Hindu widow but he contested its decision on the following broad grounds :—

First, that there was no actual transfer of possession of the property to the Plaintiff-Respondent and that Musammat Maharaj Rani remained in actual possession and the deed of transfer did not represent any genuine transaction.

Secondly, that the deed of transfer conferred no title on the Plaintiff-Respondent at all and Musammat Maharaj Rani could not by this document confer any valid title on him. On these grounds alone it is urged that the Plaintiff-Respondent was not entitled to the decree which he obtained from the lower Court.

Whilst this appeal was pending before the Judicial Commissioners Musammat Maharaj Rani died in June 1910. The learned Advocate for the Plaintiff-Respondent contended that as the Appellant did not contest the finding of the lower Court as to the Will of 1866 which was the basis of his title, he should not now be heard in support of his appeal because according to the finding of the lower Court he had no title to the property at all and therefore had no status to intervene in a matter which did not concern him in any way.

Upon this preliminary point, the Judicial Commissioners held as follows :—

" We are of opinion that the contention has no force.

" The causes of action set up were the adverse orders of the Revenue Courts in the mutation proceedings dated the 5th December 1905 and the 9th March 1908, and it is conceded that these orders were issued in consequence of objections taken by the Appellant. The suit was instituted under the provisions of sec. 42 of the Specific Relief Act which reads as below :—

" 'Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled.' It is not disputed that the Appellant has denied and still continues to deny the validity of the title of the Plaintiff-Respondent to this property. The Plaintiff-Respondent considered it advisable to institute this suit in order to disperse the cloud on his title which had been created by the Appellant's denial. But as the Appellant in spite of

certain findings of the lower Courts against him persists in saying that the Plaintiff-Respondent has not a good title to the property, and as the litigation was started by the Plaintiff-Respondent the Appellant is in our judgment clearly entitled to be heard in support of his appeal although he does not pretend at this stage to be able to establish any title in himself.

"It has been urged on behalf of the Plaintiff-Respondent that as Musammat Maharaj Rani has now died the succession has opened out and as his title is not contested by the intervening reversioners, therefore any decision [illegible] the state of affairs which existed at the date [illegible] was instituted is now useless. In reply to this argument we have been referred to a decision of the Madras High Court in *Govinda* v. *Perumdevi* (1). In that case certain alienations had been made by a Hindu widow and the Plaintiff, a reversionary heir, instituted a suit for a declaration that these alienations were not binding on him. The suit was dismissed. The Plaintiff appealed but in the meantime the widow died. Apparently the Subordinate Judge held that the reversionary right had become an estate vested in possession and made an order that the suit should abate. The learned Judges in considering sec. 42, Act I of 1877, remarked that the proviso to that section referred only to the position of the Plaintiff when he commenced the suit and could not be treated as taking away a right of suit which had already accrued. They further remarked :—' We do not consider that the proviso is applicable to this case, for when the Court acquires jurisdiction it cannot be divested of it except under some provision of law. The Appellate Court has only to see as a Court of error that the decree under appeal was correct or otherwise *when it was passed*.' Similarly in this case we have only to consider the question whether the decision of the lower Court is correct with reference to the state of affairs which existed when the suit was instituted, and we cannot consider what effect the death of Musammat Maharaj Rani which took place in June 1910 will have on the title of the contending parties."

The learned Judicial Commissioners also held on the merits that the Plaintiff was not entitled to the declaration that he was the absolute owner of the property in question. In the course of their judgment, the learned Judicial Commissioners said as follows :—

"Indeed it might be said that the Hindu [illegible] recognizes the validity of no alienation by a [illegible] law, whether for a religious or a worldly purpose, unless there is necessity for the alienation. Where the purpose is religious or charitable the necessity contemplated is that arising out of the obligation to discharge a pious duty by the conferment of spiritual benefit. In such a case the purpose being clear the necessity is presumed—there is no need to offer any proof of it—and an alienation of this nature is valid whether the reversioners consent or not. On the other hand where the transfer is made for a worldly purpose no presumption of necessity can be made merely from the nature of the purpose. Necessity must be proved. It need not be proved in any particular way but there must at least be evidence of circumstances sufficient to raise a presumption that there was a material necessity which could only be relieved by alienation. The consent of the reversioners obtained under certain conditions is held to be sufficient to constitute a presumption of this kind and if unrebutted the result is that the transaction in favour of which it is raised

(1) I. L. R. 12 Mad. 136 (1888).

is deemed to be one which is justified. In all cases the question to be answered is whether the transfer in dispute is a fair one and one justifiable by the Hindu Law.

"Applying this test to a case like the present where the alienation is made without consideration and for a purely worldly purpose can it be said that such a transfer even if made with the consent of the nearest reversioners is one which satisfies the essential conditions? We think not. In the case of a gift for worldly purposes there can be no room for any notion of necessity and consequently no ground of justification under the Hindu Law. We are supported in this view of the law by a recent decision of the Bombay High Court *Pilu* v. *Babaji* (2) in which it was laid down that the principle by which a Hindu widow is allowed to alienate absolutely with the consent of the reversioners cannot be extended to voluntary transfers by way of gift.

"*In Bajrangi Singh* v. *Manohamika Baksh Singh* (3) their Lordships of the Privy Council remarked that they would be unwilling to extend the widow's power of alienation beyond its present limits, and we are of opinion that the concession to the widow or to any other Hindu female in possession of a limited estate of a power to give away absolutely a portion of the estate with the consent of the reversioners would constitute an enlargement of her power of alienation far beyond the limits of such powers as hitherto recognized in this province."

Hence this appeal.

Mr. L. DeGruyther, K. C., and *G. C. O'Gorman* for the Appellant submitted that the Respondent had no *locus standi* to maintain his appeal to the lower Appellate Court as on the admissions he had no title whatever to the estate. It was unnecessary to discuss the merits of the appeal.

Messrs. A. M. Dunne and *B. Dubé* appeared in support of the Respondent's case. Their Lordships (without calling on counsel for the Appellant for reply) intimated that they would allow the appeal.

THEIR LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is in appeal from a decree, dated the 25th May 1911, of the Court of the Judicial Commissioner of Oudh, which reversed a decree dated the 3rd January 1910, of the Subordinate Judge of Sitapur and dismissed the suit with costs.

The facts necessary for the decision of this appeal may be briefly stated. The dispute relates to the Appellant's title to an Oudh taluka, known as Mahgawan, which was an impartible estate. The parties are Hindus, subject to the law of the Mitakshara. On the 13th December 1904, Babuain Maharaj Rani, who held Mahgawan for a Hindu widow's interest, made, by a deed of gift, an absolute transfer of Mahgawan to the Appellant, and he obtained possession. To that transfer Mahabir Singh and his younger brother, Bechu Singh, were consenting parties. At the time of the transfer Mahabir Singh was the heir to Mahgawan expectant on the death of Babuain Maharaj Rani, and the Appellant is his only son. Upon the transfer to him the Appellant applied to the Revenue authorities for mutation of names in his favour. On the 9th January 1905, the Respondent, who was not a member of the family which had held Mahgawan, filed objections to mutation of names being made in the Appellant's favour, alleging that Babuain

(2) I. L. R. 34 Bom. 165 (1909).
(3) 12 C. W. N. 74: s. c. I. L. R. 30 All. 1 (1907).

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Maharaj Rani had no power to transfer the estate, and claiming title to it in himself under an alleged Will of 1866 of Babu Pirthipal Singh, who had been the husband of Babuain Maharaj Rani. In consequence of the Respondent's objections, the Revenue authorities on appeal rejected the Appellant's application for mutation of names, and the Appellant, in order to clear his title and obtain mutation of names, was compelled to bring this suit. He brought this suit on the 11th December 1908, in the Court of the Subordinate Judge of Barabanki, for a declaration of his title as proprietor of Mahgawan. [illegible] suit the Respondent, and Babuain Maharaj [illegible] Mahabir Singh, and Bechu Singh were made [illegible] ndants. By their written statements Babuain Maharaj Rani, Mahabir Singh, and Bechu Singh admitted the Appellant's title, and Mahabir Singh and Bechu Singh expressly alleged that it was with their consent that Babuain Maharaj Rani had executed the deed of gift of the 13th December 1904, and that they had on the 9th November 1908 executed deeds of relinquishment in favour of the Appellant, who was in proprietary possession of the taluka.

The Respondent in his written statement denied the Appellant's title, did not admit that Babuain Maharaj Rani had executed the deed of gift of 1904; denied that she had any power to transfer the estate to the Appellant; did not admit that the Appellant was in proprietary possession; alleged that Mahabir Singh and Bechu Singh were not legitimate; alleged that the nearest reversioners were persons whom he described as Girdhara Singh and Kalka Singh; and asserted title in himself through the alleged Will of 1866 of Babu Pirthipal Singh.

The Subordinate Judge of Barabanki found that Babuain Maharaj Rani had executed the deed of gift of 1904 in favour of the Appellant with the consent of Mahabir Singh and Bechu Singh, who were, he found, legitimate; that the taluka passed under that deed of gift to the Appellant; that the Appellant was then and had been since the date of the deed of gift in proprietary possession of the taluka; that Girdhara Singh and Kalka Singh were fictitious persons; and that Babu Pirthipal Singh had not made the alleged Will of 1866; and gave to the Appellant a declaration that he was the absolute proprietor of the properties detailed in Schedules A, B and C to the plaint, and would continue to be such proprietor after the death of Babuain Maharaj Rani.

From that decree the Respondent on the [illegible] March 1910 appealed to the Court of the Judicial Commissioner of Oudh, making the Appellant and Babuain Maharaj Rani Respondents to his appeal. In June 1910 Babuain Maharaj Rani died. On the 9th February 1911, Mahabir Singh and Bechu Singh respectively [illegible] petitions and affidavits in the appeal in the Court of the Judicial Commissioner, in which they asserted that the deed of gift of the 13th December 1904 had been executed by Babuain Maharaj Rani by their advice and with their consent; that the deed was valid, and that Babu Chandrika Bakhsh Singh had been put in proprietary possession of the taluka at the time of the execution of the deed, and they prayed to be added as Respondents to the appeal. On the 24th March 1911, Mahabir Singh and Bechu Singh were by order of the Court of the Judicial Commissioner added as Respondents to that appeal.

When the appeal came on for hearing in the Court of the Judicial Commissioner, Raja Indar Bikram Singh, through his counsel, informed the Court that he did

not contest the decision of the Subordinate Judge as to the alleged Will of 1866, or as to the non-existence of the alleged reversioners Girdhara Singh and Kalka Singh, or as to the execution of the deed of gift of the 13th December 1901, and his counsel confined his contention in opposition to the decree of the Subordinate Judge to an argument that the deed of gift did not represent any genuine transaction, and that Babuain Maharaj Rani had remained in possession and had no power to confer any valid title upon Babu Chandrika Bakhsh Singh.

The suit was not a suit for the ejectment of a Defendant who was in possession, in which the Plaintiff would have to prove a better title in himself to the possession of the property than the title of the Defendant. On the contrary, it is a suit for a declaration of title by a Plaintiff who was and is in possession. The Subordinate Judge had found that Raja Indar Bikram Singh had no title, and when the correctness of that finding was not disputed in the Court of the Judicial Commissioner of Oudh, it should have been apparent to the Judges of that Court, who were hearing the appeal, that as Raja Indar Bikram Singh had failed to prove that he was, even remotely, concerned in the title to Mahgawan and in the right to the proprietary possession of that taluka, he had no title to protect and no interest which could give him a right to contest the declaration of title which Babu Chandrika Bakhsh Singh had obtained, and that the appeal to that Court should be dismissed. Raja Indar Bikram Singh was a mere impertinent intervener in another person's affair. The Judges who heard the appeal, however, instead of dismissing it, went into a long and, under the circumstances, a purely academic discussion as to the powers of a Hindu widow to dispose of property, and finally allowed the appeal and dismissed the suit with costs.

Their Lordships, at the conclusion of the argument, humbly advised His Majesty that this appeal should be allowed; that the decree of the Court of the Judicial Commissioner of Oudh should be set aside with costs; and the decree of the Subordinate Judge of Barabanki restored.

The Respondent was ordered to pay the costs of the appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors: *Messrs. Baron, Bowers and Nevill* for the Respondent.

B. D. [illegible] *allowed with costs.*

[INSOLVENCY JURISDICTION.]

No. 194 OF 1911.

GREAVES, J.
1916,
Heard, 23, June.
Judgment,
27, June.

In re KISSORY MOHAN ROY (SHAHA), an Insolvent.

Presidency Towns Insolvency Act (III of 1909), sec. 36 (1), application under, if may be made ex parte—Calcutta High Court Insolvency Rules, 17, 18, 19 and 30.

Applications under sec. 36 (1) of the Presidency Towns Insolvency Act for examination of persons thereunder are intended to be made ex parte *under the Rules framed by the Calcutta High Court under sec. 112 of the Act.*

To such applications r. 30 applies and not rr. 17, 18 and 19, and this view is supported by the English Bankruptcy Act (1914), 4 and 5, George V, Ch. 59 and the rules thereunder.

On the 26th April 1916, Bal Kissen Bagri, a creditor of the insolvent, obtained from the Registrar an *ex parte* order under sec. 36 of the Presidency Towns Insolvency Act for the examination of one

In re Kissory Mohan Roy (Shaha).

Lachmi Chand Karnowat. This application was made on behalf of Lachmi Chand Karnowat on the ground that such orders could not be made *ex parte* but must be on notice.

The facts will fully appear from the judgment.

Mr. Langford James (with *Mr. B. K. Ghose*) for Lachmi Chand.

This is an application to set aside the order made *ex parte* under sec. 36 of the Insolvency Act. Refers to Insolvency rr. 17 and 18.

Messrs. N. Sarkar and *S. C. Bose* for Balkissen Bagri.

It has been settled practice to make this sort of order *ex parte*. Refers to Insolvency r. 30.

Mr. James in reply.

The Judgment of the Court was as follows:—

Greaves, J.—This is an application made on behalf of one Lachmi Chand Karnowat to set aside an order made on the 26th April 1916 by the Registrar for his examination under sec. 36 of the Presidency Towns Insolvency Act. The order was obtained *ex parte* at the instance of one Balkishen Bagri, a creditor of the Insolvent. It was made on the petition of Balkishen Bagri filed on the 15th April 1916, and the petition alleges that Balkishen Bagri filed an affidavit in proof of his claim, and I understand from the petition that the Official Assignee admitted the proof by a letter, dated the 31st July 1915 addressed to Balkishen's attorney. The ground upon which the applicant seeks to set aside the order is, that it was made *ex parte*.

Sec. 36 (1) of the Presidency Towns Insolvency Act provides that the Court may, on the application of the Official Assignee or of any creditor who has proved his debt at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed, the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property, and that the Court may require any such person to produce any documents in his custody or power relating to the insolvent his dealings or property.

R. 17 of the Rules made under the Act provides that every application to the Court (unless otherwise provided by these or [illegible] the Court shall in any particular case otherwise direct) shall be made by motion supported by affidavit.

R. 18 provides that where any party other than the applicant is affected by the motion, no order shall be made unless upon the consent of such party duly shown to the Court or upon proof that notice of the intended motion and a copy of the affidavit in support thereof have been duly served upon such party, but the rule contains a proviso that the Court may make an *ex parte* order if delay would entail serious mischief.

If these rules govern applications under sec. 36 of the Act then the *ex parte* order was clearly wrong unless the Registrar thought that any delay would entail serious mischief.

But I was referred to another rule by counsel who opposed the application, that is to say, to r. 30, which is as follows: "Every application to the Court under sec. 36 of the Act shall be in writing and shall state shortly the grounds upon which the application is made." This rule to my mind clearly contemplates a proce-

In re KISSORY MOHAN ROY (SHAHA).

dure other than that laid down under rr. 18 and 19 and it contains no provision for service of the application upon the person sought to be examined such as is contained in r. 19. Under these circumstances the inference to my mind is irresistible, that applications under sec. 36 are intended to be made *ex parte* and that this is the manner prescribed by the Rules framed under sec. 112 of the Act.

I am fortified in this view by a reference to the English Bankruptcy Act of 1914, 4 and 5 of the King, Ch. 59. The section of that Act which corresponds to sec. 36, is sec. 25, the wording is almost identical, except that the section of the English Act does not contain the words "in such manner as may be prescribed." Rr. 26 and 27 of the English Act are identical with rr. 17 and 18 of the Presidency Towns Insolvency Act, and r. 74 of the English Act is identical with r. 50 of that Act.

Form 144 of the Forms under the English Act is a form of summons under sec. 25 of that Act, see William's Bankruptcy Practice, 11th Ed., p. 645, to attend for examination and a perusal of that Form to my mind indicates that this is the first notification to the person to be examined and that he has had no previous notice of motion served upon him at the time of the application for leave to examine him, and, that is to say, that the order for his examination was made *ex parte*. The application is dismissed with costs.

Babu Jotindra Nath Mitter, Attorney, for the Applicant.

Babu Subodh Chandra Mitter, Attorney, for Bal Kissen Bagri.

K. P. K.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES NOS. 1558 TO 1586 OF 1911.

HOLMWOOD, J. WALMSLEY, J. 1915, 28, January.	BABU KRISHNA SAHAY and ors., Defendants, Appellants, *v.* PALAKDHARI ROUT, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 38, cl. 1 (a)—Permanent deterioration, what is.

The word "permanent" in sec. 38 of the Bengal Tenancy Act must in every case be construed with reference to existing conditions and when a piece of land gets covered with sand the deterioration is permanent with reference to existing conditions.

GOURI PATRA *v.* H. R. REILY (1) *followed.*

This was an appeal from a decision of Moulvi Ibrahim Ahmed, Subordinate Judge of Patna, dated the 23rd December 1910, confirming a decision of Moulvi Syed Rohim, Munsif of Patna, dated the 12th September 1908.

The material facts will appear from the judgment.

Dr. Rash Behary Ghose and *Babus Lakshmi Narain Singh* and *Chandra Sekhar Prasad Singh* for the Appellants.

Babu Umakali Mukherjee for the Respondent except in S. A. Nos. 1561 and 1583.

Babu Biraj Mohan Majumdar for the minor Respondent in No. 1559.

The JUDGMENT OF THE COURT was as follows:—

HOLMWOOD, J.—These second appeals raise the question whether or not the Respondents are entitled to abatement of rent under sec. 38 of Bengal Tenancy Act on

(1) I. L. R. 20 Cal. 572 at p. 586 (1893).

a finding by the Courts below that the Respondents will have to pay rent as fixed by the settlement for *karary* land if the land reappears or gets covered with earth. There were two descriptions of land in suit, and it is admitted that as far as the land that has been washed away is concerned the abatement is permanent but it should have been made under sec. 52 and not under sec. 38. Still the fact remains that even this land, as the Subordinate Judge points out, may come back again. We are therefore met with the proposition that nothing in this world can be said to be permanent.

As regards the question of the sandy land which is the point really argued before us it is contended that there ought to be a remand for a proper finding whether the deterioration is permanent or not. But both the lower Courts have said and in our opinion erroneously said not as a point of fact but as a matter of interpretation of the section that the deterioration is not permanent inasmuch as they both say that when the previous state of things is restored the rent will have to be restored also. To give effect to any such interpretation of the word permanent would be to do away with the effect of sec. 38 altogether, and this was clearly pointed out in the case of *Gouri Patra* v. *H. R. Reily* (1). The learned Judges say " We think the Judge is wrong. He seems to think that a deterioration ought not to be held to be permanent if by the application of capital and skill the cause of deterioration might be removed. We are of opinion that a more liberal interpretation must be put on the word and it must be construed with reference to existing conditions." Now we think that this is a very sound legal proposition that the word permanent in sec. 38 must in every case be construed with reference to existing conditions; and when a piece of land gets covered with sand the deterioration is permanent with reference to existing conditions, for no human being can tell when it may please a higher power to cause the river to wash away the sand again or to deposit fresh earth upon it, and the case of an absolutely vague and uncertain event like this is even stronger than the example given in *Gouri Patra's* case (1) of the application of human capital and skill. The more uncertain the result is the more it must be held to come within the meaning of the word " permanent " as construed with reference to existing conditions.

Both the Courts below have given the decree for abatement as asked for, and it is not necessary to vary the decree in any way, merely because we consider that the passage in both the judgments stating what will be the result in some future contingency which has not arisen must be expunged.

The result is that the appeals are dismissed. But as the point was one which could fairly be raised, each party will bear his own costs in this Court.

Walmsley, J.—I agree that the appeals should be dismissed.

S. C. M. *Appeals dismissed.*

(1) I. L. R. 20 Cal. 579 at p. 586 (1892).

[Civil Appellate Jurisdiction.]

Appeal from Appellate Decree No. 1652 of 1915.

N. R. Chatterjea, J.
Richardson, J.
1916,
Heard, 27, January.
Judgment, 19, April.

Sital Chandra Chowdhury and ors., Defendants, Appellants,

v.

Mrs. A. J. Delanney and anr., Plaintiffs, Respondents.

Easement, creation of, if must be in writing

(1) I. L. R. 20 Cal. 579 at p 586 (1892).

SITAL CHANDRA CHOWDHURY *v.* MRS. A. J. DELANNEY.

registered—Transfer of Property Act (IV of 1882)—Preamble, secs. 3, 6 (c), 54, 123—Easement, if immoveable property—General Clauses Act (X of 1897), sec. 3, cl. (25)—Registration Act (XVI of 1908), sec. 2 (6)—Statute, interpretation of—Preamble, proper use of.

The provisions of the Transfer of Property Act have no application to the creation of easements.

No writing was necessary for the imposition of an easement before the Transfer of Property Act was passed; and secs. 54 and 123 of that Act were not intended to change and did not change the pre-existing law regarding easements so as to require a writing for their creation or imposition where no writing was previously necessary.

Where a right of way is created by writing, sec. 2 (6) of the Registration Act may require registration but not if the value of the right is less than one hundred rupees.

Held, *therefore, that the Courts below were right in decreeing the Plaintiff's claim of a right of way by grant upon parol evidence only.*

BHAGWAN *v.* NARSINGH (3) *referred to.*

Though a right of way over other lands of the landlord cannot be acquired by prescription under sec. 26, Limitation Act, it can be created by grant.

MADAN MOHAN *v.* SASHI BHUSAN (4) *followed.*

It is extremely doubtful whether a tenant who uses a pathway by the mere leave and license of the landlord is invested with anything in the nature of a right enforcible by suit.

Though the preamble of an Act does not control any plain enactment which follows it, it may be a most useful guide when a question of doubt arises upon the construction of a particular provision and considerations relating to the scope of the Act are involved.

This was an appeal preferred on the 19th July 1915 against the decree of Babu Nagendra Nath Chatterjee, Subordinate Judge of Zillah Tipperah, dated the 25th June 1915, modifying the decree of Babu Haripada Majumdar, Munsif at Comillah, dated the 12th November 1913.

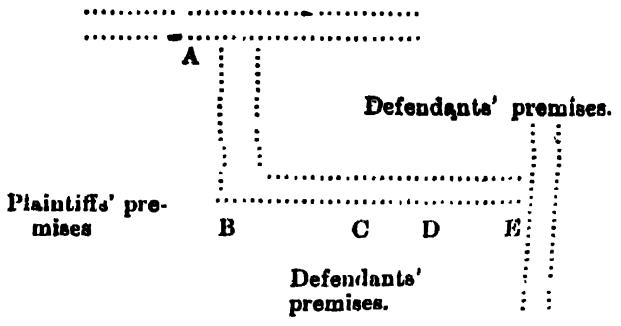
The facts of the case will appear from the judgment.

Babu Jogesh Chunder Roy, Dr. Sarat Chunder Basak and *Babu Bepin Chunder Bose* for the Appellant.

Babus Dwarka Nath Chakerbarty and *Tarak Chandra Chakerbarty* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This second appeal arises out of a dispute as to a right of way. The parties are the tenants of the same landlords, the Ujjir Babus, and the way claimed by the Plaintiff lies as to part of it between lands which they respectively occupy as lessees. The whole way takes the form of a right angle as in the following rough plan :—



In this plan the way claimed runs south from the point A to the point B and then turns east, terminating at the point C. The portions A B and B C have been separately considered in the Courts below. The land leased to the Plaintiff extends on the north-west to the southern part of A B. The Defendants

(3) I. L. R. 31 All. 612 (1909).
(4) 19 C. W. N. 1211 at p. 1214 (1915).

are tenants of land to the south of B C and more recently land to the north of B C and east of A B was also leased to them. The way B C therefore runs between their older premises on the south and their newer premises on the north. Their premises on the south extend to the point C and the land between C and E is occupied by other tenants of the Ujjir Babus. The Defendants' land on the north extends to a point opposite the point D. The importance of this will appear later.

It is conceded that from the point A access can be obtained by a road or path to a public highway on the west. It is further conceded that from the point C there is a way to a point E further east and that from the point E access can be obtained to a public highway on the south. The way C E is used by the Defendants and the tenants of the lands between D and E. The Plaintiff's contention is that the way C E is merely a continuation of the way A B C and that the Defendants are obstructing the way in order for their own convenience to join up their land on the north with their land on the south. The Defendants' answer is that the Plaintiff is trying to force a way through land leased to and occupied by them. It is apparent that the real bone of contention is the portion B C.

Another point may be mentioned. The land in the angle A B E including the Defendants' land there, was reclaimed from a larger area known as Ujjir's tank. The reclamation was carried out by the landlords in or about the year 1904. The Defendants' lease is dated Sravan 1315 (1908) but they were in possession for a year or two before the lease was executed.

As to the pleadings, in the plaint the Plaintiff claimed the way by grant, by user as of right for more than twenty years, as a way of necessity, as a customary way and "under a general right of way of all sorts of user." The Defendants, apart from formal pleas with which we are not now concerned, denied the existence of any way and asserted that A B and B C were included in the reclaimed land leased to them by the landlords.

Both the Courts below agreed in thinking that the Plaintiff had failed to establish any right based on immemorial user or the Limitation Act or necessity or custom. That conclusion is not open to review by us as it depends on the facts found and not upon considerations of law, and in saying that we do not suggest that any other conclusion was possible in the circumstances. So far, therefore, as the claim is founded on these grounds the Plaintiff fails. The trial Court, however, found that she had a right by grant from the landlords to the way A B while the lower appellate Court found that she had a right by grant not only to the way A B but also to the way B C.

The difference of opinion between the two Courts in regard to the way B C arose chiefly out of the different views which they took as to the precise boundaries of the reclaimed land leased to the Defendants. Both Courts held that the alleged way A B was excluded from the area leased and this finding is not now disputed. As to the alleged way B C the first Court held that the lease included this land while the lower Appellate Court came to the conclusion that this land was also excluded. The question turns on the description of the southern boundary of the land in the schedule of the lease. The description runs "Pathway on the old south bank of Ujjir Dighi and Sital Choudhury's (*i.e.*, the Defendant's) old *basha*." The learned Subordinate Judge in the lower Appellate Court considered

this description in the light of the evidence on the record and found that the pathway mentioned extended not only from the point D to the point C but also from the point C to the point B. Before us an attempt was made to argue the question whether the Subordinate Judge was right or not as a question of pure law relating to the construction of a document. It was said that the description was satisfied by confining the reference to a pathway to the admitted pathway C D and the remainder of the description to the Defendants' old premises. That may be so. But the description is also capable of the meaning which the Subordinate Judge put upon it and the question is not a mere question of grammar or law. Evidence is always admissible to show how the language of a document is related to existing facts or to facts which existed when the document was written. In construing the words used the extent of the pathway is a factor which cannot be neglected or left out of account. The Subordinate Judge was entitled therefore to consider the evidence on the point and it cannot be said that the construction adopted by him according to which the whole way claimed is outside the area leased to the Defendants, is bad in law.

But so to construe the lease is not sufficient to dispose of the case. The fact that the land was not leased to the Defendants does not prove that the Plaintiff has a right of way over it, though the fact that the land was used or described as a way at the time of the lease may be of some assistance to her.

That brings us to a question which was raised for the first time in this Court. As things stand, at any rate, the Plaintiff is not in any sense in possession of the right of way. In order to succeed she must prove her title to it. The other grounds on which she put her case being found to be untenable, the title on which she relies is a grant from the landlords. She must therefore prove a right by way of grant which she would be in a position to assert as against the latter. It is not sufficient for her to show that she used the way by the leave and license of the landlords. That is not her case and it is at the least extremely doubtful whether the mere leave and license of the landlords would invest her with anything in the nature of a right which she could enforce by suit. She might have good reason for complaining to the landlords without herself having any further or legal remedies. It would then be for the landlords to take such legal action as they might think fit.

The Plaintiff then has to prove a grant. In finding a grant of a part or the whole of the way the Courts below have depended entirely on parol evidence. The alleged grant is not supported by any document on which the Plaintiff can rely as a title-deed. The Defendants' lease is plainly not such a document. The Courts below inferred the grant from the facts and circumstances of the case, including the terms of the Defendants' lease. The question is whether they were at liberty to do so or whether in the absence of a written and registered document creating a right of way in the Plaintiff's favour, the suit must fail. In other words, is the evidence legally sufficient for the purpose of proving a grant? The point is one open to the Defendants, the Appellants before us, in second appeal, though it was not taken below and we have to deal with it.

The argument was to the following effect. A right of way is immovable property and the grant of a right of way is a transaction governed by the Transfer of Property Act. The transaction in the pre-

sent case must have been either a sale or a gift. If it was a sale, it was the sale of intangible immoveable property, or of an intangible thing, within the meaning and scope of sec. 54 of the Transfer of Property Act. If it was not a sale (as the Plaintiff has never suggested that any consideration moved from her) it was a gift of immoveable property within the meaning of sec. 123. In either case a written and registered instrument was necessary irrespective of the value of the right claimed. In reference to this argument what the Plaintiff founds upon seems to be a reservation of the way by the landlords for the use of the Plaintiff and other tenants whose premises abut upon it. The way being a private way and not a public or village way [*Chuni Lal* v. *Ram Kishen* (1)], the transaction by which it was created may perhaps be plausibly represented as possessing the elements of a gift. "Dedication" cannot be predicated of a private way. But before the argument is accepted a closer examination of it is necessary.

In England, no doubt, a right of way is said to lie in deed and not in livery. The reasoning seems to be that incorporeal or intangible rights require a deed to support them because it is difficult or impossible to deliver actual possession of such rights. The rule, that is to say, is one of evidence or archaic form rather than of substance or principle. What there may be of substance in it is illustrated by the commonly accepted view that sec. 9 of the Specific Relief Act does not extend to incorporeal rights because they are not rights of which "possession can be taken and delivered to a claimant" [sec. 5 (*a*), *Fadu Jhala* v. *Gour Mohan Jhala* (2)]. However that may be, what has to be considered is the Indian Law and not the English Law. Before the Transfer of Property Act was passed no writing was necessary for the creation or grant of a right of way and it is not suggested that if a writing is not required by the Transfer of Property Act, there is anything else in Indian Law which requires a writing. The question therefore is how the Transfer of Property Act deals with the matter.

As to the term "immoveable property," the definition in the General Clauses Act of 1897, which is identical with the definition in the earlier Act of 1868, may be wide enough to include a right of way. But the case just cited shows that such a right is not always or necessarily included. The term is not defined in the Specific Relief Act (1877) and the definition in the General Clauses Act is therefore *primâ facie* applicable to the words as they are used in sec. 9 of that Act. It was held, nevertheless, that the context was sufficient to take rights classified as incorporeal rights out of the operation of that section.

In the interpretation section of the Transfer of Property Act, sec. 3, all that is said is that "immoveable property" does not include "standing timber, growing crops or grass." That proposition is consistent with the term being used so as to include other things included by the General Clauses Act. It does not exclude, at any rate, it does not expressly exclude, rights of way. Assuming that rights of way are included, the argument for the Defendants proceeds on the lines indicated.

The learned Pleader for the Plaintiff on the other hand referred to the case of *Bhagwan* v. *Narsingh* (3) and laid stress on cl. (*c*) of sec. 6 of the Transfer of Property Act. The clause lays down that

(1) I. L. R. 15 Cal. 460 (1888).
(2) I. L. R. 19 Cal. 544 (1892).
(3) I. L. R. 31 All 612 (1909).

"an easement cannot be transferred apart from the dominant heritage." It is said that the clause shows that an easement does not come within the scope of the Act until it is created and that the Act does not regard the creation of an easement as a transfer of property.

Now, no doubt, the right claimed by the Plaintiff is a right in the nature of an easement. It is true that the right is claimed over other land of the landlords and it may be that such a right cannot be acquired by prescription under sec. 26 of the Limitation Act [*Madan Mohan* v. *Sashi Bhusan* (4)]. It can however be created by grant.

But has cl. (*c*) of sec. 6 the effect contended for? Does it do more than express the rule that there cannot be an easement in gross? The right which the landlord assigns is not in his hands an easement because he cannot have an easement over his own property. The right becomes an easement in the hands of the grantee and the clause merely says that the grantee cannot transfer his easement apart from the dominant heritage to which by the nature of the right it is attached. There still remains the question whether the act of the landlord in creating the easement is governed by the Act.

It is perhaps unnecessary to consider whether a right of way is included in the words "in the case of a reversion or other intangible thing" in sec. 54 of the Act, because on the materials on the record it would be impossible to say that the transaction amounted to a sale. The real question is whether the transaction amounted to "a gift of immoveable property" within the meaning of sec. 123 of the Act. What we are about to say, however, is as applicable to sec. 54 as to sec. 123.

In our opinion the provisions of the Transfer of Property Act have no application to the creation of easements for the simple reason that the Act was not intended to deal with that topic.

In the first place the preamble of the Act, which was passed as Act IV of 1882, shows that the Act was not intended to be exhaustive. Its object was "to define and amend certain parts of the law relating to the transfer of property by act of parties." No doubt the preamble does not control any plain enactment which follows it but it may be a most useful guide when a question of doubt arises upon construction of a particular provision and considerations relating to the scope of the Act are involved. Now, not only is the preamble of the Transfer of Property Act in the terms stated, but the next Act passed by the Indian Legislature was the Indian Easements Act (Act V of 1882) which purports "to define and amend the law relating to easements and licenses" or in other words to be a complete and self-contained Code on those subjects. It is true that the Act was not applied to the whole of India. It originally extended to Madras, the Central Provinces and Coorg. It has since been applied to other Provinces but not to Bengal. The fact however that the Easements Act was not and is not universal in its operation does not affect the scope of the Transfer of Property Act. It still remains that the Supreme Legislature dealt with some parts of the law relating to the transfer of property in one Act, with easements in another Act and that there are Provinces in which both Acts are in force. In those Provinces to which the Easements Act was not applied, the Courts were left to follow the course which they had previously pursued of drawing upon English sources for their substantive law, on the principle that the English law on the

(4) 19 C. W. N. 1211 at p. 1214 (1915).

subject is in accordance with justice, equity and good conscience. Where legislation has stepped in, it has done so by express enactment. In Bengal, for instance, there were, and still are, in force the provisions relating to the acquisition of easements by prescription in the Limitation Act, and stray legislative provisions regarding easements may also be found elsewhere as in sec. 6 of the Transfer of Property Act.

These observations on the scope of the Transfer of Property Act and the relation of that Act to the law of easements may be somewhat general but their bearing on the particular question we have to decide is apparent. That question is one of form only and as we have already indicated neither the English law nor the dictates of justice, equity and good conscience can be of any assistance. The answer depends in this Province at any rate entirely on the provisions of the Transfer of Property Act and the effect of those provisions on the law as it previously stood, under which, it must be borne in mind, no writing was necessary for the creation or imposition of an easement. In our opinion, the course which legislation has taken, the existence of scattered provisions which directly and expressly refer to easements, the fact that the Transfer of Property Act was immediately followed by the Easements Act, all indicate that great caution should be used before applying to easements general provisions such as those contained in secs. 54 and 123 of the Transfer of Property Act in which easements are not expressly referred to. There is the further consideration that if the Legislature ever contemplated making a writing necessary for the purpose of creating an easement, the natural place for such a provision would be in Chap. II of the Easements Act, which is headed "The Imposition, Acquisition and Transfer of Easements." The Allahabad High Court however has pointed out in the case above referred to citing Dr. Whitley Stokes' Anglo-Indian Codes, Vol. I, p. 882, that the Easements Act does not require the imposition of an easement to be in writing. The language used in secs. 54 and 123 of the Transfer of Property Act is certainly not such as to compel us to include the creation or imposition of easements within their scope. On the contrary the language is scarcely adapted for that purpose. The conclusion at which we arrive (in agreement so far as sec. 54 is concerned with the conclusion reached by the learned Judges of the Allahabad High Court) is that those sections were not intended to change, and did not change, the existing law regarding easements so as to require writing for their creation or imposition where no writing was previously necessary. The Courts below therefore were at liberty to determine the question between the parties as a question of fact on the materials on the record.

It may be added that sec. 2 (6) of the Registration Act which defines "immoveable property" for the purposes of that Act, expressly includes "rights to ways." Where, therefore, a right of way is created in writing, the writing may require registration but not if the value of the right is less than one hundred rupees.

In the result the objections taken before us to the decision of the Court below all fail and the appeal must be dismissed with costs.

N. G. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 273 OF 1916.

SANDERSON, C. J.
MOOKERJEE, J.
1916,
3, May.

GOUR SUNDAR BHOWMIK, Defendant, Appellant, Petitioner,
v.
RAKHAL RAJ BHOWMIK, Plaintiff, Respondent, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 47, r. 8—Decree of Division Bench of High Court of two Judges found erroneous, giving Plaintiff more than he claimed—Application for amendment before one of them—Jurisdiction of single Judge to amend decree—Court in granting application for review, if bound to re-hear whole case—Re-hearing of case by single Judge without authority from Chief Justice—Jurisdiction.

An application for amendment of a decree made in favour of the Plaintiff by a Division Bench of the High Court of two Judges was moved by some of the Defendants before one of them (the other Judge having left the Court) and a Rule was issued on the Plaintiff to show cause why the decree should not be set aside or amended, or why such other order should not be made as might seem fit, on the ground that the decree purported to give Plaintiff a relief not claimed by him. The Judge made the Rule absolute, and then in terms of r. 8, Or. 47, C. P. C., proceeded to rehear the case with the result that the judgment and decree of the Division Bench were amended. The Plaintiff appealed against this last decision.

Held—(*Per* JENKINS, C. J. *and* N. R. CHATTERJEA, J.)—*That in the absence of an order by the Chief Justice authorising the learned Judge alone to sit for the hearing of the case, his decision was without jurisdiction.*

The case thereafter was heard before the Regular Bench, the Judges whereof refused to rehear the whole case, and confining themselves to the point of amendment only passed a decree amending the judgment and decree. Some of the Defendants having applied for review of this last decree, on the ground that the learned Judges should have reheard the whole appeal,

Held—*That the decree of the Division Bench stood amended, as soon as the Rule to amend it was made absolute, and all subsequent proceedings were superfluous.*

That as the last decree of the High Court only affirmed that order, it was not necessary to set it aside.

Per MOOKERJEE, J.—*R. 8 of Or. 47 of the Civil Procedure Code clearly leaves it optional with the Court to determine whether, when a review is granted, the case should be reopened in part or in its entirety.*

This Rule arose out of an application for review of the judgment of this Court, dated the 24th November 1915, passed by Holmwood and Mullick, JJ., in Second Appeal No. 145 of 1909, which had been preferred against the decree of Babu Promotha Nath Chatterjee, Subordinate Judge of Zillah Nadia, dated the 23rd September 1908, modifying the decree of Babu Lala Tarak Nath, Munsif of Kushtia, dated the 4th January 1908.

The facts of the case material to this report were as follows :—

The Second Appeal No. 145 of 1909 first came on for hearing before Brett and Richardson, JJ., who set aside the judgment and decree of the Subordinate Judge and restored the decree of the Munsif, by their judgment dated the 12th December 1912. In drawing up the decree of this Court, however, the Plaintiff who before the Munsif had only obtained a decree for possession of certain lands but not of the building thereon (the Plaintiff not having prayed for any such relief) was

awarded possession of the building also. Some of the Defendants thereupon applied for amendment of the decree and obtained a Rule from Richardson, J., Brett, J., having by this time left the Court. The Rule was heard before Richardson, J., who granted the application and having restored the appeal for rehearing, forthwith reheard the appeal and ordered the decree to be amended in terms which will appear from the judgment of Sanderson, C. J. An appeal under the Letters Patent was preferred against this judgment of Richardson, J., and it was heard before Jenkins, C. J., and N. R. Chatterjea, J., who passed the following judgment :—

Jenkins, C. J. (N. R. Chatterjea, J., agreeing).—We must set aside the decree of Mr. Justice Richardson as having been made without jurisdiction inasmuch as the Chief Justice did not determine that he should sit alone for the purpose of this case. The case must be restored to the Appellate list to come before the Bench of the group in the usual way.

We say nothing as to the scope of the rehearing as that is a matter that does not arise before us at this stage.

[In consequence of this order, the appeal was heard in due course before Holmwood and Mullick, JJ., who refused to hear on any matter other than on the amendment and passed a decree in terms identical with the decree of Richardson, J., whereupon some of the Defendants applied for and obtained the present Rule for review of the judgment and decree of Holmwood and Mullick, JJ., on the ground that they should have re-opened and reheard the whole appeal.]

Bâbu Asita Ranjan Ghosh for the Petitioners.

Babus Mohendra Nath Ray and *Monmotha Nath Ray* for the Opposite Party.

The Judgment of the Court was as follows :—

Sanderson, C. J.—The learned Vakil at the opening of his remarks for the purpose of showing cause stated that this was rather a peculiar matter. I entirely agree with him and I most sincerely hope that it is not only a peculiar matter, but also an exceptional matter, because the facts relating to the proceedings in this case are truly amazing—there is no other word for them. The action was brought in November 1906, very nearly ten years ago, by the Plaintiff for the recovery of certain land. The Court of first instance gave the Plaintiff a decree. Then there was an appeal to the first Appellate Court. That Court varied the judgment of the first Court by declaring that the Plaintiff and the Defendants are joint owners of the land. Then there was an appeal to the High Court, and the High Court consisting of Mr. Justice B[illegible] and Mr. Justice Richardson allowed the appeal and restored the judgment of the Court of first instance, and thereby declared that the Plaintiff was entitled to the possession of the land in question. Unfortunately, by mistake [illegible] has not been made plain to me how the mistake arose—the decree gave the Plaintiff something more than he asked for, inasmuch as it not only declared that the Plaintiff was entitled to the possession of the land but it also declared that he was entitled to the possession of a building which was upon the land. That was a matter—which was obviously an error—and which, in my opinion, ought to have been set right as soon as the parties saw the decree. If that had been brought to the attention of the learned Judges before the decree was signed, it could have been set right in five minutes. Instead of that, in consequence of that mistake which was made in December 1912, proceedings have

been going on in this Court from December 1912 down to May 1916. I think I am justified in saying that the proceedings in this case are nothing short of amazing. What happened then is this : An application was made to Mr. Justice Richardson, the other learned Judge, Mr. Justice Brett, having by this time left the Court. That was made in April 1913, and Mr. Justice Richardson granted a Rule limiting it to this particular point, and calling upon the Opposite Party to show cause why the judgment and decree of this Court, dated the 12th December 1912, should not be set aside or amended, or why such other order should not be made as to this Court might seem fit on the ground that in giving the Plaintiff a decree for the structures on the land this Court went beyond the relief claimed in the plaint. So that the Rule was granted on that one point only. In June 1913 this Rule was argued before Mr. Justice Richardson; and, after argument, he made the Rule absolute. I agree with what fell from my learned brother Mr. Justice Mookerjee during the course of the argument in the case, that there was an end of the matter, as soon as the Rule was made absolute and in accordance with that Rule the decree would, as a matter of fact, have been amended in respect of the point which was mentioned in the Rule that was granted. For some reason or other Mr. Justice Richardson was persuaded to rehear the case under Or. XLVII, r. 8, of the Code of Civil Procedure, and, after hearing the case, he made the order, which has been referred to and which is to this effect :—" The judgment will therefore be altered in this way, that for the words ' with structures as may be standing on the land ' the following will be substituted, that the Defendants do remove the structures from the land within two months from the date of this order. In the event of their failing to do so the Plaintiff will be at liberty to remove them at the costs of the Defendants to be realised in execution of the decree. A corresponding alteration will be made in the decree." Then, he went on to say, " I make no order as to costs. The mistake should have been brought to notice before the decree was signed." Well, some ingenious person then thought of the point that Mr. Justice Richardson had no jurisdiction to rehear the case sitting by himself, and although he had jurisdiction to grant the Rule and to make the Rule absolute and thereby to make an order by which the judgment would be amended, still he had no jurisdiction to rehear the case in the proper sense of the word, as he by himself could not constitute a Division Bench. Therefore, this point was taken and an appeal from his decision was instituted and it was heard in this Court by the late Chief Justice and Mr. Justice N. R. Chatterjea, and they decided that he had no jurisdiction to rehear the case, because he was not a Division Bench, and they directed that the appeal should be reheard. As a result of that, two other learned Judges were called upon to hear this appeal, and Mr. Justice Holmwood and Mr. Justice Mullick heard it on the 24th of November 1915, some two years after the order which was made by Mr. Justice Richardson and having heard it they made an order identical in terms with the one that was made by Mr. Justice Richardson in the month of June 1913. The parties were not satisfied even then : but some of the Defendants came here and obtained a Rule upon the ground that Mr. Justice Holmwood and Mr. Justice Mullick had not reheard the case. If I may say so with every respect to the learned Judges, I think they took a reasonable view of the matter. What they did

was, they said that the whole of this matter arose from an obvious error, upon which the Rule was granted for review by Mr. Justice Richardson, and they confined themselves to that error and declined to go any further and said they had discretion in the matter. It is argued by the learned Vakil that they were wrong in so doing and he wishes us to make the Rule absolute, so that this case may be reheard by two other learned Judges of this Court.

All I can say, speaking for myself, is this. As far as I can understand the proceedings, when Mr. Justice Richardson made that Rule absolute in June 1913, by reason of which the judgment and the decree would as a matter of course be amended in the way he intended them to be amended and in the way he intended them to be drawn up, from that moment every other proceeding was superfluous. If we were to make this Rule absolute, it would be a travesty of justice to which I will not be a party.

Therefore, in my opinion, this Rule ought to be discharged with costs—hearing fee, two gold mohurs.

Mookerjee, J.—I agree that the order we are invited to review is substantially correct, notwithstanding the extraordinary errors which have characterised the proceeding in its later stages.

The suit was instituted so far back as the 12th November 1906 for declaration of title to land and for recovery of possession thereof. It was decreed in the Court of first instance on the 4th January 1908. On appeal by the Defendants, the Subordinate Judge modified this decree. The result was that the present appeal was lodged in this Court on the 5th February 1909 by some of the Defendants. The Plaintiff thereupon presented a petition of cross-objection. The appeal was heard in the first instance by Mr. Justice Brett and Mr. Justice Richardson on the 12th December 1912; they dismissed the appeal and allowed the cross-objection, so that the decree of the primary Court was restored. The decree of this Court, however, contained a provision for possession of the structures on the land in a manner not contemplated by the plaint. The Defendants took advantage of this error, and presented an application for review of judgment to Mr. Justice Richardson, on the 28th April 1913, after Mr. Justice Brett had ceased to be a member of the Court. Thereupon, Mr. Justice Richardson issued a Rule calling upon the Opposite Party to show cause why the judgment and decree dated the 12th December 1912 shou'd not be set aside or amended, or why such other order should not be made as might seem fit, on the ground that, in giving the Plaintiff a decree for the structures on the land, the Court had gone beyond the reliefs claimed in the plaint. This Rule was heard by Mr. Justice Richardson on the 5th June 1913 as he was obviously competent to do, and was made absolute with the consequence that the judgment and decree stood amended in the manner stated in the order for issue of the Rule. Mr. Justice Richardson, however, not only made the Rule absolute, but proceeded to act under Rule 8 of Order XLVII of the Civil Procedure Code. That Rule provides that "when an application for review is granted, a note thereof shall be made in the register and the Court may at once rehear the case or make such order in regard to the rehearing as it thinks fit." Mr. Justice Richardson apparently thought that it was incumbent upon him to rehear the case under Rule 8 of Order XLVII. The result of the rehearing was that the alteration already mentioned was made in the judgment and decree.

GOUR SUNDAR BHOWMIK *v.* RAKHAL RAJ BHOWMIK.

The substance of the matter was that the order made on the rehearing of the case was identical with the order whereby the Rule was made absolute. An appeal was then preferred under cl. 15 of the Letters Patent against the judgment of Mr. Justice Richardson, and was heard by Sir Lawrence Jenkins, C. J., and Mr. Justice N. R. Chatterjea. They allowed the appeal on the ground that Mr. Justice Richardson had no jurisdiction to rehear the case under Rule 8 of Order XLVII; but they not only cancelled that portion of his order, but proceeded to direct that the appeal should be reheard. At the rehearing which took place before Mr. Justice Holmwood and Mr. Justice Mullick, the question was raised whether the appeal was to be reheard in its entirety or whether the ground urged before Mr. Justice Richardson in support of the application for review was the only ground open for consideration. The Court came to the conclusion that the latter course should be pursued. The result was that Mr. Justice Holmwood and Mr. Justice Mullick proceeded to make a decree identical with what had been made by Mr. Justice Richardson when he made the Rule for review absolute. We are now invited to set aside on review the decree made by Mr. Justice Holmwood and Mr. Justice Mullick on the ground that it was incumbent upon them to rehear the entire appeal. In my opinion there is no foundation for this contention.

In the first place it is indisputable that a review may be granted either as to the entirety of the order assailed or as to a portion only thereof. This was laid down by the Judicial Committee so far back as 1867 in the case of *Bhagwandeen Dobay* v. *Myna Baee* (1) where Sir James Colvile observed that "the Judges who might have made a final order, granting or rejecting the application in *toto* or in part, were not incompetent to make the qualified order which they did make, leaving in the Court, which was to review the decision, a discretion as to the extent to which the review should be carried." This view had been adopted by this Court in 1864 in the case of *Hurro Chunder* v. *Ram Kishore* (2) and has been consistently followed in a long series of decisions [*Bijnath Sahai* v. *Wuzeer Narayan* (3), *Dhuronidhur Sen* v. *Agra Bank* (4), *Thakur Prosad* v. *Baluk Ram* (5), *Hurbans Sahye* v. *Thakur Pershad* (6) and *Bhubaneswari* v. *Ajodhya* (7)]. Reliance has been placed on behalf of the Petitioner on the observation in the case of *Sainal Ranchhod* v. *Dullabh Dvarka* (8), that when a review of a decision has been admitted, the whole case is thereby reopened, an observation quoted with approval in the case of *Emperor* v. *Narayan* (9). I am not prepared to accept this comprehensive statement as an accurate exposition of the law. Rule 8 of Order XLVII, which reproduces sec. 630 of the Code of 1882, clearly leaves it optional with the Court to determine whether, when a review is granted, the case should be reopened in part or in its entirety. It is obvious that any other view might lead to grave inconvenience, if not injustice. It is conceivable that the different points in a case may be so inseparably connected with each other, that if the decision on one point is set aside, it becomes essential in the interests of

(1) 11 M. I. A. 487 (499) (1870).

(2 [1864] W. R. 141.
(3) 24 W. R. 427 (1875).
(4) I. L. R. 5 Cal. 86 (1879).
(5) 12 C. L. R. 64 (1882).
(6) I. L. R. 9 Cal. 209 (1882).
(7) 11 I. C. 102 (1911).
(8) 10 Bom. H. C. 360 (1873).
(9) I. L. R. 32 Bom. 111 (120) (1907).

justice that the whole case should be re-opened. On the other hand, cases are equally conceivable in which the different points may be so distinct, that reconsideration of one of those points may not necessitate the re-examination of the other points. Consequently, the view cannot be supported on principle that whenever an application for review is granted, the entire case must of necessity be reopened and reconsidered. This view is supported by the decisions in *Sadaruddin* v. *Ekramuddin* (10), *Janaki Nath* v. *Probhasini* (11), *Vadilal* v. *Fulchand* (12) and *Gopala Aiyar* v. *Ramasami Sastrial* (13). These cases show that the Court may, in its discretion, direct that the whole case be reopened, if it is necessary, in the interests of justice, that such a course should be adopted; but they are not authorities for the proposition that whenever a review is granted on a particular point, the whole case must be reopened. The facts of the case before us afford a good illustration, why the contention of the petitioner should not be accepted. The point whereon the review was sought and granted, was absolutely distinct from the other points in the case. The question was whether the Plaintiff should be allowed a decree for possession of the structures on the land or whether the Defendants should be reserved liberty to remove them. The determination of this question did not in any way affect the other points in the case; it was also conceded that the erroneous order in the decree in this behalf had been made by an oversight. Clearly, it was not necessary in the interests of justice that if the decree were modified in this respect, the whole case should be reopened. But, I am also of opinion, that the case was concluded when Mr. Justice Richardson made the Rule absolute, and that there was nothing further to reconsider or rehear. Although, therefore, in this view the judgment, now under review, was passed by Mr. Justice Holmwood and Mr. Justice Mullick in an appeal which had been concluded by a final decree made by Mr. Justice Richardson, still it is not necessary for us to interfere, as it merely repeats the decision of Mr. Justice Richardson. This Rule must accordingly be discharged with costs.

N. G. *Rule discharged with costs.*

(10) 18 C. W. N 22 (1913)
(11) 19 C. W. N. 1077 (1915).
(12) I. L. R. 30 Bom. 56 (1905).
(13) I. L. R 31 Mad. 49 (1907).

[CRIMINAL REVISIONAL JURISDICTION.]

Rev. No. 643 of 1916.

Sanderson, C. J. and Walmsley, J.

1916, Heard, 20 and 21, June. Judgment, 21, June.

Kshetra Mohon Giri and ors., 2nd Party, Petitioners, v. Darpanarain Giri and ors., 1st Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 439—Revision—Time within which High Court must be moved—Practice of Court.

According to the practice of the High Court an application for revision in criminal cases must be made within sixty days from the date of the order complained of, exclusive of the time necessary for obtaining copies. This is not an inflexible rule and in exceptional circumstances the rule may be departed from.

This was an application for revision of the order of Mr. A. H. Jackson, Subdivisional Magistrate of Contai, dated the 8th April 1916, declaring under sec. 145, Cr. P. C., the first party to be entitled to possession until evicted therefrom in due course of law.

KSHETRA MOHON GIRI *v.* DARPANARAIN GIRI.

The application was filed in the High Court on the 19th June 1916.

Babu Sarada Charan Maiti for the Petitioner.

The ORDER OF THE COURT was as follows :—

Since yesterday, I have caused enquiries to be made with regard to the practice affecting this matter, and I find that the well-known practice is that an application for revision must be made within sixty days from the date of the order complained of. The Court has allowed an addition, to the sixty days, of the time which is necessary for obtaining copies. This is not a question of limitation but a rule of the practice of the Court to the effect that an application for revision must be made within a reasonable time. It is not an inflexible rule, and in exceptional circumstances the rule might be departed from. In this case the date of making over the copy to the applicant was the 1st day of June, so that there was ample time to make this motion on one of the usual motion days, namely, on Monday the 5th of June or Monday the 12th of June. Yet, this motion was not made until the 19th of June when it was out of time. In these circumstances, we are of opinion that this application should not be entertained.

S. C. M. *Application refused.*

[CRIMINAL REFERENCE.]

REF. No. 81 OF 1916.

MOOKERJEE, J.
SHEEPSHANKS, J.
1916,
7, June.

RAIMOHAN KARMAKAR and another
v.
KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec 133—Reasonable opportunity to show cause—Order if can be made on result of local inspection—Vague and indefinite order.

A proceeding under sec. 133, Cr. P. C., is in the first instance entirely ex parte *and the report or the other information whereon the Magistrate has taken action before making the conditional order is no evidence against the opposite party. It is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by sec. 135, cl.* (b), *and to adduce evidence as prescribed by sec. 137* (1).

An order under sec. 133 cannot even by consent of parties be based upon information gathered at a local enquiry.

When in a proceeding under sec. 133, instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately, with regard to each person, the specific obstruction made by him, which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned.

KALIMOHAN *v.* NAKARI CHANDRA (3) *followed.*

This was a Reference from M. Smither, Esq., Sessions Judge, Dacca, dated 25th May 1916, recommending that the order of Mr. S. Klingenstien, Subdivisional Officer, Munshigunj, dated 24th March 1916, making absolute the conditional order passed under sec. 133, Cr. P. C., directing the above accused to remove certain obstruction, be set aside for reasons set forth in his reference, which was as follows :—

"What purport to be proceedings under sec. 133, Cr. P. C., were taken against several persons said to have obstructed a public way,—a "*halat.*" On the date fixed for the appearance of the persons to show cause, one man appeared and consented to an order. Two men did not ap-

(3) 11 C. L. J. 114 (1909).

pear. An order was passed against all of them. Two more men, the Petitioners, asked for time to show cause, but the Magistrate said that this was merely to cause delay, and he passed an order against them also. Their names are Rai Mohan and Gopal. The order drawn up was against six men. It did not specify what each was to do. From the paper preceding it on the record, it appears that Rai Mohan was one of ten men who had dug earth from the *halat*, to improve their *baris*. It does not appear what the other, Gopal, was said to have done. The order says that the obstruction has been caused "by digging earth, excavating a pond, &c., or by extending your ploughed land." It does not say which of these things any particular man has done, or to what extent.

"Further, no copy even of this order was sent to the Petitioners, but only a summons to appear in proceedings under sec. 133, Cr. P. C. The Magistrate has forwarded an explanation of the clerk, to the effect that he had no suitable forms, and that the persons concerned could have read the peon's copy, although there were no copies for themselves.

"I think the order should be set aside. It is possible that the Petitioners know what it is they are required to do: but it is impossible to ascertain it from the record, and impossible to hold that they have had a proper opportunity to show cause. It may be noticed that even the summons were served only on 21st March and the order was passed on 24th.

"I recommend that the order be set aside."

No one appeared on this Reference.

The Judgment of the Court was as follows:—

This is a reference by the Sessions Judge of Dacca, under sec. 438, Cr. P. C., in the matter of a proceeding under sec. 133.

On the 21st February 1916, the President Punchayet of the Hashara Union reported to the Sub-divisional Magistrate of Munshigunge that the *halat* from the Hashara Bazar to Teghoria had been destroyed by several persons (six of whom were mentioned in his list) "who had either dug earth therefrom, or excavated a pond, or had ploughed up the land and included it in their holding." On the 4th March, the Magistrate directed proceedings to be drawn up against all the persons to show cause why they should not remove the obstructions mentioned; by the same order he fixed the 24th March for the hearing of the case. A proceeding was then drawn up against the six persons jointly requiring them to remove the obstructions mentioned within seven days or to show cause on the 24th March why the order should not be confirmed. The order however in the form No. 16, Schedule V of the Criminal Procedure Code, was not drawn up and signed till the 14th March and was not made over to the peon till the 18th March. His return shows that the order was not served till the 21st March. On the date fixed, one of the six persons mentioned in the notice appeared and stated that he had no objection to remove the obstruction, and the order was made absolute against him; three of the others were absent and the order was made absolute against them under sec. 136. The remaining two persons appeared and prayed for an adjournment to enable them to file a written statement. The Magistrate refused the application and made the order absolute against them also. Pursuant to this order, a notice was issued upon them that they do remove the obstruction immediately on receipt of the

notice. The Sessions Judge has, upon the application of these two persons, who had appeared to show cause under sec. 135, recommended that the order be set aside on two grounds, namely, first, that the Petitioners had not sufficient opportunity to show cause against the order, and secondly, that the proceedings were defective, because the initial as well as the final order was not sufficiently precise. We are of opinion that these objections are well founded.

The initial order under sec. 133, though made on the 4th March, was not served till the 21st March. The reason for the delay has not been explained, but the result has been that the Petitioners had only two days to enable them to show cause. Their application for an adjournment was thus not unreasonable. It cannot be overlooked that a proceeding under sec. 133 is, in the first instance, entirely *ex parte*, and, as pointed out in *Srinath* v. *Ainaddi* (1), the report or the other information whereon the Magistrate has taken action before making the conditional order is no evidence against the opposite party. It is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by sec. 135, cl. (*b*) and to adduce evidence as prescribed by sec 137 (1). In the case before us, we agree with the Sessions Judge that the Petitioners had not such opportunity given to them. We may add that the Magistrate in his explanation relies upon the result of an inspection he had made of the locality in the course of a tour long previous to the institution of the proceedings. It may be pointed out, as explained in *Upendra* v. *Rampal* (2), that an order under sec. 133 cannot, even by consent of parties, be based upon information gathered at a local enquiry.

It is further plain that the initial order is not sufficiently specific; when in a proceeding under sec. 133, instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately, with regard to each person, the specific obstruction made by him, which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned. No person can be called upon, under sec. 133, to remove an obstruction not caused by himself. In the case before us, there is no allegation that the unlawful obstructions imputed to the Opposite Party had been caused by all of them jointly; on the other hand, from the report of the President Panchayet it seems that different persons had caused different obstructions. In these circumstances, a joint initial order, which does not specify what obstruction each person called upon to show cause has made, followed by a joint order absolute, which does not specify what each member of the Opposite Party is required thereby to do, cannot be supported. As was pointed out by Jenkins, C. J., in *Kalimohan* v. *Nakari Chandra* (3), an order issued under sec. 133 should not be vague and indefinite or ambiguous, but must be such that the persons to whom it is directed may be able to learn from its terms what it is that they are to do for the purpose of complying with it. This is no trivial matter, for, under sec. 140, disobedience to the order renders the defaulter liable to serious

(1) I. L. R. 24 Cal. 895: s. c. 1 C. W. N. 217 (1897).

(2) 10 C. L. J. 482 (1909).

(3) 11 C. L. J. 114 (1909).

RAIMOHAN KARMAKAR *v.* KING-EMPEROR.

penal consequences, namely, to a prosecution under sec. 188, Indian Penal Code.

We accordingly accept the recommendation of the Sessions Judge and set aside the order of the Magistrate dated the 24th March 1916.

S. C. M. *Order set aside.*

PATNA HIGH COURT.

[FULL BENCH REFERENCE]*

IN

APPEAL FROM ORIGINAL DECREE No. 380 OF 1913.

CHAMIER, C. J.
SHARFUDDIN, J.
ATKINSON, J.
KINGSFORD, J.
1916, 26, June.

MUSAMAT BIBI WAHIDUNNISA, Defendant, Appellant,
v.
BABU DEEP NARAIN PRASAD, Plaintiff, Respondent.

Partition suit—Preliminary decree, appeal against—Final decree passed pending the appeal against preliminary decree—No appeal filed against final decree—Whether appeal against preliminary decree can proceed.

Where in a partition suit a preliminary decree was passed on 29th May 1913 and an appeal was filed against it on 3rd July 1913, but a final decree was passed on 27th September 1913 despite the objection of the Appellant that the final decree should not be passed until the appeal had been disposed of, and no appeal was filed against the final decree, and the hearing of the appeal against the preliminary decree was objected to on the ground that the appeal could not proceed inasmuch as a final decree had been passed in the case and no appeal had been preferred against that decree.

Held, *on a review of authorities, that the preliminary objection should be overruled. The appeal could be heard although a final decree had been passed in the case and no appeal had been filed against that decree.*

KANHAIYA LAL *v.* TIRBENI SAHAI (1), RAM NATH SINGH *v.* BASANTA NARAIN SINGH (2), NISTARINI DEBI *v.* RAI MOHAN BISWAS (3), ABDUL JALIL *v.* AMAR CHAND PAUL (4), ATUL CHANDRA SINGHA *v.* KUNJA BEHARI SINGHA (5) *and* LAKSHMI *v.* MARU DEVI (6) *followed.*

KHIRODAMOYI DASI *v.* ADHAR CHANDRA GHOSE (7), SADHU CHARAN DUTTA *v.* HARA NATH DUTTA (8), BULWANT SINGH RAM CHANDRA *v.* SAKHARAM MANCHARAM (9) *and* DATTATRAYA RAMCHANDRA SAVALE *v.* AJMUDDIN FAKRUDDIN (10) *were distinguishable, because in those cases the final decree had been passed before the appeal against the preliminary decree was filed.*

Per SHARFUDDIN, J.—*A preliminary decree in a partition suit has existence independent of the final decree and the final decree really is dependent upon and subordinate to the preliminary decree and instead of extinguishing a preliminary decree gives effect to it.*

CHAMIER, C. J.—*A Defendant cannot resist partition of a* mehal *on the ground that by an agreement the members of the family agreed to keep it* ijmali *when the Defendant claimed partition of it in a pre-*

* This Full Bench was constituted under r. 11, Chap II, Part I, p. 9 of the Rules of the High Court at Patna, which runs as follows:—

"Notwithstanding anything to the contrary in the rules the Chief Justice may direct that any application, petition, suit, appeal or reference shall be heard by a Full Bench."

(1) I. L. R. 36 All. 582 (1914).
(2) 17 C. W. N. 868: s. c. 18 C. L. J. 209 (1913).
(3) 18 C. L. J. 214 (1913).
(4) 18 C. L. J. 223 (1913).
(5) 22 C. L. J. 90 (1915).
(6) I. L. R. 37 Mad. 29 (1911).
(7) 18 C. L. J. 321 (1912).
(8) 27 I. C. 135 (1914).
(9) 33 I. C. 137 (1915).
(10) 33 I. C. 146 (1915).

MUSAMAT BIBI WAHIDUNNISA *v.* BABU DEEP NARAIN PRASAD.

vious suit and succeeded in effecting partition.

This was a first appeal against a decision of Moulvi Mohammad Abdul Jabbar, Khan Bahadur, second Subordinate Judge of Monghyr, dated the 29th May 1913.

The facts out of which this appeal arises are shortly as follows :—

The Plaintiff-Respondent purchased a fifteen and a quarter annas share out of a *mehal* in Mouza Bobil bearing *tauzi* No. 3841 from two persons named Kamaluddin Ahmad and Rafiqunnessa Bibi and he instituted this suit for partition against the Defendant who is the owner of the remaining nine pies share in the *mehal*. The defence *inter alia* was that on the 1st June 1888 when the different members of the family divided up the family property they agreed to allow Mouza Bobil to remain unpartitioned until certain suits, which had been brought by third persons in respect of a village allotted to the Defendant, had been disposed of. She further alleged that the suits referred to in the *ekrarnama* were still pending. The first Court passed a preliminary decree on 29th May 1913 and against the said decree the Defendant filed this appeal in the Calcutta High Court on 3rd July 1913. A final decree was made in the case on 27th September 1913, despite the objection of the Defendant that the final decree should not be made until her appeal had been disposed of.

Messrs. Syed Mohammad Tahir and *Muhammad Husan Jan* for the Appellants.

Messrs. Kulwant Sahai and *Rai Guru Saran Prosad* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHAMIER, C. J.—This is an appeal by the Defendant in a suit for a partition against a preliminary decree passed on May 29th, 1913. The appeal was filed on July 3rd, 1913. A final decree was made in the case on September 27th, 1913, despite the objection of the Appellant, that the final decree should not be made until her appeal had been disposed of. A preliminary objection has been taken to the hearing of this appeal to the effect that this appeal cannot proceed inasmuch as a final decree has now been passed in the case and no appeal has been filed against that decree. In my opinion the preliminary objection should be overruled. I adhere to the decision of the Full Bench of the Allahabad High Court in *Kanhaiya Lal* v. *Tirbeni Sahai* (1) in which I took part. Further I consider that it has been shown that there is a strong current of authority in the Calcutta High Court in favour of the view that an appeal of this kind can be heard although a final decree has been passed in the case, and no appeal has been filed against that decree : I would refer to the decisions in *Ram Nath Singh* v. *Basanta Narain Singh* (2), *Nistarini Debi* v. *Rai Mohan Biswas* (3), *Abdul Jalil* v. *Amar Chand Paul* (4) and *Atul Chandra Singha* v. *Kunja Behari Singha* (5). In all those cases the appeal against the preliminary decree was filed before the final decree had been made. They are therefore on all fours with the present case. The view taken in those cases is in accordance with the view taken by the Allahabad High Court in the case cited above and with the view taken by the Madras High Court in *Lakshmi* v. *Maru Devi* (6). Our attention has been drawn to the decisions in *Khirodamoyi Dasi* v.

(1) I. L. R. 35 All. 532 (1914).
(2) 17 C. W. N. 868 : s. c. 14 C. L. J. 209 (1913)
(3) 18 C. L. J. 214 (1913).
(4) 18 C. L. J. 223 (1913).
(5) 22 C. L. J. 90 (1915).
(6) I. L. R. 37 Mad. 29 (1914).

MUSAMAT BIBI WAHIDUNNISA *v.* BABU DEEP NARAIN PRASAD.

Adhar Chandra Ghose (7) and *Sadhu Charan Dutta* v. *Hara Nath Dutta* (8). In both those cases the final decree had been passed before the appeal against the preliminary decree was filed. They are therefore distinguishable from the present case. For the same reason we may distinguish from the present case the cases of *Bulwant Singh Ram Chandra* v. *Sakharam Mancharam* (9) and *Dattatraya Ramchandra Savale* v. *Ajmuddin Fakhruddin* (10) decided by the Bombay High Court. On these grounds therefore I am of opinion that this preliminary objection should be overruled.

SHARFUDDIN, J.—Under the Civil Procedure Code a decree may be appealed against. It is therefore clear that so long as a decree retains its force as such it can be appealed against. I understand that a preliminary decree in a partition suit has existence independent of the final decree and the final decree really is dependent upon and subordinate to the preliminary decree. In my opinion a preliminary decree retains its force as such even after the passing of the final decree. A preliminary decree is not extinct after the passing of the final decree and the final decree instead of extinguishing a preliminary decree gives effect to it. Agreeing with the observations of His Lordship the Chief Justice I am also of opinion that the objection should be overruled.

ATKINSON, J.—I entirely agree with the views expressed by the Chief Justice.

KINGSFORD, J.—I entirely agree with the views expressed by the Chief Justice.

Judgment on the merits :—

CHAMIER, C. J.—The Respondent claims to be entitled by purchase from two persons named Kamaluddin Ahmad and Rafiqunnessa to a 15¼ annas share out of a *mehal* in Mouza Bobil bearing *tauzi* No. 3841. The Defendant-Appellant is the owner of the remaining nine pies share in the *mehal*. She resisted this suit for partition of the *mehal* on the ground that on June 1st, 1888, when the different members of the family divided up the family property they agreed to allow Mouza Bobil to remain unpartitioned until certain suits which had been brought by third persons in respect of a village allotted to the present Appellant had been disposed of. It appears however that notwithstanding the agreement contained in the *ekrarnama* of June 1st, 1888, the present Appellant claimed partition of Mouza Bobil. Kamaluddin, one of the persons through whom the present Respondent claims, objected that the village should not be partitioned and he relied upon the *ekrarnama* of June 1st, 1888. His objection was overruled and partition was effected and two *mehals* were formed in the village. The Appellant in her written statement in the present case alleged that the suits referred to in the *ekrarnama* were still pending. Whether this is so or not we think that she cannot resist the suit on that ground. She herself in conjunction with her relative Azizunnessa claimed partition of this very village in 1894 and she cannot now resist the claim of the purchaser from Kamaluddin. In my opinion the partition to be effected in this case will not affect in any way any right which the Appellant may have under the *ekrarnama* of June 1st, 1888. I would dismiss this appeal with costs.

SHARFUDDIN, J.—I agree.

A. K. R. *Appeal dismissed.*

(7) 18 C. L. J. 321 (1912)
(8) 27 I. C. 135 (1914).
(9) 33 I. C. 137 (1915).
(10) 33 I. C. 146 (1915).

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 354 OF 1912.

CHAPMAN, J.
ATKINSON, J.
1916,
Heard, 22 and 23, March, 4 and 5, April.
Judgment, 10, April.

SYED LATIF HUSSAIN and ors, Plaintiffs, Appellants,
v.
BASDEO SINGH and ors., Defendants, Respondents.

Partition suit—Issue between co-Defendants—Previous partition suit instituted by third parties against present Defendants and the vendor of the Plaintiff—Issue regarding the share of the Plaintiff's vendor being subject to other Defendants' mokurari ***raised but expunged—Final decree in the previous partition suit passed on the basis of the*** mokurari ***interest and allocation made thereunder—Bar of*** res judicata, ***to present suit—Explanation IV of sec. 11, Civil Procedure Code (Act V of 1908)***

In a previous partition suit instituted by Y against the present Plaintiff's vendor T and the present Defendants, an issue was raised as to the share of T being subject to the mokurari *interest of the other Defendants but was expunged by the Order of the Court. But when the partition was actually carried into effect the present Defendants were allotted possession not only of their proprietory share but also the* mokurari *of the share which they claimed to hold under the daughter of T. In a subsequent partition suit instituted by the vendees of T against the Defendants for a declaration that T's share was not subject to any* mokurari *and for allotting to the Plaintiffs a separate* takhta *out of the* takhta *which was allotted to the Defendants in the pervious suit:*

Held—*That the question was not expressly decided in the previous suit and it was impossible to hold that a decision might and ought to have been obtained in the previous partition suit by T or the present Plaintiffs, and that the Defendants failed to make out that the Plaintiffs were barred by the rule of* res judicata.

This was a first appeal from the decision of Babu Sashibhusan Sen, Rai Bahadur, 2nd Subordinate Judge of Gya, dated 6th March 1911.

The facts which led to the present litigation are shortly as follows :—

The Plaintiffs allege that they, the Defendants and others, are owners of Mouzah Rampur Bara Mosharekat and Altamgha, that the mouzah was partitioned under a Civil Court decree passed in partition suit No. 82 of 1898 and each co-sharer got a separate *takhta* for his share, that during the pendency of the suit the Plaintiffs acquired one anna share from Mussammat Tamizan, mother of Plaintiff No. 3, that this share was included in the *takhta* allotted to the Defendants. They further allege that they have been in possession of this share with the Defendants, that they could not get a separate *takhta* of this share on account of the fraudulent acts of the Defendants and of their false allegation of a *mokurari* title, and as the Defendants were interfering with their peaceful possession, they had to bring this suit.

The Defendants who are members of the same joint family deny Plaintiff's title and possession. They also pleaded, *inter alia*, *res judicata*.

The Subordinate Judge held that the Plaintiffs were not in possession of the *takhta* in suit and that the partition decree in suit No. 82 of 1892 also bars the suit and so he dismissed the suit. The Plaintiffs thereupon preferred this appeal.

Mr. Khurshed Hussain for the Appellants referred to *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (1) and to a passage at p. 531 in Freeman's Co-tenancy to shew the principle upon which an issue between co-Defendants becomes *res judicata*.

(1) 19 C. W. N. 531 (P. C.) (1914).

SYED LATIF HUSSAIN *v.* BASDEO SINGH.

Mr. Kulwant Sahai for the Respondents referred to Explanation IV of sec. 11, C. P. C., 1908, Ameer Ali and Woodroffe's Civil Procedure Code, p. 125 and *Dost Muhammed Khan* v. *Said Begam* (2).

Mr. Khurshad Hussain in reply, referred to *Parsotam Rao* v. *Radha Bai* (3) on the question of *res judicata* amongst co-Defendants.

The JUDGMENT OF THE COURT was as follows :—

CHAPMAN, J.—This appeal arises out of a suit for a declaration that the Plaintiffs hold one anna share in Mouzah Rampur, that the *mokurari* right which the Defendants claim to hold in this one anna share is not so held by them. The Plaintiffs asked for a partition.

The Plaintiffs derived their title to the one anna share from one Mussammat Tamizan. The Defendants claim to be the descendants of certain persons to whom the *mokurari* of one anna share was granted in the year 1859 by one Bibi Bukhshan.

The grant of the *mokurari* by Bibi Bukhshan is not denied. The contest is on the question whether the one anna, the *mokurari* of which was granted by Bibi Bukhshan, is the same one anna as that which was purchased by the present Plaintiffs. The right of the Plaintiffs to one anna share in the estate is not now disputed. The question for determination therefore is whether the Defendants have been able to make out that their *mokurari* was attached to this one anna share.

It appears that the original entire sixteen annas belonged to one Galib. He had two wives named Pati Begum and Bibi Bukhshan and a son by Bibi Bukhshan named Shah Lal. Bibi Bukhshan had, as I have stated, granted a *mokurari* in 1859 of a one anna share to the predecessors of the Defendants. In 1862 the rights and interests of Mussammat Bibi Bukhshan and her son Shah Lal in seven annas were put up to sale in execution of a decree and purchased by two persons named Pairan and Sarifan. In the remarks column of the sale certificate it is recited that an objection had been made by certain persons claiming under the *mokurari* granted by Bibi Bukhshan in the year 1859 which I have above referred to. There is then a conveyance by one Kabir the son of Pairan acting as attorney for Pairan and Sharifan of two annas share to Mahamdi Begum the wife of Shah Lal the son of Bukhshan. In this deed it is recited that the two vendors had purchased the seven annas at the execution sale in 1862 in equal shares. The sale-deed is dated the 16th January 1863. The deed makes reference to the fact stated in the sale certificate that the holders of the *mokurari* had objected. Of the two annas conveyed by this deed one-half anna belonged to Sharifan and half an[illegible] to Pairan.

Thus after the sale three annas were left to Pairan and of these three annas, two annas devolved on Pairan's son named Kabir and one anna on her daughter Latifan. The *mokurari* is said by the Respondents to have been distributed proportionately and was thus held two-thirds under Kabir and one-third under Latifan. Latifan sold half of her one anna share to one Mohur Singh under a conveyance of the year 1884. She recites that she sells 10 dams out of the one anna inherited by her from her father—the Respondents had to say that the word " father " here is a mistake for " mother." The other ten dams were sold by Latifan to her daughter Amirul Fatima by a conveyance of the

(2) I. L. R. 20 All. 81 (1897).
(3) I. L. R. 32 All. 469 (1910).

year 1888. This daughter sold the ten dams to her uncle Kabir by a conveyance of the year 1890. Kabir had, as I have stated, previously inherited two annas share. Kabir had thus two annas ten dams. In the conveyance of the ten dams to Kabir it is recited that the *milkiat* and *mokurari* of Amirul Fatima is transferred. The Respondents had to say that the words "*mokurari* right" here do not mean, as they usually do, the right to hold the *mokurari*, but mean the right to receive the rent from the *mokurariдar*. The ten dams which Latifan, Kabir's sister, sold to Mohur Singh were said to be free from the *mokurari* inasmuch as full price was paid. The remaining two annas ten dams inherited by the brother and sister from their mother Pairan were now in the hands of the brother Kabir, and the contention is that the *mokurari* attached to ten dams out of this two annas ten dams was held by Kabir. The other ten dams to which the *mokurari* attached passed, the Respondents say, to Sharifan, who, it will be remembered, purchased equal shares with Pairan under the sale certificate of the year 1863. Tamizan is the widow of Kabir and Kabir's two annas ten dams were inherited by Tamizan and by the children of Kabir. The Plaintiffs have derived their title from these persons.

The Respondents contend that they have been able to show that ten dams of the one anna now held by the Plaintiffs were subject to the *mokurari*. As regards the other ten dams which the Respondents say passed to Sharifan at the execution sale of 1863 subject to the *mokurari*, the Respondents now admit that they have not been able to trace the passage of these ten dams from the possession of Sharifan to the possession of Kakir. So far as these latter ten dams are concerned the Respondents admittedly were unable to make out any case upon the facts. I am of opinion that in regard to the other ten dams the Respondents also failed. In the first place there is nothing to show that the one anna share of Bukhshan which she had given in *mokurari* passed at the sale in 1863 to Pairan and Sharifan except the note in the sale certificate above referred to, to the effect that certain persons had objected to the sale on the ground that they held this *mokurari*, but even if the recital in the sale certificate were held to prove that a portion of the property sold was subject to this *mokurari* it would be impossible to say what portion of the seven annas then sold was so subject, for it is not recited what portion of the seven annas sold belonged to Bukhshan and what to Shah Lal—the joint properties of both were sold. Bukhshan had inherited from the previous owner Galib presumably one-eighth of the entire estate and Shah Lal probably seven-eighths so that from the commencement of the story there is insuperable difficulty in tracing the one anna subject to Bukhsan's *mokurari* even as far as Pairan and Sharifan and there are other difficulties at later stages of the story.

Moreover if we are to base our judgment merely on surmises from recitals in documents, it is equally probable that the *mokurari* attached entirely to the share purchased by Sharifan. [See Ex. 20 (*a*)].

As against the Respondents' contention there is the fact that Mussammat Tamizan was registered in respect of a ten dams share as absolute owner in 1878 (Ex. 3), that on the 14th May 1884 she obtained a separate account in respect of the ten dams share, she paid revenue accordingly, and in 1888 sued in this character successfully in ejectment (Exs. 19 and 19A). All this is inconsistent with the Respondents' case.

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I am not satisfied with the evidence offered by the Respondents to prove possession of the *mokurari*. Having regard to their failure to adduce the evidence that might have been adduced I find that they have not been in possession of it.

The Respondents then say that the question of the existence of this *mokurari* has already been decided in the course of a partition suit to which they and the Plaintiffs vendors were parties. This partition suit was filed by one Yakub Hussain, one of the co-sharers of the Mauza, in September 1898. The Respondents were co-sharer proprietors of the Mauza and Mussammat Tamizan was also a co-sharer proprietor.

On the 5th of October 1898 a written statement purporting to have been filed in that case by Mussammat Tamizan stated that the extent of her proprietory share had been correctly stated in the plaint and that she too desired partition. Three months later, in January 1899, the Defendants put in a written statement contesting the suit for partition upon various grounds and incidentally claiming that in addition to their proprietory share as stated in the plaint they had held a one anna *mokurari* right under Defendants 6 and 10 the daughters of Mussammat Tamizan. There is nothing to show that this claim to a *mokurari* was brought to the notice of Mussammat Tamizan who was not contesting the suit for partition. The contest was only between Yakub Hussain and the present Defendants. The Plaintiffs in the present suit say that an issue was framed in that partition suit between the contesting parties upon the subject of the *mokurari* claim of the Defendants who were the contesting Defendants in the partition suit and that on the 2nd March 1899 the Defendants fraudulently caused a petition to be filed on behalf of Mussammat Tamizan and her two daughters admitting the Defendants' claim to the *mokurari*, that this petition was merely filed and that no order was passed upon it. This petition has never been proved and if the Defendants seek to rely upon this admission of the Plaintiffs they can rely upon it only as a whole. Moreover the evidence to the effect that Mussammat Tamizan and her daughters were not in fact parties to this petition, whatever it was, has not been rebutted. No evidence has been offered that they were in fact parties to it and it is the fact that no order was passed on the petition by the Court.

An issue was framed on the subject of the *mokurari* on the 7th of August 1901. Yakub Hussain, the Plaintiff in that suit who had himself purchased a portion of the share held by Mussammat Tamizan, admitted, as it was to his interest to do, that the contesting Defendants did hold the *mokurari* they claimed in the one anna retained by Mussammat Tamizan which had not passed to the Plaintiff Yakub Hussain under his recent purchase. The order of the Court was that the issue regarding the *mokurari* be expunged.

Then followed the judgment of the 19th August 1901 directing the partition: In the course of this judgment it is again stated that the issue regarding the one anna *mokurari* claimed by the contesting Defendants has been expunged. The judgment notes that Mussammat Tamizan and her daughters together with the other Defendants in the case merely state their own share which means, I take it, that they made no contest. It appears however that subsequently when the partition was actually carried into effect, the present Defendants were allotted possession not only of their proprietory share but also the *mokurari* of one anna which they

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REPORTS (See Index).

Companies of alien enemies registered in British Empire, if may be of enemy character.

Soon after the outbreak of the present European War, we discussed in these columns the debateable question as to the right of a Company composed chiefly of alien enemies but registered in any part of the British Empire to sue in the British Courts. At that time the decision of the House of Lords in the case of *Janson* v. *Driefontein Consolidated Mines (Ld.)*, [1902] A. C. 484 was regarded as the leading authority which had declared the right of such Companies to sue by reference to its British domicile irrespective of any other consideration. We ventured at the time to present a view of the question from certain standpoints which in our opinion had not been sufficiently considered in that or any previous case. We have therefore great satisfaction in noticing that in the recent House of Lords Appeal in *Dalmier Company, Ld.* v. *Continental Tyre and Rubber Co. (Great Britain), Ld.*, Lords Parker, Mersey, Kinnear, Sumner and Lord Halsbury as well to a great extent propounded a view of the law which lends now an authoritative support to the view we have maintained in these columns.

We expressed our independent view of the question in our issue of the 31st of August 1914 (18 C. W. N. ccxxix) at a time when, so far as we are aware, no case involving this question had come up before the Courts for decision. But in the *Continental Tyre Co.'s* case, (19 C. W. N. xciii) which came before the Court of Appeal in England and was decided by the Lord Chief Justice of England, the Master of the Rolls (Lord Cozens Hardy) and three other Law Lords on the 19th of January 1915, their Lordships naturally took the same view as had been previously done by the House of Lords in the *Driefontein* case. Only Lord Justice Buckley recorded a dissentient judgment. We had the temerity at the time to question whether the view of the majority of the Court of Appeal was not after all based on technicality and whether placing a Company or a corporation in the category of a "person" of British domicile in spite of its apparent enemy character was not in fact disregarding the "substance" on which their Lordships purported to base the judgment and adhering to a mere matter of "form" for which, Lord Justice Buckley, amongst other grounds, differed from their Lordships. We would invite attention to our remarks in this connection in our issue of the 22nd of February 1915 (see 19 C. W. N. lxxiii). But the opinion of so many eminent Judges having prevailed in the Court of Appeal we did not venture to criticise the judgment although we adhered to our own opinion on the subject as explained by us much earlier and quite independently of this or any other specific case.

This is what we wrote on the subject on the 31st of August 1914 (18 C. W. N. ccxix).

According to English Law all trade intercourse between enemy subjects "divided by the line of war" is prohibited; it is the Crown alone which can grant a trade license or right of suit. Let

us now apply this English doctrine to alien Companies registered in this country. It may be said that when a Company is registered in this country it has a trade domicile in this country. Further, that a company so registered is a "juristic person" in the eye of the law and that in its corporate capacity it is quite distinct from the members composing it who may be all aliens, and by reason of its domicile it is entitled to sue. Theoretically and also as an abstract proposition of law this may appear to be all right. But a Court of law will in every such case have to look beyond this and take into consideration the concrete facts, as they may be in each case. The mere fact of registration under the Companies' Act in this country cannot give the Court a jurisdiction, if the "principal place of business" and "chief control of the business" is in the enemy country. This has to be ascertained by entering into the facts of each case. According to the English view of Public International Law the residence or trade domicile of the Corporation has to be fixed by reference to its "principal place of business" and not by the fact of its doing business in another country even under a reigstered name.

Next, a Company is no doubt a "juristic person," but one has got to see who are the real persons in authority behind it and for whose benefit the business is being done. If it is a registered Company, it is surely the directors who have the control, management, capacity for contract, etc., behind this "juristic person." The latter is but a name for purposes of suing or being sued as also for designating the concern in all its transactions for the sake of convenience. The directors have been described by the House of Lords to be the "managing partners" of the Company. They are under the provisions of the Company Law entitled to bind the shareholders by all their acts which are not *ultra vires*. In this respect they may be said to wield larger authority than even managing partners of a firm. So far as the outside world is concerned, the directors are the *de facto* Company. It naturally follows that if the directorate of a Company is composed of enemy subjects, they would no more be entitled to sue or transact business than the managing partners of a partnership business composed of alien enemies and British subjects. In fact on the outbreak of war alien enemy directors of Companies registered in this country according to the doctrines of English Law would become *functus officio*.

A mixed directorate of a Company even with a British or Indian domicile is therefore incapable of making any contract or of instituting any suit or transacting any business of the Company without the license of the Crown. It is not necessary for such directors to retire or resign because on the declaration of war they *ipso facto* become *functus officio* as in the case of partnerships which in the same way become dissolved. The shareholders must then proceed to elect directors in their places, and such of the shareholders as may be alien enemy subjects cannot exercise any right of shareholders at such election or any other business of the Company. A Court has to scrutinize all these facts before it can allow any suit by a Company of alien enemies, even when registered within jurisdiction, to proceed. The English Law makes no presumption as to right of an alien enemy subject to sue, contract or transact any business from the fact of residence or even trade domicile of a person bearing *primâ facie* an enemy character. The presumption is always the other way and the onus is always on such persons to show that they do not have the enemy character.

In the *Continental Tyre and Rubber Company's* case Lord Parker who on the 30th June last delivered a written judgment on his own and on behalf of three of his brother Lords, at the conclusion summarized the law laid down by them in the following propositions :—

1. A company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience. To use the language of Buckley, L. J., "it can be neither loyal nor disloyal. It can be neither friend nor enemy."

2. Such a company can only act through agents properly authorized, and so long as it is carrying on business in this country through agents so authorized and residing in this or a friendly country it is *primâ facie* to be regarded as a friend, and all his Majesty's lieges may deal with it as such.

3. Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy.

4. The character of individual shareholders cannot of itself affect the character of the company. This is admittedly so in times of peace during which every shareholder is at liberty to exercise and enjoy such rights as are by law incident to his status as shareholder. It would be anomalous, if it were not so also in a time of war during which all such rights and privileges are in abeyance. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents, or the persons in *de facto* control of its affairs, are in fact adhering to, taking instructions from, or acting under the control of enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings. The fact, if it be the fact, that after eliminating the enemy shareholders the number of shareholders remaining is insufficient for the purpose of holding meetings of the company or appointing directors or other officers, may well raise a presumption in this respect. For example, in the present case, even if the secretary had been fully authorized to manage the affairs of the company and to institute legal proceedings on its behalf, the fact that he held one share only out of 25,000 shares, and was the only shareholder who was not an enemy, might well

throw on the company the onus of proving that he was not acting under the control of, taking his instructions from, or adhering to the King's enemies in such manner as to impose an enemy character on the company itself. It is an *a fortiori* case when the secretary is without authority and necessarily depends for the validity of all he does on the subsequent ratification of enemy shareholders. The circumstances of the present case were, therefore, such as to require close investigation and preclude the propriety of giving leave to sign judgment under Ord. xiv., R. 1.

5. In a similar way a company registered in the United Kingdom but carrying on business in a neutral country through agents properly authorized and resident here or in the neutral country is *primâ facie* to be regarded as a friend, but may, through its agents, or persons in *de facto* control of its affairs, assume an enemy character.

6. A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.

It will seem that the learned Lords have gone upon the question of *de facto control* as determining the enemy character of the Company in spite of its apparent *de jure* domicile.

Lord Halsbury, who delivered a separate judgment, says the following about the Company, its enemy directors and enemy shareholders :—

"But this machinery, while perfectly lawful in peaceful time, became absolutely unlawful when the German traders were at war with this country. It seemed to him that the question became very plain when one applied the language of the law to the condition of things when war was declared.

* * * * *

They (the Germans) could neither meet here, nor could they authorise any agent to meet on any Company business. They could neither trade with the subjects of the country, nor could any British subject trade with them. Nor could they comply with the provisions as to government of the Company which they are bound by their incorporated character to observe.

In these circumstances it became material to consider what was this thing which was described as a "Corporation." It was, in fact, a partnership in all that constituted a partnership except the names, and in some respects the position of those whom he would call the managing partners. No one could doubt that the names and the incorporation were but the machinery by which the purpose (giving moneys to the enemy) would be accomplished. The absence of the authority to issue a writ was only a part of the larger question. No one had authority to issue a writ on behalf of an alien enemy because he had no right himself to sue in the Courts of a King with whom his Sovereign was at war. No person, or any body of persons, to whom attached the disability of suing in such circumstances could have authority, and to attempt to shield the fact of giving the enemy the money due to them by the machinery invented for a lawful purpose would be equivalent to enclosing the gold and attempting to excuse it by alleging that the bag containing it was of English character."

The analogy given by His Lordship is very apposite in bringing out the distinction between the "form" and the "substance." We are glad to find that the points of view from which we presented the legal position of British Companies chiefly composed of alien enemies find support from the highest judicial authority in the Empire.

Sir James Sterling.

Sir James Sterling whose death has been recently announced had a remarkable career both in his early life and later on as a Judge of the Chancery Division of the High Court in England and as a Lord Justice of Appeal. He was born in Aberdeen in 1836. He was the son of a minister of the United Presbyterian Church. He received his early education in a Grammar School and at the Aberdeen University. From there he went to the Trinity College, Cambridge, with a scholarship. He ended his Cambridge career by becoming the Senior Wrangler and the First Smith's Prizeman of his year—1860. He could have easily secured a Cambridge Fellowship and acquired further distinction as a mathematician or a scientist, but faith in his own Church, a disinclination to join the Church of England and a certain amount of hesitancy in his own mind as to whether he would be welcome in such a stronghold of the Church of England made him take to law as a career. He was called to the Bar at Lincoln's Inn in 1862. He began his career as a law reporter. He with certain other junior members of the Bar, who later on distinguished themselves at the Bar, on the Bench and in politics, first took to conducting the "New Reports." Amongst his colleagues in law reporting may be mentioned Lord Herschell, Lord Courtney, Lord Davey, and others. After his independent venture in law reporting became a failure he joined the Incorporated Society of Law Reporting when the English Law Reports were first established in 1865. While serving as a law reporter he secured a good junior practice at the Chancery Bar and in 1881 became Junior Counsel to the Treasury. In 1886 he was appointed to the Bench when still practising as a member of the Junior Bar and we need not wonder at this when we remember that such distinguished English Judges as Willes, Parke, Blackburn, Hannen, Wilkins, Bowen, A. L. Smith,

Mathew, were all likewise promoted. Amongst the present occupants of the English Bench Lord Parker, Mr. Justice Sargent, Mr. Justice Rowlatt were also elevated to the Bench from the junior Bar. During the fourteen years that the late Sir James Sterling was a Judge of the Chancery Division he enjoyed the unbounded confidence of the litigants. He was as remarkable for his learning as for his patience, courtesy and desire for doing justice. All these virtues made him rather slow but his judgments were seldom upset on appeal. As a Lord Justice of Appeal he once withdrew a judgment out of deference to the opinion of his colleagues and the House of Lords eventually upheld the view from which he had resiled. Lord Halsbury is said to have once remarked that the greatest of judicial gifts was the power to listen and the late Sir James Sterling had this great gift in addition to all his other judicial virtues. Inclination to defer to the opinion of his colleagues in the Court of Appeal was regarded as a sign of weakness.

Appearance of counsel before the Bar of another Court.

The following, which we take from the *Law Times* of the 1st of July last, will be found interesting in view of the right of counsel of one Bar to appear at the Bar of any other Court of Justice of His Majesty the King :—

In one of the last prosecutions for high treason in Scotland, that of Andrew Hardie in 1820, an interesting question was raised as to the right of a member of the English Bar to appear—a question which might have had an exact parallel in the Casement case if Serjeant Sullivan, the leading counsel for the defence, besides being a member of the Irish Bar, had not also been a member of the English Bar. In the Scottish case the Crown authorities brought down Serjeant Hullock of the English Bar (afterwards Baron Hullock) to assist in the prosecution. Jeffrey (afterwards Lord Jeffrey), who was leading counsel for the accused, strenuously objected to Hullock's appearance, basing his objection on the ground that the court was a Scottish court where an English barrister had no right of audience. He presented an elaborate argument upon the point which is fully reported in State Trials, vol. 1, pp. 651 *et seq.* The court declined to accede to Jeffrey's contention inasmuch as the commission under which they were sitting was issued under the Great Seal of Great Britain, which thus created not a Scottish, but a British court. It appeared, moreover, that precedents were against Jeffrey upon the point. On the trials of the rebels at York and Carlisle in 1746 several Scots advocates appeared for the prisoners: it also appears from a note to the report that in 1718 John Willes (afterwards Chief Justice of the Common Pleas) and Serjeant Hanbury conducted prosecutions for treason at Perth and other Scottish towns; and that in 1716 the Scottish Solicitor-General and other Scottish advocates appeared at the trials for high treason at Carlisle. Referring to Jeffrey's objection to the *locus standi* of Hullock, Lord Cockburn, in his memoir of Jeffrey, says that this was the only occasion on which he got on bad terms with a professional brother.

CURRENT INDIAN CASES.

(Civil.)

Mistake by agent of Court in carrying out its directions.

Ramchandra *v.* Krishnaji, I. L. R. 40 Bom. 118.

The Court will not allow a mistake of one of its agents in carrying out its directions to work permanent injustice.

Father's debts.

Ramchandra *v.* Narayan, I. L. R. 40 Bom. 126.

A Hindu son cannot avoid the payment of a debt contracted by his father in carrying on trade in contravention of Government Servant Conduct Rules.

Indian Company's Act, secs. 58, 147.

In the matter of the Indian Specie Bank, I. L. R. 40 Bom. 134.

Under sec. 147 of the Indian Companies Act, 1882, the Court has power when settling the list of contributories to rectify the register of members in all cases where such rectification is required in pursuance of sec. 58.

If two parties are disputing as regards the ownership of a share the Company would be justified in declining to do anything until the dispute was settled and in such a case the Courts may exercise their discretion in deciding the dispute in a summary way under sec. 58. But the mere fact that a shareholder has made a contract with another party to sell his share cannot by itself bring about an omission by the Company without sufficient cause, as contemplated by the section, to enter the purchaser's name on the register of shareholders.

(Criminal.)

Trial by jury.

Emperor *v.* Fakira Appaya, I. L. R. 40 Bom. 220.

Non-direction on a material point by a Judge in his charge to the jury is misdirection justifying the reversal by the High Court of the verdict of the jury.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF CRIMINAL APPEAL, ENGLAND.—Before RIDLEY, AVERY and ATKIN, JJ. *R.* v. *Finch*. 4th July 1916.

Non-direction to jury amounts to misdirection.

The Appellant was convicted of larceny of various articles from different persons by trickery and was sentenced to six months' imprisonment with hard labour.

Appeal was preferred on the ground that although the plea of *alibi* and want of proper identification by the witnesses were raised by the accused, no sufficient directions were given to the jury in respect of these points.

COURT held that as the trial judge did not sufficiently direct the attention of the jury to these points, such non-direction amounted to misdirection and the trial under the circumstances was unsatisfactory and the conviction must be set aside.

Mr. Hugo Young, K. C. (with *Mr. Arthur Ward*) for the Appellants.

Mr. A. D. L. Finnemore for the Crown.

COURT OF APPEAL.—Before THE MASTER OF THE ROLLS, LORD JUSTICE PICKFORD and MR. JUSTICE NEVILLE. *Heath's Garage, Ltd. v. Hodges*. 3rd June 1916.

The duty of the owner and occupier of land adjoining a highway.

While the Plaintiffs' motor car was being driven along a public highway, a number of sheep jumped in front of the car from the Defendant's land with the result that the car was overturned and suffered damage. The sheep belonged to the Defendant. The Plaintiff claimed to recover damages from the Defendant because, he alleged, that the fence of the field had gaps in it and that the accident was a natural consequence of the sheep escaping through an inadequate fence. The County Court found for the Plaintiff but the Divisional Court dismissed it on appeal. The Master of the Rolls, in the course of his judgment dismissing the appeal, said :—

The first question to be considered was, what was the duty of the owner and occupier of land adjoining a highway? Was he bound to maintain a hedge or fence to prevent sheep from straying on the highway? He put aside the case where, either by the provisions of a local Enclosure Act, or by prescription, or otherwise, a duty to fence was imposed and he treated the highway where the accident happened as an ordinary highway. It was remarkable that there was no direct decision on the point, but there were *dicta* which had to be considered. In *Goodwyn* v. *Cheveley* (4 H. and N., 634) Mr. Baron Bramwell said "a person is not bound to fence his land;" and Chief Baron Pollock agreed. In *Jones* v. *Lee* (106 L. T., 123) Mr. Justice Bankes said that at common law there was no duty on an owner or occupier of land adjoining the highway to prevent animals from getting on the highway, and it had not been argued that any such duty could be created under the Highway Act. In *Ellis* v. *Bangard* (106 L. T., 53) Lord Justice Buckley expressly approved of that doctrine; but Lord Justice Vaughan Williams dissented, at least if the sheep or cattle were so numerous as to obstruct the highway. And the Court of Appeal in *Higgins* v. *Searle* (100 L. T., 280) indicated their approval of the doctrine laid down by Mr. Justice Bankes. He was prepared to hold that in ordinary circumstances there was no duty to prevent harmless animals like sheep from straying on the highway, and that it made no difference whether the action was sought to be based on negligence or on a nuisance to the highway. An animal like a sheep, which was by nature harmless, would not fairly be regarded as likely to come into collision with a motor-car, and the owner of the sheep could not be held liable on that footing. The reasoning of the Court of Common Pleas in *Cox* v. *Burbidge* (13 C. B., N. S., 430) seemed to cover the present case.

It was true that under the Highway Acts, 1835 and 1864, certain penalties might be imposed on anyone whose cattle were found straying on the road. That was a new remedy given for the protection of the public, but it did not render a man liable to an action at law. The fine imposed by the Justices was the only remedy available.

It was conceded by counsel that there was no trace that any duty had been established against the occupier of land adjacent to a highway towards a member of the public, no indictment had been found for nuisance by permitting cattle to stray.

Messrs. Matthews, K. C. and *Sadler* for the Appellants.

Mr. Joy for the Respondent.

B. D.

KING'S BENCH DIVISION.—Before Mr. Justice Atkin. *Dickson & Co., Ld.* v. *Devitt.* 31st May 1916.

Liability of an Insurance Broker for not carrying out his clients' instructions.

Dickson & Co., Plaintiffs, were the agents of a Rubber Company, which had purchased some machinery. The Plaintiffs instructed the Defendants to insure Marine and War Risks, the machinery for shipment *per* S. S. "Suwa Maru" and/or other steamers from London to Port Dickson in Singapore. The Defendant effected an insurance on the machinery against Marine Risks *per* "Suwa Maru" and/or steamers from London to Port Dickson, but by some mistake only effected an insurance on the machinery against War Risks *per* S. S. "Suwa Maru." The machinery was sent ultimately in the "Yasaka Maru" which was torpedoed by the enemy and lost. The Plaintiffs sued the Defendant for his negligent breach of duty. The defence was that the Plaintiffs had in their possession the policy of insurance from which they ought to have known that the policy did not cover a shipment by "Yasaka Maru" against War Risks. The learned Judge, in allowing the claim, said:—

The Plaintiffs said that the Defendant had committed a breach of his contract to carry out the instructions which they gave to him. There was no question that the Defendant had broken his undertaking to carry out the insurance, and there was therefore a breach of contract on his part. If the undertaking by the Defendant was to carry out his instructions with reasonable care and skill there had been a want of reasonable care and skill on the part of the Defendant's servant. The circumstances could easily be explained; but it was clear that there was carelessness by the Defendant's clerk in preparing the slip. The carelessness did not stop there, because the slip after it had been signed by the underwriter was brought back, and the debit note was prepared from it in the Defendant's office and was supposed to be checked by the clerk, and on the face of the two debit notes the difference appeared.

He thought that there was a duty on a broker to see that the slip was prepared in accordance with his instructions, and the client was entitled to rely on the broker's checking the policy. There had been a breach of contract by the Defendant both in not carrying out his instructions, and also in not carrying them out with reasonable care and skill.

It was said, however, that even though there had been a want of care and skill by the Defendant, yet the loss was due to the negligence of the Plaintiffs themselves, because if they had looked at the documents they would have seen that the goods were not covered while they were in the "Yasaka Maru." The question was whether the loss was the reasonable and natural consequence of the Defendant's negligence. That question depended on a consideration of the facts in each case. He thought that a client was entitled to rely on a broker's carrying out his instructions to insure, and that the client was not, as between himself and the broker, bound to see whether those instructions had been carried out and to look at the documents himself. Therefore he thought that it was the natural result of the Defendant's breach of contract that the Plaintiffs put the goods in the "Yasaka Maru." If the policy had been in accordance with their instructions the Plaintiffs would have been covered; but as it was not in accordance with those instructions they were not covered, and therefore the loss must fall upon the Defendant.

Messrs. Roche, K. C. and *Wright* for the Plaintiffs.

Messrs. Leck, K. C. and *Raeburn* for the Defendant.

B. D.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

Civil Appellate Jurisdiction. Before Chitty and Walmsley, JJ. Appeal from Appellate Decree No. 941 of 1914. Bewari Ch. Munshi, Plaintiff, Appellant *v.* Maniaddin Joardar & ors., Defendants, Respondents. 17th March 1916.

Civil Procedure Code (Act V of 1908) sec. 103—High Court deciding question of fact on second appeal.

One Prasannamayi Dasi possessed certain properties. These she settled by a permanent lease with Abdul Gani Munshi and Mainaddin Joardar. She had two sons, Khudiram and Hiralal—Khudiram was in agreement with his mother, but Hiralal was at that time supposed to be settling up a title in himself to half of the properties and disputing his mother's right as owner under his father's Will. The *selami* payable was agreed to be Rs. 400, of which Rs. 200 was paid in cash and for the remaining Rs. 200 the property was mortgaged.

An *ekrarnama* was executed that if Hiralal succeeded in establishing his right to these properties, the mortgage for Rs. 200 would be invalid. The period for which was fixed for this *ekrarnama* to be operative was 13 years. By a *kobala* Hiralal purported to sell eight annas of the properties to Hatem Joardar and others.

Prasannamoyi transferred her interest in the mortgage to the present Plaintiff. Plaintiff brought this suit after the expiry of 13 years and the Munsif gave him a decree, holding that the *kobala* by Hiralal was merely a collusive transaction and the Defendants have never been dispossessed.

On appeal the learned Subordinate Judge remarked, apparently contrary to the fact, that it was admitted by both the parties that though the Defendants Nos. 1 and 2 got a *patta* for the whole of the lands, they only got possession of half of the lands and not the whole. Proceeding on that supposed admission the learned Subordinate Judge omitted to decide that one important question of fact about possession.

Exercising the power given under sec. 103, C. P. C., their Lordships determined that question of fact upon perusal of the evidence and found that the decision of the lower Appellate Court was wrong. The decree of the lower Appellate Court was therefore set aside and that of the first Court restored and affirmed.

Babus Jadunath Kanjilal and *Bhudhar Haldar* for the Appellant.

Babu Hit Lal Guha (for *Babu Gour Ch. Pal*) for the Respondents.

CIVIL REVISIONAL JURISDICTION. Before D. CHATTERJEE and NEWBOULD, JJ. CIVIL RULE NO. 166 OF 1916. BEPIN BEHARI SAHA, Plaintiff, Petitioner *v.* ABDUL BARIK AND ORS., Defendants, Opposite Party. 26th and 27th June 1916.

Civil Procedure Code (Act V of 1908), Or. 9, r. 9, whether application for revival of an application lies under—Sec. 141, scope and effect of—Alternative remedy by way of Review under sec. 114 or Or. 47, r. 1, whether available—Conversion of an application under the former section to one under the latter section if allowable—Provincial Small Cause Courts Act (Act IX of 1887), sec. 17, Proviso—What it actually requires.

This was a Rule granted against an order of S. C. Ghosh, Esq., Munsif at Dacca, dated the 15th January 1916. The Petitioner brought a Small Cause Court suit against the Opposite Party, which suit was dismissed for default of the Plaintiff (Petitioner). Thereafter the Plaintiff put in an application for the restoration of the suit, which application too was dismissed for Plaintiff's default. Eventually the Plaintiff put in another application under Or. 9, r. 9, for reviving the latter application, but the Munsif, on 15th January 1916, dismissed the application on the ground that such an application does not lie. On this latter date the Plaintiff had put in another application for treating the above application as one under Or. 47, r. 1. But the Munsif rejected both the applications.

Babu Jitendra Nath Roy for the Petitioner.—An application for the restoration of a *suit* dismissed for Plaintiff's default lies under Or. 9, r. 9. Sec. 141 of the new Code makes the procedure for suits applicable, so far as it can be, in all proceedings. Hence an application for the revival of an application lies under Or. 9, r. 9. The cases in 12 C. L. J. 6 and 19 C. W. N. 758 are authorities on the point. The history of the old sec. 647 in the course of its transformation into sec. 141 of the new Code only shows that Or. 9, does not apply to execution proceedings, because the procedure for suits cannot conveniently be made applicable to execution proceedings. The Privy Council decision in 17 All. 106 only says that "proceedings" *include* original matters like proceedings in probate, etc., which means that among proceedings of other kinds, it includes original proceedings—it does not say what it excludes, but what it includes. The Munsif was wrong in refusing the Review petition, saying there was no fraud as was in the case cited before him. Review was available for any "sufficient reason"—it cannot be limited to fraud only, as he has done. Refers to 26 Cal. 598; 16 C. W. N. 613. After all the Court ought to have looked to the substance rather than to the form of the application. Refers to 16 All. 390.

Babu Monmotho Nath Roy for the Opposite Party.—Conversion of an application under Or. 9, r. 9, to one for review under Or. 47, r. 1, cannot be allowed. Refers to 10 C. W. N. (Notes) and 2 C. W. N. 318. The application under Or. 9, r. 9, does not lie. Sec. 141 does not make procedure for suits applicable to all proceedings. According to the Privy Council decision in 17 All. 106, it applies only to original proceedings. Sec. 141 has not made any material change in the law. Refers to 41 Cal. 1. As regards the Review petition, it cannot lie as there was no deposit under sec.

17 (proviso) of the Provincial Small Cause Courts Act. Refers to 18 Cal. 83.

Held, following the decision in 19 C. W. N. 758 that an application under Or. 9, r. 9, for the revival of the previous application lies under the provisions of sec. 141 of the new Code. The Munsif ought to have considered also the application for review. Sec. 17 (proviso) of the Provincial Small Cause Courts Act requires deposit or security only in cases of applications for setting aside an *ex parte* decree where a decree has been passed, or for review of judgment where a judgment has been passed.

Their Lordships made the Rule absolute and set aside the order complained of.

J. R.

Criminal Revisional Jurisdiction. Before Sanderson, C. J. and Walmsley, J. Criminal Reference No. 111 of 1916. CHANDRA MANDAL and ors., 2nd party Petitioners *v.* RAM MANDAL and ors., 1st party, Opposite Party. 4th August 1916.

Criminal Procedure Code (Act V of 1898), secs. 133, 137—Provisions of sec. 137 mandatory—Waiver—Arbitration—Local enquiry—Order made without evidence, not validiated by consent—Bonâ fide *claim—Jurisdiction of Criminal Court.*

On the 2nd May 1916 the Sub-divisional Magistrate of Narail drew up a proceeding under sec. 133, Cr. P. C., against Chandra Mandal and two others of Birgram and passed a conditional order on them to shew cause why they should not remove three huts erected by them from a pathway lawfully used by the public. They appeared and shewed cause and filed a written statement in which they denied the existence of any public pathway and stated *inter alia* that the land in question was private property appertaining to their homestead *jama* of Rs. 14 and they had been in possession of it for generations; that the public never had any right of pathway over this land, that out of enmity and grudge the 1st party at the instigation of their landlords Nalini Nath Mitter and others had been trying to have a public pathway declared over the homestead of the Petitioners in order to compel them to leave their houses. On the 24th May 1916 the learned Sub-divisional Magistrate went to the locality for taking evidence but on that date both parties filed a joint petition to him stating that they would not adduce any evidence and they would agree to abide by whatever decision the learned Sub-divisional Magistrate would come to after local inspection and enquiry. The Sub-divisional Magistrate then visited the spot and questioned some of the assembled villagers and made the conditional order absolute and directed the removal of the huts. The following portion of the Magistrate's order is material: "I visit the spot and question the assembled villagers in the presence of the parties and their legal representatives. I am satisfied from such local inspection and enquiry that the pathway in queston is a *halat* and that it has been recently obstructed by Chandra Mandal and others against whom the proceeding has been drawn up. My order of 2nd May 1916 is therefore made absolute."

Against this order of the Sub-divisional Magistrate the 2nd party moved the learned Sessions Judge of Jessore who made a reference under sec. 438, Cr. P. C., recommending that the order of the Sub-divisional Officer might be set aside.

Babu Hemendra Chandra Sen appeared for the 2nd party in support of the reference: The grounds upon which the order of the Sub-divisional Magistrate was asked to be set aside were that the Sub-divisional Officer did not follow the procedure laid down in sec. 137, Cr. P. C., he should have recorded evidence in the matter of the complaint as in a summons case: sec. 137 is imperative and mandatory and the Sub-divisional Officer acted illegally in assuming the role of an arbitrator as public questions were involved in the matter. Consent of parties or waiver did not vest the Sub-divisional Officer with jurisdiction not authorised by law; the order was not based on any legal evidence. In support of the above view the cases in 10 C. L. J. 482 and 13 C. W. N. 283 (notes), I. L. R. 24 Cal. 395 were relied on; that there being a *bonâ fide* claim by the Petitioners the learned Sub-divisional Magistrate had no jurisdiction to proceed under sec. 133, Cr. P. C., and if any one had any grievances the matter was one for the Civil Court, that the Magistrate ought to have enquired about this at the outset, that upon the facts and circumstances of the case the defence of the Petitioners was entirely a *bonâ fide* one. In support of these contentions the cases in 18 C. W. N. 1085, 7 C. W. N. 117, I. L. R. 17 Cal. 562 were relied on.

Their Lordships accepted the reference and set aside the order of the Sub-divisional Magistrate.

H. C. S.

then claimed to hold under the daughters of Mussammat Tamizan. The present Plaintiffs made their purchase during the pendency of this partition and they put in a petition before the Court asking to be made parties but so far as this went the partition had then proceeded too far. At any rate it is clear in the first place that the question as it now stands did not arise in its present form for the Defendants claimed in that partition suit to hold not under Mussammat Tamizan but under her daughters, *secondly*, the question was not raised in that suit at all except between Yakub Hussain who was seeking partition in that suit and the present Defendants for the present Defendants did not put in their claim to the *mokurari* in that partition suit until three months after Mussammat Tamizan and her daughters had put in their written statement saying that they did not contest (the Defendants have failed to make out that Mussammat Tamizan was aware of the claim of *mokurari* made in their subsequent written statement), *thirdly*, the preliminary judgment of the Court in the partition suit states expressly that the issue was expunged. No doubt the effect of the final decree for the partition was to give the Defendants possession of the one anna they claimed under the *mokurari* deed but the Defendants have in my opinion entirely failed to make out that Mussammat Tamizan or the present Plaintiffs had any suitable opportunity of contesting the point. They have also failed to make out clearly that the final decree for partition did not in fact leave the question open. There is at least a suggestion in the Commissioner's report upon which the final decree was based that the question was left open. One thing at any rate is clear: that the question was not expressly decided and in the circumstances above set forth, it is, in my opinion, impossible to hold that a decision might and ought to have been obtained in the previous partition suit by Mussammat Tamizan or the present Plaintiffs. The result is that in my opinion the Defendants failed to make out that the Plaintiffs were barred by the rule of *res judicata*. I have also no doubt that they have failed to prove that Mussammat Tamizan made any admission in that partition suit and they have also failed to prove on the facts that the *mokurari* granted by Bibi Bukhshan attached to the Plaintiffs' one anna share.

I have not made a reference to the judgment of the learned Subordinate Judge because that judgment is of an extremely unsatisfactory nature. The case was a difficult one and the judgment is perfunctory and ill-informed. In the first place he found that the Plaintiffs were not in possession of their share but so far as ten dams are concerned there can be no doubt about the Plaintiffs' possession, for they had been successful in a previous rent suit. That suit related to only ten dams it is true but in view of the Plaintiffs' success in respect of the ten dams there can be no real doubt that the evidence that they are in possession of the remaining ten dams, is true. Upon the question of *res judicata* the learned Subordinate Judge has gone wrong because he has not given any consideration to the facts.

The result is that the judgment and decree of the learned Subordinate Judge dismissing the suit for partition is set aside and in lieu thereof I direct that it be declared that the Plaintiffs are proprietors holding possession of one anna out of sixteen annas in the mauza mentioned in the plaint; that the Defendants have not the *mokurari* right in this one anna which

they claim; and that a separate *takhta* be allotted to Plaintiffs in contiguity to the *takhta* allotted to them in the previous partition suit out of the *takhta* which was allotted to the Defendants in that suit under a decree dated the 27th June 1907. The case will be remitted to the first Court. The partition will be carried out by a Commissioner under his direction and the case disposed of accordingly. The Plaintiffs are entitled to their costs in both Courts.

Atkinson, J.—I agree.

A. K. R. *Appeal allowed.*

[PRIVY COUNCIL.]

[Appeal from Bombay.]

Lord Atkinson.
Lord Parker of Waddington.
Sir John Edge.
Mr. Ameer Ali.
1916,
Heard, 26 and 29, May.
Judgment, 22, June.

Ramdas Vithaldas Durbar, Appellant,
v.
S. Amerchand and Co., Respondents.

Indian Contract Act (IX of 1872), secs. 102, 103, 108, 178 - Transfer of Property Act (IV of 1882), secs. 4, 137—Railway receipt if "document of title" or "document showing title" or "instrument of title"—Right of vendor of stoppage in transitu if determines on assignment of railway receipt by way of pledge—Indian Contract Act, interpretation of—Draughtmanship.

The Indian Contract Act is an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law.

There is no improbability in the Indian Legislature taking the lead of the English in a legal reform, the call for legislative action in India being so much more numerous.

Railway receipts issued to the consignors of goods are documents showing title to goods within secs. 102 and 108 and documents of title to goods within sec. 178 of the Indian Contract Act, and a second buyer in good faith and for consideration who obtains an assignment of such a receipt obtains thereby constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceases under sec. 102 upon such assignment.

The expression "instrument of title" in sec. 103 means the same thing as "documents showing title" in secs. 102 and 108 and "documents of title" in sec. 178 of the Contract Act; the use of different expressions to convey the same sense showing merely that the draughtsman of the Act was not very careful in the use of language.

Where, therefore, a railway receipt is assigned by way of pledge to secure an advance made specifically upon it in good faith under sec. 103 of the Contract Act, the vendor cannot, except on payment or tender to the pledgee of advance so made, stop the goods in transit.

These were two consolidated appeals from a judgment and decree of the High Court of Bombay (Sir Basil Scott, C. J. and Chandavarkar, J.), dated the 31st March 1913, reversing in two separate appeals the judgments of Macleod, J. and Beaman, J. The main question for determination was: Whether a railway receipt was an "instrument of title" to goods within the meaning of sec. 103 of the Indian Contract Act. The Appellants, who were commission agents carrying on business at Bagalkote, consigned some bales of cotton to their constituents Chhaganlal Kalidass of Bombay. The cotton was carried by rail by the Madras and Southern Mahratta

Railway Company as far as Marmagoa and thence by sea to Bombay by the Bombay Steam Navigation Company. The Railway Company issued railway receipts for the goods for the whole journey. The form of the railway receipt and conditions 3 and 9 printed on the back of the receipt sufficiently appear from the judgment of the High Court hereinafter quoted. The consignees endorsed the railway receipts to secure an advance of money as follows: 'Deliver the goods mentioned in this receipt to Messrs. S. Amerchand & Co.' While the said goods were in transit, the Appellants alleging that the consignees had become insolvent gave notice to the Bombay Steam Navigation Company of their claim to stop the goods in *transitu*. The Respondents claimed the goods from the said Company as holders of the receipts for valuable consideration. The Navigation Company thereupon instituted the present interpleader suits. Macleod, J., delivered judgment in the first suit on the 11th January 1912. He found that the consignees had become insolvent and that the Appellants had not been paid for the goods, and that whether the Appellants be regarded as factors or *quasi*-vendors they were entitled to stop the goods in *transitu*. He concluded his judgment as follows:—

"It will be noticed that this condition contemplates delivery only to the consignee or his endorsee as his agent if he is unable himself to attend to take delivery. It does not even contemplate the sale of the consignment of the railway receipt and endorsement of the railway receipt to the purchaser as the railway receipt did in the *G. I. P. Railway Company* v. *Hanmandas* (1), so there can be no doubt that the railway receipts in suit are not instruments of title within the meaning of sec. 103 of the Contract Act. It was contended that railway receipts are now instruments of title by virtue of sec. 137 of the Transfer of Property Act which has been applied to Bombay since the decision in *G. I. P. Railway Company* v. *Hanmandas* (1). The last chapter of the Transfer of Property Act deals with the transfer of actionable claims and after it is enacted how such claims are to be transferred sec. 137 says that nothing in the preceding section applies to stock, shares, etc., or to any mercantile document of title to goods. The explanation says 'the expression mercantile document of title to goods' includes a bill of lading, railway receipt, etc.

"Railway receipts are therefore excepted from the provisions of that chapter but it cannot be argued from that circumstance that the Legislature has definitely enacted that railway receipts are instruments of title within the meaning of sec. 103 of the Contract Act.

"If that was the case, Sargent, C. J., would have said in the last paragraph of his judgment that all that was required to satisfy the wishes of the commercial community was to make the Transfer of Property Act applicable to Bombay.

"But it was argued that by the custom of the trade the title to the goods covered by the railway receipts passed by endorsements and delivering of the receipt for valuable consideration.

"A custom was proved in *G. I. P. Railway Company* v. *Hanmandas* (1) to prevail amongst merchants in Bombay engaged in the grain trade that railway receipts endorsed by one holder to another were considered as representing the goods and entitling the last endorsee to delivery, see para. 13 of the case stated by the Chief Judge of the Small Causes Court, but the Appeal Court held that that did not affect the right of an unpaid vendor to stop the goods in transit.

"Assuming for the purposes of my judgment that a custom has been proved that in Bombay railway receipts do pass amongst merchants by endorsement and delivery and that railway receipts so endorsed are considered as representing the goods, I am bound by the decision in the above-mentioned

(1) I. L. R. 14 Bom. 57 (1889).

(1) I. L. R. 14 Bom. 57 (1889).

case to hold that the endorsement and delivery of the railway receipts to Defendant 2 could not affect the right of Defendant 1 to stop the goods.

"A custom prevailing amongst buyers in Bombay cannot make a railway receipt negotiable as against the vendors if it is not negotiable at law. There seems to be a considerable confusion of thought involved in such a contention. A relation of contract is established between the vendor and the purchaser, and the terms of the contract depend on what has been agreed upon between them and not on a custom which may prevail amongst purchasers in general and the persons with whom they deal.

"In the *Merchant Banking Company of London* v. *Phœnix Bessemer Steel Company* (2), it was proved that the vendors and purchasers in the iron trade had instructed Counsel to prepare a particular form of warrant which should be given to the purchaser by the vendor as representing the goods referred to therein. The warrant was in fact an order to deliver to bearer and the Court held that a vendor who parted with such a warrant must be taken to have special notice and special knowledge that the warrant was intended to be used for the purpose of raising money on it.

"The facts of this case are very different. The first Defendants contracted with the Railway Company to carry the goods to Bombay and delivered the railway receipt given to them by the Railway Company to Defendants 3 and 4 to enable them or their agents to get delivery of the goods. The railway receipt was not an order for delivery to bearer and there is nothing whatever to show that the 1st Defendants intended to preclude themselves from stopping the goods in transit if Defendants 3 and 4 did not pay for them. Assuming that 1st Defendants were aware that railway receipts passed by endorsement and delivery amongst merchants in Bombay, that could not affect their rights as against their purchasers unless they expressly or impliedly agreed to forego such rights in the event of the railway receipt so passing. It is not a question of custom but of contract.

"It has not been suggested that vendors and purchasers generally in the cotton trade have come to any agreement regarding the negotiability of railway receipts, it is difficult to see how any such agreement could be arrived at except perhaps in individual cases. This subject is constantly appearing in one form or another in our Courts but as far as I can see, merchants who advance money on railway receipts have no remedy against an unpaid vendor so long as the Legislature does not enact that railway receipts are instruments of title."

On appeal, the case was remanded for the determination of issues relating to the usage of trade affecting railway receipts. Macleod, J., delivered judgment on the 9th December 1912, and held that the consignor was not aware that it was the usual course of business for consignees to raise money by pledging railway receipts, and that the evidence did not show that there was any such usage of trade as was pleaded by the Respondents, and that if there was, it was in his opinion contrary to positive law. He accordingly gave judgment for the consignors. In the second suit, the parties agreed that judgment should be given in accordance with the decision of Macleod, J., subject to appeal, and Beaman, J., delivered judgment accordingly. The Appellate Court reversed the decisions of the trial Judges, and in the course of their judgment they said as follows :—

"The question common to both appeals remained to be dealt with. Are the railway receipts instruments of title within the meaning of sec. 103?

"The railway receipts are issued by the Madras and S. M. Railway Co. in the following form :—

Receipt.

"From Bagalkote to Bombay H. R. on B. S. N. Railway *vid* M. R. H.

"Sender's name—Ramdas Vithaldas. To whom consigned—Chhaganlal Kalidass.

(2) L. R. 5 Ch. D. 205 (1877).

" Then follows a tabular statement for particulars relating to the goods, below which it is stated ' These goods are accepted for conveyance subject to the conditions printed on the back herein.'

" Condition 3 is as follows :—That the railway receipt given by the Railway Company for the articles delivered for conveyance must be given up at destination by the consignee to the Railway Company or the Railway Company may refuse to deliver and that the signature of the consignee in the delivery book at the destination shall be complete evidence of delivery.

" If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it to be made, and if the receipt is not produced, the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company.

" The 9th condition provides that the goods should be subject to the rules and conditions printed in the Railway Company's Goods Tariff and to the rules and regulations and wharfage and other charges in force on such railways and shipping lines over which they might be conveyed.

" The holders of the railway receipts in each case presented them not to the Railway Company which issued them but to the Bombay Steam Navigation Company which was the shipping line by which the goods were conveyed during the last part of the transit, *i.e.*, from Marmagoa to Bombay. The railway receipt was a document under which the goods were received for a mixed transit by land and sea. There can be no doubt that in America such a document would be treated as and probably called a bill of lading. See *Iron Mountain Railway Company* v. *Knight* (3), where the Court after stating the nature and effect of a bill of lading said the doctrine is applicable to transportations made by Railway Companies and other carriers by land as well as carriers by sea. This point was taken by Mr. Robertson in the lower Court but the Judge said " the document is a railway receipt and cannot become a bill of lading because the Railway Company employed the B. S. N. Co. to carry the goods for part of the distance." I understand that the learned Judge meant only that the document would not be a bill of lading within the meaning of sec. 103 of the Contract Act, so that its assignment to a pledgee would defeat the unpaid vendor's right of stoppage in *transitu*. But according to sec. 103 it is not only a bill of lading but any other instrument of title to goods which may be assigned with the same effect as results from the assignment of a bill of lading and it is material to remember that the transit from Bagalkote to Bombay *viâ* Marmagoa is a transit identical in its nature for part of distance with the transit of goods shipped by a consignor in Marmagoa under a bill of lading for delivery in Bombay; and I think that for this reason on the especial facts of these cases the railway receipt if assignable by endorsement would be an instrument of title to the goods under sec. 103 of the Contract Act. It is true that in *G. I. P. Railway Company* v. *Hanmandas* (1) it has been held that a railway receipt transferable by endorsement by the terms of the contract was not an instrument of title within the meaning of sec. 103. That was a case of conveyance by land from Bijapur to Bombay and in that

(1) I. L. R. 14 Bom. 57 (1889).
(3) 102 U. S. Rep.

respect the element of voyage by sea under the combined receipt and contract issued by the carrier was absent. It is also important to note that since the date of that decision the chapter of the Transfer of Property Act relating to the assignment of contractual claims has been recast and is now applicable to the Bombay Presidency. By the 137th sec. it is provided that, " Nothing in the foregoing section of this chapter applies to stocks, shares of debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

" '*Explanation*.—The expression 'mercantile document of title to goods' includes a bill of lading, dock-warrant, warehouse-keeper's certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented.'

" This is one of the sections of the Transfer of Property Act relating to contracts which under sec. 4 is to be taken as part of the Indian Contract Act. We have, therefore, an express statement by the Legislature that railway receipts shall be taken to be mercantile documents of title fulfilling one or other of the two specified conditions, *viz.*, proof in the ordinary course of business of the possession or control of goods, or authorising or purporting to authorise either by endorsement or by the delivering the possessor of the document to transfer or receive the goods thereby represented. Under the 3rd condition of the railway receipts in these cases it is clear that the documents fall under the latter class. The significance of the division into two classes of mercantile documents of title mentioned in sec. 137 of the Transfer of Property Act (which with the exception of its reference to railway receipts is taken verbatim from sec. 4 of the English Factors Act of 1842 and reproduced in the Factors Act of 1889, sec. 1 (4) and applied in the Sale of Goods Act, 1893, sec. 62) is explained by the following passage from Blackburn on Sale, 2nd Ed., p. 416 :—

" ' There have been some attempts made to give the same effect to the endorsement of dock-warrants, wharfingers' receipts, delivery orders, and similar documents, as is given to the endorsement of a bill of lading.

" ' Those documents are generally written contracts, by which the holder of the endorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order or dock-warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore.'

" It was perhaps this distinction that the Court had in mind in *G. I. P. Railway*

Company v. *Hanmandas* (1) when declining to apply as Mr. Justice Farren had done, the English definition to 'instrument of title' in sec. 103 of the Contract Act although admitting that it might be applied to the expression 'document showing title' in sec. 108 on the ground that dealings by factors entrusted with documents showing title were a different subject-matter to assignments of instruments of title by the buyer of goods in transit. It is clear that no distinction can be drawn from the difference of wording as in sec. 102 which also relates to assignments by the buyer during transit, the expression used is 'document showing title.'

"It seems to me that sec. 137 of the Transfer of Property Act puts an end to the question. It recognises that since the passing of sec. 45 of the Sale of Goods Act, 1893, in England there is no force in the distinction drawn by Sir Charles Sargent in *G. I. P. Railway Company* v. *Hanmandas* (1). It is to be noticed that secs. 102 and 103 are the only sections of the Contract Act which refer to assignment of documents of title and that sec. 137 of the Transfer of Property Act which must be taken as part of the Contract Act occurs in the Chapter relating to the assignment of claims.

"I am of opinion therefore that the Appellants in each of these Appeals are entitled to the benefit of sec. 103 of the Contract Act against the unpaid vendor. In Appeal No. 4 of 1912 the case was remanded to the lower Court for evidence upon certain issues of which Issue 9 was: Whether by the custom of the trade railway receipts are not treated as instruments of title to the goods covered by them within the meaning of sec. 103 of the Contract Act.

"The evidence given recorded as to the custom of merchants regarding railway receipts is very much to the same effect as that recorded in *Jethmull* v. *B. B. and C. I. Railway* (4) the effect of which was stated by Tyabji, J., as follows:—'There is a great deal of evidence to show that there is a general practice prevailing amongst merchants and commission agents in Bombay to treat railway receipts as documents of title, representing the goods mentioned therein; upon which advances can be obtained to the extent of 80 or 90 per cent. of the value, that these receipts are usually endorsed in blank by the consignee and that such endorsements are recognised by the Railway Companies in Bombay and delivery is given accordingly.' Mr. Justice McLeod thus states the result of the evidence taken on remand.—'The buyer's name appears in the railway receipt and as a rule he advances to the vendor 80 to 90 per cent. of the value of the cotton when he gets the railway receipt.'

"'But some contracts, mostly those for Bengal cotton, are made on railway terms by which it is meant that the buyer contracts to advance 90 per cent. as soon as he gets the railway receipt. Such receipts pass from hand to hand by endorsement and the evidence shows that buyers consider that the railway receipt gives them a title to the goods though as a matter of fact they take care to see that their endorsee (endorsor?) is a respectable person.

"'Commission agents advance from 80 to 90 per cent. on railway receipts. Their constituent is either up-country, in which case no question of unpaid vendor arises or a holder of a railway receipt in Bombay who endorses it over to them. None of the 2nd Defendant's witnesses lent

(1) I. L. R. 14 Bom. 57 (1889).

(4) 3 Bom. L. R. 268 (1900).

money on railway receipts merely to earn interest. This, as far as the evidence goes, is only done by the banks and they invariably require the cotton to be in the Bank's *jetha* or godown as security for the advance. It has then been proved as was proved in *G. I. P. Railway Company* v. *Hanmandas* (1) that amongst merchants and commission agents dealing in cotton in Bombay, railway receipts endorsed by one holder to another are considered as representing the goods and entitling the last endorsee to delivery. But it does not follow from that that there is a usage that the last endorsee is entitled to delivery as against an unpaid vendor who stops the goods in transit.'

"In connection with this last observation we may refer to the judgment of Ashurst, J., in *Lickbarrow* v. *Mason* (5). 'The assignee of a bill of lading trusts to the endorsement. The instrument is in its nature transferable. In this respect therefore this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendor only; but he has made it an endorseable instrument. So it is like a bill of exchange in which case as between the drawer and the payee the consideration may be gone into yet it cannot between the drawer and an endorsee and the reason is because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be endorsed but the effect of that endorsement is a question of law.' The learned Judge has overlooked the form of the issue remanded which is, whether by the custom of the trade railway receipts are not treated as instruments of title to the goods covered by them within the meaning of (*i.e.*, in the sense in which that expression is used in) sec. 103 of the Contract Act. The result of the railway receipt being such an instrument of title as against the unpaid vendor does not depend upon custom but is a matter of law which is stated in the section."

Hence the present appeals.

Messrs. L. DeGruyther, K. C., and *E. B. Raikes* for the Appellant submitted that the railway receipt was not "instrument of title" to goods within sec. 103 of the Indian Contract Act. The receipt was not in form negotiable. Condition 3 of the receipt required the consignee or his agent to sign the receipt and to give it up at destination. It was for the protection of the Railway Company and to serve as evidence of complete delivery, and it did not contemplate an assignment of the receipt or the goods. No title could pass merely by the endorsement made thereon. "If the receipt be produced, at destination, by a person other than the consignee, that person was the agent of the consignee, and not his assignee. The English Factor's Act, 1842, was extended to India by sec. 4 of Act 20 of 1844 but that Act was applicable to an "agent" only. In England, the whole law was subsequently enacted in the Factor's Act of 1877, but that Act has not been extended to India. The law applicable to India was contained in the Indian Contract Act of 1872. That Act was a consolidating Act, and the English Law prevalent at the time was embodied therein. It was difficult to believe that the legal reform which was carried out in England in 1877 had already been carried out in India in 1872. Under sec. 148, Indian

(1 I. L. R. 14 Bom. 57 (1889).
(5) 2 Term Rep. 63, 71 (1787).

Contract Act, there could be no bailment without delivery of goods, nor could there be a pledge without such delivery under sec. 172. Under sec. 102 the right of stoppage in *transitu* ceases if the buyer having obtained a bill of lading, or other document showing title to the goods assigns it to a second buyer. It means that the assignment must be such as to pass title at once, as in the case of a bill of lading.

[LORD PARKER.—Does not sec. 108 indicate several kinds of documents showing title to which reference is made in secs. 102 and 103?]

Mr. DeGruyther.—Sec. 103 uses the words "instruments of title" which were different from the words "document showing title." Sec. 108 reproduces sec. 4 of Act 20 of 1844 which applied to an agent only and did not interfere with the rights of the owner. By an instrument of title is meant "a negotiable instrument similar to a bill of lading by endorsing which title passes to the endorsee. Further, the High Court had erred in reading sec. 137 (as amended) of the Transfer of Property Act as a part of the Contract Act. That section was part of a chapter which related to transfers of actionable claims. It was a saving clause in reference to provisions made in the preceding sections of that chapter and was not meant to lay down a statutory definition of a "mercantile document of title" for all purposes. That section was not intended to make negotiable by law what was not negotiable before. Reliance was placed on the following authorities :—

G. I. P. Railway Company v. *Hanmandas* (1) and *Merchant Banking Company of London* v. *Phœnix Bessemer Steel Company* (2).

(1) I. L. R. 14 Bom. 57 (1889).
(2) L. R. 5 Ch. D. 205 (1877).

Sir Erle Richards, K. C., and *Sir William Garth* for the Respondent submitted that there was no difference between an "instrument of title" and "a document of title" or "document showing title." The evidence established that, by the usage of trade, a railway receipt was treated as proof of possession and control of goods and that, by its endorsement, the possessor of the receipt was entitled to receive the goods they represented. There was no reason to limit the meaning of an "instrument of title" to those documents only under which complete title to property passed. The Indian Contract Act was not only a consolidating Act but an amending Act as well. The reason why an exception was made in the case of a bill of lading, was because of the usage of trade. It was a recognition of the law merchant. It was not because title to property passed thereunder. Blackburn himself did not put it on that ground. Reference was made to Benjamin on Sale, 5th Ed., pp. 847-851. Gower on Carriage by Sea, p. 684. Railway receipts were "documents showing title to goods" within the meaning of secs. 102, 103, 108 and 178 of the Contract Act. There could be no difference between a buyer and a pledgee. Reliance was also placed on sec. 137 read with sec. 4 of the Transfer of Property Act.

Mr. DeGruyther in reply : said that he could not mention any other "document of title" exactly similar to a bill of lading but the possibility of such a document was suggested by Benjamin on Sale, p. 852.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARKER OF WADDINGTON.—The question which arises on these appeals is whether a railway receipt issued to the consignor of goods in the form ap-

pearing on pp. 70 and 71 of the record is " an instrument of title " within the meaning of sec. 103 of the Indian Contract Act.

Sec. 103 of this Act is one of a group of sections relating to a seller's right to stop goods while they are in transit to the buyer. Sec. 99 defines the right. Sec. 100 provides that goods shall be deemed to be in transit while in course of transmission to and not yet come into the possession of the buyer. Sec. 101 lays it down that the right does not, except in the cases thereinafter mentioned, cease on the buyers reselling the goods while in transit and receiving the price, but continues until the goods have been delivered to the second buyer or to some one on his behalf. Sec. 102 provides that the right of stoppage ceases if the buyer, having obtained a bill of lading or other " document showing title " to the goods, assigns it, while the goods are in transit, to a second buyer, who is acting in good faith and who gives valuable consideration for them.

The expression " document showing title " is used again in sec. 108, which refers to a 'bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods." The same enumeration is found in sec. 178, except that in this section the expression " document of title " is substituted for " document showing title." Secs. 108 and 178, though they very possibly extend, at least cover the same ground as the provisions of the Indian Act No. 20 of 1844, which with certain modifications not material for the purposes of this appeal made the provisions of the English Factors' Act, 1842, applicable to British India. Both the last-mentioned Acts use the expression document of title to goods, and define it as including any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented. In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a " document showing title " or a " document of title " to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the posession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. In the present case it has been found as a fact by both the Courts below, and is not, and indeed cannot, be disputed before this Board that the railway receipts in question satisfy this test. It is therefore unnecessary to consider whether, apart from evidence as to the ordinary course of business, the effect of secs. 4 and 137 of the Transfer of Property Act No. 2 of 1900 would be conclusive on the point. It is clear that, even without the assistance of these sections, the receipts in question are documents showing title to goods within secs. 102 and 108 and documents of title to goods within sec. 178 of the Indian Contract Act.

Returning to sec. 102, its effect may be stated as follows: First, so far as bills of lading are concerned, it enacts the rule of the common law by which a

second buyer who obtained an assignment of the bill of lading obtained constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceased. Secondly, so far as other documents of, or showing title to, the goods are concerned, it makes their assignment to a second buyer have the same effect as the assignment of a bill of lading. If, therefore, the Respondents in these appeals had been second buyers and not pledgees of the goods represented by the receipts in question, the Appellant's right of stoppage would have been displaced.

Passing now to sec. 103, it will be found to provide that where a bill of lading or other "instrument of title" to any goods is assigned by the buyer of such goods by way of pledge to secure an advance made specifically upon it in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit. If this section had used the expression "document showing title" or "document of title" instead of the expression "instrument of title," it is, in their Lordships' opinion, quite clear that it would have applied to the receipts in question, and that the vendor could not have stopped the goods in transit without payment or tender to the respective Respondents of the amounts of their advances, which were admittedly made in good faith and specifically upon the security of the receipts in question. In other words, the section would have done, in the case of assignments by way of pledge, precisely what had been done in the previous section in the case of assignments upon a resale.

Great stress was naturally laid by the Appellants on this difference of expression. They argued that "instruments of title" were a particular species of the genus "documents of title," and they attempted to define the species as consisting of documents which conferred title in the same manner and sense as title is conferred by a bill of lading. They supported this argument by the following considerations: First, they contended that the Indian Contract Act was primarily a consolidation Act, and therefore ought, in default of a clear expression to the contrary, to be read as embodying the law as existing when it was passed. Secondly, they urged the improbability of the Indian legislature having taken the lead in a legal reform for which this country had to wait until the passing of the English Factors' Act of 1877. Their Lordships cannot attach any weight to either consideration. The Indian Contract Act recites the expediency of defining and amending certain parts of the law relating to contracts. It is therefore an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Again, their Lordships do not see any improbability in the Indian legislature having taken the lead in a legal reform. Such reform may have been long recognised as desirable without an opportunity occurring for its embodiment in a legislative enactment, and it may well be that the opportunity occurred sooner in India than in this country, where the calls for legislative action are so much more numerous.

It remains to consider the Appellant's argument, so far as it is based on the use of the expression "instrument" instead of "document" of title. In the first place it is to be observed that "title" in both expressions can relate only to the right to receive delivery of the goods to

which the instrument or document relates. It can have nothing to do with ownership. A bill of lading may in this sense be an instrument or document conferring title; but, if so, the same is true of all the other documents contained in the genus "document of title." The fact that a document confers title in this sense cannot therefore be used as the distinguishing mark of a particular species of the genus. The truth is that the only point in which a bill of lading differs from other "documents of title" is that its assignment, whether upon a resale or by way of pledge, operates as a constructive delivery of the goods to which it refers. The Appellant's counsel was unable to mention, and their Lordships are not aware of any other document with this peculiarity. In their Lordships' opinion the suggestion that the words "or other instrument of title" were inserted *per cautelam* in case there were any such instrument other than a bill of lading is far-fetched. Moreover, they cannot help thinking that the section, if intended to have the effect for which the Appellant contends, would have been otherwise worded. Further, no reason can be suggested why, if (as is clearly the case) the legislature intended by sec. 102 to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bonâ fide* purchaser for value, it should not have by sec. 103 intended to do the same in favour of a *bonâ fide* pledgee for value. Under these circumstances little importance can be attached to the fact that one section employs the word "document" and the other the word "instrument," more especially as the use of the two expressions "document showing title" and "document of title," in the same sense shows that the draughtsman was not very careful in his use of language.

For the foregoing reasons their Lordships are of opinion that these appeals fail, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors: *Messrs. Hughes & Sons* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

B. D. *Appeals dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 40 of 1916.

Sanderson, C. J. Woodroffe, J. Mookerjee, J. 1916, Heard, 7 and 14, April. Judgment, 19, April.	J. B. Ross & Co., Defendants, Appellants, *v.* C. R. Scriven and others, Plaintiffs, Respondents.

Undefended cases, Plaintiff to prove his case in --Code of Civil Procedure (Act V of 1908), Or. VIII, r. 5, Or. VIII, r 8, Or. IX, r. 6, Or. VI, r. 15, Or XIX, r. 3 (1), Or. XXXVII, r. 2, sec. 107 (1), Or. 43, r. 23—Indian Penal Code (Act XLV of 1860), secs. 191 and 193—Plaint verified, if evidence—Verification, object of—Damages unliquidated, pleadings and proof as to—Remand, power of High Court as to—Pleadings—Practice.

Sanderson, C. J.—*The fundamental principle of law is that the Plaintiff, when he comes to Court, must prove his case, and he must prove it to the satisfaction of the Court.*

Under the Civil Procedure Code (Act V of 1908) such proof can be dispensed with and the allegations in the plaint considered as admitted, only in undefended cases of bills of exchange, promissory notes and hundis as contemplated in Or. XXXVII, r. 2 of the Code.

Or. VIII, r. 5 of the Code does not apply

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to undefended cases. It is clear from the wording of that rule that it is only intended to apply to a case where a pleading has been put in by the Defendant.

Per CURIAM.—*Or. VIII, r. 5, does not apply where there is no written statement and it does not justify a decree without any evidence where no written statement has been filed.*

WOODROFFE *and* MOOKERJEE, JJ.—*Or. VIII, r. 5 is really a rule of construction of the Defendant's pleading.*

The provision in Or. IX, r. 6 for the Court to "proceed ex parte *" in undefended cases means "proceed to take and determine on evidence."*

SANDERSON, C. J.—*It would be unreasonable to conclude from sec. 191 of the Indian Penal Code that it was ever intended that a plaint which has got the usual verification by the Plaintiff, could be adopted by a Court of Justice as sufficient proof of the facts which are contained in the plaint.*

WOODROFFE *and* MOOKERJEE, JJ.—*Because a false verification may be the basis of a prosecution under sec. 191 of the Indian Penal Code, that is, it may come within the definition of "False Evidence" for the purposes of the Indian Penal Code, that does not make a verification evidence on which a decree can be founded in a civil suit whether the Defendant appears or not.*

WOODROFFE, J.—*Verification does not dispense with evidence. The object of verification of the plaint is to fix on the Plaintiff the responsibility for the statements which it contains and to afford a guarantee of his good faith. Verification of pleadings may be by persons other than those who have personal knowledge of facts and who may verify same, as in the present case, on information and belief of the facts being true.*

SANDERSON, C. J.—*A Court would not be justified in allowing the plaint to be put in as evidence of the facts on which the Plaintiff wished to rely.*

In the present case, which was one for breach of contract and unliquidated damages, the Defendants had taken no steps to defend and the trial Judge gave a decree for full amount claimed by the Plaintiffs without taking any evidence;

Held on Appeal—*That the Plaintiffs should be called upon to prove all the material facts which are necessary for the proof of their case,* i.e., *not only the cause of action upon which they rely but also the actual amount of damages they have in fact sustained.*

Held also—*That in this case where the claim is for unliquidated damages, it was not incumbent on the Defendant under Or. VIII, r. 3, to deny specifically the allegations of fact regarding damages and the Court should even then make some enquiry to ascertain the damages to which the Plaintiff would be entitled.*

MOOKERJEE, J.—*The Defendant, merely because he did not appear, cannot, in the present case, be in a worse position in this respect, than what he would have been in if he had appeared and filed a written statement.*

WOODROFFE *and* MOOKERJEE, JJ.—*Where a Plaintiff did not offer any evidence, strictly speaking, the suit should be dismissed.*

Per CURIAM.—*Having regard to the fact that a written statement was not filed under a* bonâ fide *mistake and to the circumstances of the case, it was remanded for rehearing with liberty to Defendant to put in a written statement and adduce evidence.*

MOOKERJEE, J.—*Although there is a provision in the Code for remand in certain*

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specified circumstances, it cannot legitimately be contended that our powers are restricted thereby and that we cannot make an order of remand if exigencies of the case demand that such an order should be made.

This is an appeal from an *ex parte* decree made by Fletcher, J., sitting in the Original Side of the Calcutta High Court against the Defendant-Appellant who had taken no steps to defend the suit, on proof of the service of summons on the Defendant but without taking any evidence.

Mr. Langford James (with *Mr. D. C. Ghose*) for the Appellants.

Mr. P. L. Buckland for the Respondents.

Mr. James after stating the circumstances under which the judgment was given in the Court below said that no decree in any suit could be given without evidence except in a suit which comes under Or. XXXVII of the Civil Procedure Code. In the case of a suit which comes under Or. XXXVII, the summons which is served on the Defendant is different from the summons in other suits and referred to rule 22, Or. XXXVII. Reliance will no doubt be placed by the other side on Or. VIII, r. 5, which says that "every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the Defendant, shall be taken to be admitted except as against a person under disability: Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission. But it is quite clear that this rule will only apply to a case where a written statement has been put in by the Defendant. The Civil Procedure Code lays down a procedure to be followed by the Court in the case of a suit, where the Defendant does not appear and it is proved that the summons was duly served upon him. That procedure is to be found in Or. IX, r. 6. "Proceeding *ex parte*" has been interpreted to mean that the Court must see that the Plaintiff's case is at least *primâ facie* proved. Referred to *Amritanath* v. *Dhunpat* (6).

Mr. Buckland relied on two points, namely, (1) the principle of admission by non-traverse and (2) the principle that allegations in a plaint duly verified form legal evidence whereon a judgment may be based. With regard to his first point he relied on Or. VIII, r. 5 and with regard to his second point, he said that sec. 191 of the Indian Penal Code shewed that the plaint itself, when properly verified according to the rules, was to be considered as evidence in a suit. Sec. 191 of the Indian Penal Code says "Whoever . . . . being bound by law to make a declaration upon any subject makes any statement which is false and which he either knows or believes to be false or does not believe to be true, is said to give false evidence" and he argued from this that inasmuch as the Plaintiff, if he verified a statement in his plaint which he either knew or believed to be false, might be proceeded against because he would have been taken to have given false evidence, his plaint ought to be considered as evidence in the case. He relied strongly upon the case of *Queen-Empress* v. *Mehrban Singh* (5). In support of his second point, he also referred to sec. 47 of the Indian Divorce Act which says that the statements contained in a petition which is properly verified, may be referred to as evidence.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal

(5) I. L. R. 6 All. 626 (1884).
(6) 8 B. L. R. 44; 15 W. R. 503 (1871).

by the Defendants in this case, J. B. Ross & Co., against the judgment which was given by the learned Judge in the Court below in favour of the Plaintiffs under these circumstances: The action was brought for unliquidated damages arising upon an alleged breach of contract which was made between the Plaintiffs and the Defendants. The damages claimed were based upon the ordinary rule, *viz.*, the difference between the contract price and the market price at the time the contract ought to have been performed. The summons was served, but the Defendants did not enter appearance within the time specified in the summons, nor did they put in a written statement of defence within the time mentioned in the summons. Thereupon, the case was put upon the list of undefended cases, and it came before the learned Judge in due course. Then an application was made to the learned Judge on behalf of the Defendants for leave to appear and defend. The application was based upon the ground that the gentleman representing the Defendant firm had been away and that he had sent a telegram which was not delivered to his attorney in the way it had been sent, and that through that mistake the attorney understood that he had no instructions to defend, whereas, as a matter of fact, the Defendant had given instructions to his attorney to appear; and, the result was that no steps were taken to defend the suit. The learned Judge having refused the Defendant leave to appear proceeded to give judgment for the Plaintiffs without hearing any evidence, for the full amount claimed; and, the question which has been raised in this appeal is whether the learned Judge was entitled so to do.

Now, I am of opinion, in spite of the ingenious and able argument which has been addressed to us by Mr. Buckland on behalf of the Plaintiffs, that the learned Judge had no jurisdiction to make the decree which he in fact did.

The fundamental principle is that the Plaintiff, when he comes to Court, must prove his case, and he must prove it to the satisfaction of the Court. There are certain rules, made under the powers of the Civil Procedure Code, expressly limited to certain cases in which proof, in the ordinary sense of the word, by the Plaintiff of his case is dispensed with: and, those rules are contained in Or. XXXVII, r. 2 of the Civil Procedure Code. That is a Rule which is limited to bills of exchange, hundis or promissory notes, and it provides that "All suits upon bills of exchange, hundis or promissory notes may, in case the Plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed." Then it goes on to provide in cl. (2) that "In any case in which the plaint and summons are in such forms, respectively, the Defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the Plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons" and so on. Now this rule created an exception to the ordinary fundamental rule to which I have referred; and, in my opinion, one of the reasons why that exception was made was because of the special nature of the documents mentioned in that rule, namely, negotiable instruments such as bills of exchange, hundis

or promissory notes. It is a procedure which is somewhat analogous to the procedure under Or. III, r. 6 of the rules which are applicable to England, but it is of a much more limited nature: and, it is only in a case of that limited nature, such as where the Plaintiff sues upon bills of exchange, etc., and in respect of which he files his verified plaint, and the Defendant asks for leave to appear and defend, but fails to obtain it, that the allegations in the plaint shall be deemed to be admitted. As far as I am aware, in the rules which are applicable to this Court, there is no other provision under which proof by the Plaintiff, in the ordinary course, as we understand it, in support of his claim can be dispensed with.

Reliance was placed by the learned Counsel who argued this case for the Plaintiffs, upon two points: He said that there was evidence in this case and that the evidence consisted in the plaint which was verified in accordance with the rules of the Court, and he relied first upon Order VIII, r. 5.

In my judgment, Or. VIII, r. 5 does not apply to this case at all. That rule says, "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the Defendant, shall be taken to be admitted except as against a person under disability: Provided that the Court may in its discretion require any fact to be proved otherwise than by such admission." I think it is clear from the wording of that rule that it is only intended to apply to a case where a pleading has been put in by the Defendant: and I think the short answer to the learned Counsel's argument on that point is that the rule is not intended to apply to a case where the Defendant has not put in a written statement. It should be noted that in this case where the claim is for unliquidated damages, even if a written statement had been put in, it would not have been necessary for the Defendants to deny specifically the damages: it would have been quite sufficient if they had pleaded generally to the damages, and in that case even though all other material facts were admitted in the defence, there would still have been necessity for some enquiry to be made either by the Court which heard the case, or by the Official Referee or some other person to whom the Court might refer the enquiry, to ascertain the amount of damages to which the Plaintiffs would be entitled.

The other point is that if the learned Counsel was not right in relying on Or. VIII, r. 5, still there was some evidence in the case, because the plaint in itself constituted evidence, inasmuch as it had been verified in accordance with the rules of the Court.

Speaking for myself, I am not prepared to accede to that argument. First of all, I think the rule is that the Plaintiff must give the best evidence he can; and if the Plaintiff were alive and could come to Court it would be necessary for him to prove his case by producing evidence in the ordinary and well-recognised way, and I should have thought that the Court would not be justified in allowing the plaint to be put in as evidence of the facts on which he wished to rely. It is to be pointed out that the plaint is not verified by an affidavit: it is simply verified either by the signature of the party or parties or by some person who is authorised to verify on his or their behalf.

But it is said by Mr. Buckland that sec. 191 of the Indian Penal Code shows that the plaint ought to be considered as

evidence in the case; and, there it was that I think he showed considerable ingenuity in advancing the argument which he did, in favour of the Plaintiffs. I am bound however to say that I do not think that the argument is a good one, and for this reason: The point is, that the plaint is evidence because it is to be verified in accordance with the rules. If we look at sec. 191 of the Indian Penal Code, we find this "Whoever . . . being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence." Therefore he argues that inasmuch as the Plaintiff, if he verified a statement in his plaint which he either knew or believed to be false, might be proceeded against under sec. 193, because he would have been taken to have given false evidence, his plaint ought to be considered as evidence in the case. The answer to that is this: I think that the object of the Legislature is pretty clear: First of all the object of the rule insisting upon the verification of the plaint is clear, namely, that it was thought desirable to insist upon some guarantee that a false or totally trivial claim should not be put before the Court. There would be no such guarantee by simply requiring a man to make a verification of the claim, unless there was some sanction. Mr. Buckland says that the sanction is sec. 191. I think it is clear that sec. 191 was framed in the way in which it stands for this reason: It was the obvious intention of the Legislature to bring such a case, namely, the verification of statements in the pleadings by a person who knew them to be untrue, within sec. 193. Sec. 193 deals with the case of a man intentionally giving false evidence: and, the method the Legislature employed for bringing such case as I have referred to, within sec. 193, was to say that if a man being bound by law to make a declaration upon any subject, makes any statement which is false to his knowledge he shall be deemed to give false evidence. The words are, "he is said to give false evidence," and those words are employed simply for the purpose of bringing the case within sec. 193, and for no other purpose. With great deference to the learned Counsel, I think it would be unreasonable to conclude from that section that it was ever intended that a plaint which has got the usual verification by the Plaintiff could be adopted by a Court of Justice as sufficient proof of the facts which are contained in the plaint.

Therefore, I am of opinion that the two grounds upon which the learned Counsel has relied cannot be upheld.

Before I conclude my judgment, I would like to say one word, from the general point of view. Of course, if we had found in the rules or in the statutes any provision giving the learned Judge a jurisdiction to deal with the case in the way he has done, we should have been bound to follow it. But I cannot myself help saying that it would be undesirable if a suit such as this were adjudicated upon without any evidence in the real sense of the word given by the Plaintiff, where the claim is for unliquidated damages. The learned Counsel in the course of his argument, when I put the question to him, had to admit that in a very large number of cases where the claim is for unliquidated damages, the damages are inflated. It may be that in some cases they are intentionally inflated, but in most cases they are quite unintentionally inflated. The question of the proper measure of damages is one of the most difficult questions that a Court of Justice has to deal with and in

many cases of unliquidated damages, the amount which is put in the statement of claim is found to be wrong when the case comes to be investigated, and the amount of damages to which the Plaintiff is actually entitled is different from that which the Plaintiff has inserted in his plaint. Therefore, it shows the desirability and necessity in such cases, when the Defendant does not appear that the Plaintiff should be called upon to prove all the material facts which are necessary for the proof of his case, that is, not only the cause of action upon which he relies but also the actual amount of damages which he has in fact sustained. I think that if this course is not pursued, injustice may be done.

The appeal is, therefore, allowed.

With regard to costs of the appeal I do not see any reason for interfering with the ordinary rule that costs should follow the event. Therefore, the appeal is allowed with costs.

The facts upon which the Defendant rely have been verified by an affidavit, and the learned Counsel for the Plaintiffs frankly admitted that he had no reason to suppose that they were not as stated in the affidavit.

Therefore, I think that this case should be remanded for hearing and that the Defendants should have leave to put in a written statement of defence, and to call such evidence as they may think desirable, in support of their case. With regard to the costs of the application for stay of execution, in my judgment each party should pay his own costs.

WOODROFFE, J.—In my opinion, no decree can legally be given in any case without evidence except in cases of suits governed by the provisions of Or. XXXVII of Civil Procedure Code. According to r. 2, sub-r. 2 of that Order in default of obtaining leave to appear and defend or of appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the Plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons. This in my opinion is strong evidence of the intention of the Legislature that it is only in such cases that the allegations in the plaint should be deemed to be admitted and amount to proof on which a decree may be founded when there is no written statement and the Defendant does not appear.

The procedure in this country is not that which prevails in England. In my experience the practice sought to be upheld by the Respondents has not hitherto prevailed in this Court where it has always been the practice in undefended cases to take evidence as defined in the Evidence Act, *viz.*, oral statements of witnesses and documents proved before the Court. The *cursus curiæ* may be looked at when interpreting the terms of the Civil Procedure Code. There is, in my opinion, nothing in the decision in *Galstaun* v. *Hutchison* (1) to which I was a party and in which judgment was also delivered by the late Chief Justice, which justifies the contention which has been advanced by the Respondents before us. In this case the Plaintiff gave evidence and proved his claim but a question of stamp arose. The Defendant entered appearance but did not file a written statement. The Code however is clear. The case does not fall under Or. XXXVII; for the suit was based upon an alleged breach of contract claiming unliquidated damages.

The decree has been sought to be justified by an application of r. 5, Or. VIII of the Civil Procedure Code and by the

(1) I. L. R. 39 Cal. 789 : s. c. 16 C. W. N. 945 (1912).

argument that verification of pleadings dispenses with evidence. As all pleadings in this Court are verified this latter contention is simply restatement of the argument that a decree can be given on pleadings without evidence in undefended cases. This contention is a novel one. Verification does not, in my opinion, dispense with evidence. But it is merely a form of giving authenticity to the pleadings. The object of the verification of the plaint is to fix on the Plaintiff the responsibility for the statements which it contains and to afford a guarantee of his good faith. See the case of *Basdeo* v. *John Smidt* (2). Verification in my opinion is not evidence on which a suit can be decreed whether the adversary does or does not appear. Because a false verification may be the basis of a prosecution under sec. 191 of the Penal Code, that is, comes within the definition of "False Evidence" for the purposes of the Penal Code that does not make a verification evidence on which a decree can be founded in a civil suit.

Moreover under Or. XIX of the Code the Court may allow facts to be proved by affidavit, but the Code expressly stipulates that the affidavit must be confined to facts within the personal knowledge of deponent except in cases of interlocutory applications on which he is permitted to speak to his own belief. This knowledge, by no means, always exists in the case of verification of pleadings; and the present case is an illustration in point—the plaint having been verified by the attorney of the Plaintiffs who states that the allegations in the plaint are based on information received by him and believed by him to be true.

It is then said that under Or. VIII, r. 5, this procedure can be justified. This rule, in my opinion, has obviously no application. Or. VIII is headed, as appears from the title of the chapter, "written statement and set-off," and the rule assumes existence of a pleading of the Defendant; for it states "that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the Defendant, shall be taken to be admitted except as against a person under disability." This section is really a rule of construction of the Defendant's pleading. It cannot be said that a fact is admitted until one looks at the written statement. This rule does not apply where there is no written statement at all. The law says, as a rule of construction, that if there is a written statement and the fact as alleged in the plaint is not denied then the written statement must be so construed as to be taken to have admitted such allegation. The rule does not, in my opinion, justify the passing of a decree on no evidence where there is no written statement.

Under Or. IX, r. 6, where the Plaintiff appears and the Defendant does not appear when the suit is called on for hearing then if it is proved that the summons was duly served the Court may proceed *ex parte*. "Proceed *ex parte*" means "proceed to take and determine on evidence" and this is what the summons in the suit says. The summons does not say that on failure to appear the Plaintiff is entitled to a judgment by default, but on the Defendant's failure to appear the case will be heard and determined *ex parte*, that is, in his absence by the taking of evidence.

In my opinion, the decree having been made without evidence cannot be supported. As the Plaintiffs did not tender any evidence, strictly speaking, the suit should be dismissed. But Mr. Langford

(2) I. L. R. 22 All. 55 at p. 61 (1899).

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James who appears on behalf of the Appellants does not insist on this or contend that we have no power to remand. So I need not discuss this question.

The decree will therefore be set aside and the case will be remanded in order to be reheard after giving the Defendants an opportunity of filing written statement and of adducing evidence. The circumstances on which reliance is placed as entitling the Defendants to defend the suit are not contested.

In my opinion the Appellant is entitled to his costs of this appeal.

MOOKERJEE, J.—I am clearly of opinion that there has been no trial of this suit in conformity with the procedure prescribed by the legislature, and that the decree in favour of the Plaintiffs cannot possibly be supported. Mr. Buckland, who has made a strenuous endeavour to support the decision under appeal, has conceded that the procedure adopted for the trial of this suit is novel; but he has argued that novelty did not necessarily indicate departure from law. This may be conceded. But when recourse is had to a novel procedure, which has escaped the attention of generations of Judges, if the legality of the procedure is called in question, the matter undoubtedly deserves careful scrutiny.

The very brief history of this litigation which involves a sum of over Rs. 17,000 may be stated in a few words. On the 24th January 1916, the Plaintiffs lodged the plaint in this Court for recovery of Rs. 17,578-13-8 from the Defendants as liquidated damages for breach of a contract alleged to have been made on the 21st December 1914. Summons is said to have been served upon one of the partners of the Defendant firm on the 10th February 1916. The suit came on for trial on the 13th March 1916. Up to that stage, the Defendants had not entered appearance or filed a written statement; but Mr. Gregory appeared on that day on their behalf and asked for leave to defend. Leave was peremptorily refused. The Plaintiffs, however, did not adduce any evidence; and the following order was thereupon recorded:—"Judgment for the amount claimed, 6 per cent. on decree. Costs on Scale No. 1." We are now invited to set aside this decree as not founded on any legal evidence.

It is an elementary principle, which forms the basis of all legal procedure, that no litigant is entitled to obtain relief from a Court of Justice unless he establishes to the satisfaction of the Court that his claim is well-founded. Tested in the light of this principle, how does the claim of the Plaintiffs stand? They examined no witnesses; how did they then profess to have established their claim to the satisfaction of the trial Judge? The judgment itself does not throw any light on this point: But Mr. Buckland has invoked the assitance of two doctrines; *viz.*, *first*, the principle of admission by non-traverse, and, *secondly*, the principle that allegations in a plaint duly verified form *legal evidence*, whereon a judgment may properly be based.

As regards the first branch of this contention, the principle invoked is embodied in r. 5 of Or. VIII of the Code of Civil Procedure, and is expressed in these terms—"Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the Defendant, shall be taken to be admitted, except as against a person under disability; provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission." The plain reading of the rule, which is really a

rule of construction of pleadings, is that it is limited in its application to cases where there is in fact a pleading of the Defendant. Mr. Buckland contended that it was not logical to distinguish between cases where there is a pleading by the Defendant and cases where there is no pleading by the Defendant. We are not concerned, however, with the question whether the principle embodied in r. 5, which, I may observe parenthetically, was for the first time introduced into the Code of this country in 1908 [*Anundmoyee* v. *Sheeb Chunder* (3)] can or cannot be defended on logical grounds; we have to apply it as we find it framed by the legislature, and in my opinion, its very phraseology shows that it has no application to the present case. Apart from this, the Plaintiffs have to overcome an additional difficulty, because, r. 3 lays down that "It shall not be sufficient for a Defendant in his written statement to deny generally the grounds alleged by the Plaintiff, but the Defendant must deal specifically with each allegation of fact of which he does not admit the truth, *except damages*." This rule is based on Or. XIX, r. 17 of the rules of the Supreme Court of England. That rule must be read with Or. XXI, r. 4, which is in these terms: "No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted." Although there is no provision in our Code corresponding to Or. XXI, r. 4 of the rules of the Supreme Court of England, I think we can legitimately put the same construction upon Or. VIII, r. 3, as has been put in England upon Or. XIX, r. 17. That interpretation will be found explained by Mr. Justice Hawkins in the case of *Wood* v. *The Earl of Durham* (4). It is plain that in the present case even if the Defendants had entered appearance and filed a written statement it would not have been obligatory upon them to plead specifically as to the amount of damages; and merely because they did not appear, they cannot be in a worse position than what they would have occupied if they had appeared and filed a written statement. I may add that if the contention of the Respondents were to prevail, the provisions of Or. XXXVII, which are applicable to special classes of negotiable instruments, would be entirely superfluous. If what is contended by the Respondents is well-founded and can be legitimately done in all classes of cases, why should the legislature provide a special procedure in Or. XXXVII? I therefore hold without hesitation that the Plaintiffs are not entitled to succeed on the basis of implied admission of their claim by the Defendants.

As regards the second branch of the contention, it has been argued that as the plaint was duly verified, all the allegations therein must be deemed to be evidence in favour of the Plaintiffs against the Defendants and should be treated as material for the basis of the judgment of the Court. In support of this contention, reliance has been placed upon the decision of the Allahabad High Court in the case of *Queen-Empress* v. *Mehrban Singh* (5). In my opinion, that argument rests on no solid foundation. A comparison of the terms of secs. 191 and 193 of the Indian Penal Code shows that a person who makes a false affidavit is deemed to give false evidence, in order that he may be punished under sec. 193 of the Indian Penal Code. Indeed, the inference may be legitimately drawn from the language used in sec.

(3) 9 M. I. A. 291 (305) (1862).

(4) 21 Q. B. Div. 501, 508 (1888).

(5) I. L. R. 6 All. 626 (1884).

191 read with sec. 193 that a verified statement would not be " evidence " but for the special provision of sec. 191 which has been enacted for a special purpose.

In this connection, reference may usefully be made to the procedure prescribed by the legislature for the trial of a suit in which the Defendant does not appear. Or. IX, r. 6, lays down that where the Plaintiff appears and the Defendant does not appear when the suit is called on for hearing, then, if it is proved that the summons was duly served, the Court may proceed *ex parte*." The next stage is described in Or. XVIII, r. 2, which lays down that " on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove." If the contention of the Respondents were well-founded, the legislature would no doubt have stated that where the Defendant has not appeared, the case may be decreed on the basis of the allegations made in the verified plaint. Reference has been made in the course of argument to the decision of the Allahabad High Court in *Basdeo* v. *John Smidt* (2) which explains the value and object of verification. That certainly does not support the contention of the Respondents. A verification is required with a view to discourage, if not to prevent, the institution of false suits; the legislature never contemplated that verified statements should be treated as evidence on behalf of the Plaintiff against the Defendant. This view is confirmed on an examination of the provisions of the Code as to the use of affidavits in evidence. Or. XIX defines the circumstances in which affidavits may be used as evidence and specifies the limitations subject to which this is permissible. If the contention of the Respondents were to prevail, the provisions of Or. XIX would be superfluous. It is worthy of note that sec. 96, sub-sec. 2 of the Code of Civil Procedure allows an appeal from an original decree passed *ex parte*; it is difficult to conceive how such an appeal can be of any assistance to the Defendant, if there is no evidence on the record.

Reference has also been made to sec. 47 of the Divorce Act, which I should have thought, was against the view put forward by the Respondents. If a verified plaint could always be treated as evidence, it was superfluous to make a special provision in the Divorce Act.

In my judgment, there is no possible escape from the conclusion that there is no legal evidence on the record on which the decree made in favour of the Plaintiffs may be supported.

The question next arises, what course should now be pursued. Mr. Langford James, in my opinion, would have been perfectly justified if he had seriously pressed his contention that as the Plaintiffs are not shown to have offered or, indeed, to have been even ready with any evidence in the trial Court, the appeal should be allowed and the suit should stand dismissed. I am reluctant, however, to adopt this course, on the present occasion, for I feel doubtful how far the conduct of the Plaintiffs might or might not have been affected by the novel procedure, which, we were informed in the course of the argument, was adopted in the trial Court. That we are entitled to remand the case for trial, is, I think, obvious. Sec. 564 of the Civil Procedure Code of 1882 which provided that the Appellate Court shall not remand a case for a second decision except as provided in sec. 562 does not reappear in the Code of 1908. Con-

(2) I. L. R. 22 All. 55 at p. 61 (1899).

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sequently, although there is a provision in the Code for remand in certain specified circumstances, it cannot legitimately be contended that our powers are restricted thereby and that we cannot make an order of remand if the exigencies of the case demand that such an order should be made. I am also of opinion that on remand, the Defendants should have an opportunity to file a written statement; no useful purpose will be gained if this matter is left open.

I desire to add, finally, that great caution should be exercised when suits are heard *ex parte*. This observation is, in my opinion, of universal application [*Amritanath* v. *Dhunpat* (6)]. But it applies with special force to cases of the description now before us, where unliquidated damages are claimed on the allegation that there has been a breach of contract. I entirely agree with the Chief Justice in the weighty observations he has made as to the exaggerated claims usually put forward in cases of this character, and the necessity for careful scrutiny into all such claims, before a decree is made in favour of the Plaintiff.

On these grounds I concur in the view that this appeal must be allowed with costs, the decree made by Mr. Justice Fletcher reversed, and the case remanded for trial.

Messrs. Pugh & Co., Attorneys, for the Appellants.

Mr. J. N. Taylor, Attorney, for the Respondents.

D. C. G. *Appeal allowed.*

(6) 8 B. L. R. 44 (48) : 8 C. 15 W. R. 503 (1871).

[CIVIL REVISIONAL JURISDICTION.]

RULES NOS. 1083 AND 1084 OF 1915.

TEUNON, J.
NEWBOULD, J.
1916,
Heard,
27, March.
Judgment,
28, March.

BHUBAN BEHARY NAG MAZUMDAR, Auction-purchaser, Petitioner,
v.
DHIRENDRA NATH BANERJI and others, Judgment-debtors, Opposite Party.

Civil Procedure Code (Act V of 1908), Or. 9, r. 9, Or. 43, r 1, cl (c)—*Application by judgment-debtor under Or. 21, r. 90 to set aside sale—Dismissal for default—Application for restoration, rejection of—Order if appealable—Application to set aside sale if "suit"*

Or. IX, r. 9 of the Civil Procedure Code is applicable to applications for setting aside sales which have been dismissed for default.

DELJAN NICHHA BIBEE *v.* HEMANTA KUMAR RAY (1) *and* SAFDAR ALI *v.* KISHUN LAL (2) *relied on.*

An application to set aside a sale is a proceeding which may terminate in an adjudication such as is referred to in sec. 2 of the Civil Procedure Code, and if the question had been res integra, *the Court would have held that it was a suit within the meaning of Or. XLIII, r. 1, cl.* (c).

CHARU CHANDRA GHOSH *v.* CHANDI CHARAN RAY CHOWDHURY (3) *referred to.*

These were Rules issued on the 27th November 1915 against the orders of Babu Jnanendra Nath Mukherjee, Subordinate Judge of Khulna, dated the 22nd July 1915, setting aside the orders of S. P. Majumdar, Esq., Munsif of Khulna, dated the 25th July 1914 and the 15th January 1915 respectively.

The two Rules arose out of the same proceedings. The Opposite Party applied

(1) 19 C. W. N. 758 (1915).
(2) 12 C. L. J. 6 (1910).
(3) 19 C. W. N. 25 (1914).

BHUBAN BEHARY NAG MAZUMDAR *v.* DHIRENDRA NATH BANERJI.

for setting aside an execution sale under sec. 47, and Or. XXI, r. 90 of the Civil Procedure Code. On the day of hearing (25th July 1914) both parties applied for time. The lower Court rejected the prayer of both parties and the Petitioner having taken no further steps rejected the application on the same date, 25th July 1914. On 28th July 1914 the Petitioner applied for a review of the order rejecting his application for setting aside the sale. This application too was rejected on 15th January 1915. The Opposite Party appealed against both these orders.

The Subordinate Judge on appeal treated the petition for review as in substance, one for restoration under Or. IX, r. 9, C. P. C., and held on the authority of *Deljan Nichha Bibee* v. *Hemanta Kumar Ray* (1), in which *Safdar Ali* v. *Kishun Lal* (2) was distinguished, that an appeal against the order rejecting that application did lie.

On the merits, the learned Subordinate Judge held as follows :—

" The Petitioner did all in his power to produce his witnesses. It is not true that the warrant was not issued at the Petitioner's default. It seems that he paid all necessary costs, yet there was delay in issuing the process. That the Petitioner is a minor and the property sold is of some value are important consideration in the cases. Having regard to all the circumstances I think the lower Court should have allowed time to the Petitioner to produce his witnesses and granted the rehearing applied for."

In the above view, the Subordinate Judge decreed the appeals and directed the trial Court to try the application for setting aside the sale after recording evidence adduced by parties.

The auction-purchaser thereupon moved the High Court and obtained these rules.

Babu Jadunath Kanjilal, in support of the rule, contended that no appeal lay against the order of the Munsif refusing the application for review. As to the other appeal, the application having been dismissed for default of both parties, no appeal lay. Civil Procedure Code, Or. IX, rr. 4 and 9. *Charu Chandra Ghosh* v. *Chandi Charan Ray Chowdhury* (3).

[TEUNON, J.—Refers to *Deljan Nichha Bibee* v. *Hemanta Kumar Ray* (1).]

Babu Sarat Chandra Ray Chaudhry (with *Babus Bimala Charan Deb* and *Jatindranath Ray Chaudhry*) for the Opposite Party No. 1 contended that the dismissal of the petition was in effect under Or. XXI, r. 92. That being so an appeal lay against the order under Or. XLIII, r. 1 (*j*). Besides the High Court could interfere having regard to the merits of the case. Opposite Party No. 1 was a minor. There was no laches on his part inasmuch as he had deposited the costs of the warrant, but the warrant was not issued owing to negligence on the part of the Court officer. Further, one-sixth of the property in question had been sold for Rs. 800, and in this auction sale the whole had been sold for Rs. 900 only.

[On 24th March 1916, the rule was mentioned in Court by Teunon, J., who said that even if no appeal lay, the High Court could interfere in its Revisional Jurisdiction, and informed the vakils, if they wanted to submit anything further on the point that their Lordships would give them a further hearing. Accordingly the matter was set down for further hearing on 27th March 1916 when Babu Jadunath

(1) 19 C. W. N. 758 (1915).
(2) 12 C. L. J. 6 (1910).

(1) 19 C. W. N. 758 (1915).
(3) 19 C. W. N. 25 (1914).

Kanjilal was heard on the points raised by Teunon, J.]

The JUDGMENT OF THE COURT was as follows :—

These two applications arise out of proceedings for the setting aside of a certain Court sale.

The sale was held on the 22nd April 1912, and was confirmed on the 23rd of May of that year.

Sometime towards the close of 1913 the judgment-debtor applied under Or. XXI, r. 90 to have the sale set aside.

This application came on for hearing on the 25th July 1914 when both parties, *i.e.*, the judgment-debtor and the auction-purchaser applied for time. Both applications were rejected, and the Petitioner taking no further steps his application was dismissed for default.

On the 28th July, the Petitioner applied that the order should be reviewed and his application for setting aside the sale restored. This application for review or restoration was dismissed or rejected on the 15th January 1915.

Against both orders of rejection or dismissal appeals were preferred to the Subordinate Judge. Both appeals were decreed on the 25th July 1915.

The auction-purchaser has now obtained the present rule calling upon the Opposite Parties to show cause why the Subordinate Judge's order should not be set aside on the ground that in neither case did an appeal lie.

In support of the rule, it is first contended that the order dismissing the application to set aside the sale was made in the absence of both parties. If so, and if the provisions of Or. IX apply, the order was one under Or. IX, r. 3, and the application to have it set aside was one under Or. IX, r. 4. Against an order rejecting an application under Or. IX, r. 4, Or. XLIII provides no appeal.

We are unable to accede to this contention. No doubt in the first Court's order of the 28th July dismissing the application for setting aside the sale, it is stated that both parties had been in default. But by part of the same order an application made by the Opposite Party (the auction-purchaser) is rejected. The inference is that he was present. No suggestion to the contrary appears to have been made in the Court of Appeal and on what after all is a question of fact we do not think that we should differ from the Subordinate Judge.

It follows that if the provisions of Or. IX apply to applications for setting aside sales, the application in the present case was dismissed under Or. IX, r. 8 and the application to have that dismissal set aside was made and rejected under Or. IX, r. 9.

The question in the Rule then is whether by virtue of the provisions of Or. IX, r. 9 and of Or. XLIII, r. 1, cl. (*c*), an appeal lies against an order refusing to restore an application made under Or. XXI, r. 90, and dismissed for deafult.

We can see no reason in principle why Or. IX, r. 9, should not be held applicable to applications for setting aside sales and in support of the view that the rule does apply in such cases we have direct authority in *Deljan Nichha Bibee* v. *Hemanta Kumar Ray* (1) and in *Safdar Ali* v. *Kishun Lal* (2). We therefore hold Or. IX, r. 9, to be applicable.

The next question is whether Or. XLIII, r. 1, cl. (*c*), confers a right of appeal against an order made under Or. IX, r. 9, refusing to restore an application for the setting aside of a sale. In other words the question is whether for the purpose of

(1) 19 C. W. N. 758 (1915).
(2) 12 C. L. J. 6 ('9.0).

BHUBAN BEHARY NAG MAZUMDAR *v.* DHIRENDRA NATH BANERJI.

Or. XLI, r. 1 (*c*), an application for the setting aside of a sale is a suit.

There can be no doubt we think that an application to set aside a sale is a proceeding which may terminate in an adjudication such as is referred to in sec. 2 of the Code, and if the question had been *res integra* we should have been prepared to hold that it was a suit within the meaning of Or. XLIII, r. 1, cl. (*c*).

But in a series of cases of which the latest is *Charu Chandra Ghosh* v. *Chandi Charan Ray Chowdhury* (3), the contrary view has been taken, and, in the present case, as it is open to us to interfere under sec. 115 of the Code, we are not disposed to make a reference to the Full Bench.

From the order of the District Judge it is clear that in dismissing and again in refusing to restore the application the Munsif erred in attributing to the Applicant a default or laches which was in fact the default or laches of the Court and its officers.

Proceeding, therefore, in our revisional jurisdiction we adopt as our own the order made by the Subordinate Judge on the 22nd July 1915, in so far as it sets aside the orders made by the Munsif on the 25th July 1914 and 15th January 1915 and direct that the Munsif do now proceed to hear the application for setting aside the sale, and determine the same on the merits. Costs in all Courts will abide the result. We assess the hearing fee in this Court at two gold mohurs.

N. G.
S. C. G.

(3) 19 C. W. N. 25 (1914).

[CRIMINAL REVISIONAL JURISDICTION]

REV. No. 514 OF 1916.

SANDERSON, C. J. WALMSLEY, J. 1916, 30, June.	MAHOMED KAZI and ors., Petitioners, *v.* THE KING-EMPEROR.

Opium Act (I of 1878), sec. 9 (c)—Illicit possession of opium—Possession of substance unfit for use as opium and containing only traces of opium.

The accused were convicted under sec. 9 (c) of the Opium Act for being in illicit possession of two and a half seers of opium. The substance seized from the possession of the accused was on chemical analysis found to contain traces of opium amounting to less than one per cent. and to be unfit for use as opium. There was no evidence as to whether the traces of opium could be extracted from the mass and used as opium:

Held—*That the conviction could not be sustained.*

This was a Rule granted on the 15th May 1916 against an order of Mr. L. Burrows, Sub-divisional Magistrate of Cox's Bazar, dated the 27th March 1916, convicting Petitioners under sec. 9 (*c*) of the Opium Act and sentencing them each to pay a fine of Rs. 100, an appeal from which order was dismissed by Mr. J. C. Twidell, Sessions Judge of Chittagong, on the 15th April 1916.

The material facts will appear from the judgment.

Mr. S. R. Das and *Babu Chandra Sekhar Sen* for the Petitioner.

Mr. Camell for the Crown.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—We think in this case that the conviction ought not to stand by reason of the first ground which was raised by the learned Counsel for the Peti-

tioners. The charge against the three accused was that they illegally possessed and sold opium, contrary to the provisions of the Opium Act of 1878. It appears that there were three pieces of black substance which weighed something like 2½ seers, and the prosecution was lodged upon the assumption that the whole of this substance was opium. The case apparently proceeded upon that assumption, and the taking of the evidence was concluded; and, my learned brother has drawn my attention to the fact that it was at the end of the case that the accused persons asked that this black substance should be analysed; and, upon analysis being made, the analyst reported that in the lumps, traces of opium were detected but the substance was unfit for use as opium. Then a telegram was received on the following day, about which the learned Magistrate had some doubt as to whether it was admissible in evidence or not—but, at all events, he did admit it—which telegram said that the lumps contained less than one per cent. of opium. Assuming that the learned Magistrate had the right to accept that telegram as evidence, the matter stands thus: the lumps contained traces of opium and those traces amounted to less than one per cent. Now, can it be said—I lay emphasis upon this part of my judgment—that that evidence supported the charge which the prosecution had made against the accused? The case was based upon evidence to the effect that these accused persons were in possession of something like 2½ seers of opium. In our judgment, such evidence is not sufficient to sustain the charge against the accused. Further than that, supposing we are to look at it from a narrower point of view, can it be said that an accused person is in possession of opium or selling opium when he is presenting a mass which is obviously not opium and which only contains, upon analysis, less than one per cent., or, in other words, traces of it; and especially when the question whether those traces of opium can be separated from the larger mass is entirely left in doubt. The prosecution have not given any evidence as to whether the traces of opium could be extracted from the mass and used as opium. Inasmuch as in a criminal prosecution the prosecution have to prove their case, which was that the accused was in possession of 2½ seers opium, and it turns out that the 2½ seers were not opium, but simply contained traces of opium and there is no evidence that such traces can be extracted from the larger mass, I think under the circumstances the prosecution fails and the conviction should be set aside. In this view, it is not necessary for us to express any opinion upon the question of law which Mr. Das has raised.

The fines in respect of this conviction that have been paid will be refunded.

WALMSLEY, J.—I agree.

S. C. M. *Rule made absolute.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2445 OF 1915.

SHARFUDDIN, J. ROE, J. 1916, 21, June.	SHAIKH SAFAIT HOSAIN, Plaintiff, Appellant, *v.* SHAIKH WAIZUDDIN and anr., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 153—Second appeal, whether lies—Tenant claiming mafi, as jeth raiyat—Meanings of jeth raiyat and mafi.

Where in a rent suit valued at less than Rs. 100, the tenant claimed Rs. 3-5 as. as mafi on the whole rent on the ground

SHAIKH SAFAIT HOSAIN *v.* SHAIKH WAIZUDDIN.

that he was a jeth raiyat *and the District Judge allowed the* mafi *and the landlord preferred a second appeal,*

Held, *that no second appeal lies under sec. 153 of the Bengal Tenancy Act, as it does not involve a question of the amount of rent annually payable by the tenant.*

Jeth raiyats *have to perform certain duties under the landlord, as for example, calling tenants for the collection of rent and such similar duties and for that they are allowed by the landlord, by way of wages and instead of payment in cash, a* mafi *from the total rent instead of payment in cash.* Mafi *is not rent because it is a sum of money payable by the landlord to the tenant, whereas rent is money payable by the tenant to the landlord and* mafi *is a set-off against the rent.*

This is a second appeal against the decision of A. E. Scroope, Esq., District Judge of Mozufferpur, dated 31st July 1915, reversing the decree of Babu Charu Chandra Mitra, Munsif, 1st Court, Mozufferpur, dated 26th April 1915.

The facts which led to this controversy in appeal are as follows :—

The Plaintiff instituted this suit for recovery of arrears of rent amounting to Rs. 96 and odd annas for the year 1320 and 12 as. kist of 1321 F. S. The defence amongst others was that the Defendant was entitled to a *mafi* of Rs. 3-5 annas as entered in the *khatian* on account of his being a *jeth raiyat*, whose duty it is to help the *malik* in collecting his rent. The first Court disallowed this *mafi* on the ground that on his own showing he ceased collecting the rent on account of *takrar* with the *malik* and he therefore could not claim it. On appeal by the Defendant, the learned District Judge held as follows : " Obviously a *malik* can always create what the Munsif calls *takrar* with a *jeth raiyat* by refusing to allow him to collect or refusing the remission entered in the *khatian* " and he allowed the *mafi* as claimed by the Defendant. The Plaintiff thereupon preferred this second appeal.

Mr. Atul Krishna Ray, appearing for the Respondent, raised a preliminary objection that the second appeal does not lie under sec. 153 of the Bengal Tenancy Act, as the amount claimed in the suit does not exceed Rs. 100 and as the decree has not decided a question of the amount of rent annually payable by the tenant. Here the tenant wants a *mafi* or remission of rent on account of his being a *jeth raiyat*. He does not dispute the annual *jama* payable but claims this *mafi* as a set-off.

Mr. Baidyanath Narayan Sinha, appearing for the Appellant, contended that the claim of *mafi* amounts to a dispute of the amount of the annual rent payable and so sec. 153 of the Bengal Tenancy Act is no bar to the second appeal.

The JUDGMENT OF THE COURT was as follows :—

SHARFUDDIN, J.—A preliminary objection has been made by the Respondent in this appeal, namely, that under sec. 153 of the Bengal Tenancy Act no appeal lies inasmuch as the amount claimed in the suit is within Rs. 100 and that the decree appealed against is a decree passed by a District Judge and there has been no decision arrived at as to the amount of rent annually payable by a tenant. On behalf of the Appellant by way of reply it was contended that the order amounts to one that would naturally go to affect the amount of rent payable by tenant. The facts of the case are, that a rent suit was instituted by the landlord against the Defendant Respondent. A question arose in that suit, how much was *mafi* in favour of the Defendant of that suit who was *jeth raiyat*. The first Court gave a decree

and in appeal to the District Judge that learned Officer held that the *mafi* was Rs. 5-3 on the whole rent. The Defendant who is a Respondent in the present appeal was a *jeth raiyat*, and *jeth raiyats* have to perform certain duties under the landlord, as for example, calling tenants for the collection of rent and such similar duties, and for that they are allowed by the landlord, by way of wages and instead of payment in cash, a *mafi* from the total rent. This *mafi* is not rent because it is a sum of money payable by the landlord to the tenant. Rent is money which is payable by the tenant to the landlord, and the *mafi* is a set-off against the rent. It is also important to note that in the suit itself there was no dispute as to the annual rent payable by the tenant. The dispute was as to whether a tenant is or is not entitled to claim this *mafi* as a set-off, and for the above reasons we hold that under sec. 153 of the Bengal Tenancy Act no appeal lies to this Court.

The appeal therefore must be dismissed with costs.

ROE, J.—I agree.

A. K. R. *Appeal dismissed.*

PATNA HIGH COURT.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 119 OF 1916.

ROE, J.
JWALA PRASAD, J.
1916,
2, June.

BAYAN ALI and 4 ors, Accused, Petitioners,
v.
KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), secs. 248, 345—Wrongful confinement case—Petition filed by the complainant praying that the case may be struck off without hearing—Such petition, whether compromise or withdrawal—Procedure in warrant cases for withdrawal—Meaning of compromise and withdrawal.

"Compromise" is a word which in itself contemplates an arrangement to which there are two parties. "Withdrawal" has no such meaning. A case is compromised if with the consent of the accused it is withdrawn. A case is withdrawn under sec. 248, Cr. P. C., without the consent of the accused.

When a petition is filed by the complainant praying for striking off the case, it is clearly open to the Magistrate to satisfy himself under what section the petition is before him. Where the answers of the complainant clearly indicate that the case had not been compromised but was being withdrawn without the consent of the accused and the subsequent action of the accused shows that he had never consented to the compromise of the case:

Held—*That the petition was not a petition made under sec. 345, Cr. P. C., and that the subsequent proceedings resulting in the trial and conviction of the accused were in order.*

MURRAY *v.* QUEEN-EMPRESS (1), ABDOOL BISWAS *v.* KHATER MONDAL (2) *and In re* GANESH NARAYAN SATHE (3) *referred to.*

This was a revision case against the order of R. Sheepshanks, Esq., Sessions Judge of Mozufferpur, dated 18th April 1916, affirming that of W. H. Boyce, Esq., Sub-divisional Magistrate of Bettiah, dated 28th March 1916.

The facts and arguments appear clearly from the judgment.

Mr. R. A. Baxter (with *Messrs. Sarat Kumar Banerjee* and *Bankim Chander Dey*) for the Petitioners.

Mr. Fakhruddin for the Crown.

(1) I. L. R. 21 Cal. 103 (1893).
(2) 3 C. W. N. 332 (1899).
(3) I. L. R. 13 Bom. 600 (1889).

BAYAN ALI *v.* KING-EMPEROR.

The JUDGMENT OF THE COURT was as follows :—

The facts of this case are as follows :—

On the 30th of January 1916 at 6 A.M. the complainant Raghunaek Misser reported at the Bagaha Police Station that one hour before sun-set on the previous day his brother Nakut Nath Misser had been wrongfully confined by the accused Bayal Ali, a Sazawal of the Bettiah Raj, with the help of the Patwari and the peons of that Raj.

The Police investigated this information and submtited a charge-sheet against the accused fixing the 10th of February 1916 for trial and recording that they had directed the complainant and his witnesses to appear at the Bettiah Court on that day.

On the 10th of February 1916 the prosecution witnesses and the accused appeared before the Sub-divisional Officer and a petition was filed by the complainant Raghunaek Misser, which has been translated thus :—"As this case is between the *amlas* of the Raj on one side and your Petitioner, the raiyat of the Raj, on the other, therefore by the intervention of arbitrators it has been compromised. Hence the Petitioner does not want to proceed with the case and to get his witnesses examined, so this petition is filed and it is prayed that the case may be struck off without hearing."

Upon this the Sub-divisional Magistrate wrote—"This may be forwarded to S. P. Complainant states to me that his case is true but he wishes to withdraw it because he is a Raj *asami* and accused are Raj servants. This, however, scarcely seems sufficient reason."

Upon this the Court Sub-Inspector wrote to the Superintendent of Police :—"I humbly beg to state that in the marginally noted case the complainant has filed a petition of withdrawal which has been forwarded by the S. D. O. to your honour. I therefore beg to send herewith the judicial record of the case along with case diaries and the petition of withdrawal filed by the complainant for your honour's perusal and orders. The next day fixed for this case is 17th February 1916."

Upon this the Superintendent of Police wrote—"I am not willing to withdraw the case but have no objection to the case being compromised."

On the 17th of February the prosecution witnesses were examined and the accused examined and a charge framed, and the case was adjourned to the 28th for cross-examination.

On the 28th of February the Mukhtear appearing for the accused applied for an adjournment in order that the accused might obtain the assistance of the Raj in his defence, and the case was thereon adjourned to the 13th of March. There is on the record a letter which runs, "correspondence between the Collector and the estate to defend the case at Raj expense is going on but no sanction has yet been received." There is also on the file a letter from Mr. Hudson, Assistant Manager of the Raj, saying that the Pleader engaged in the case on behalf of the Raj was unable to appear and asking for an adjournment. The case was continued and ended in the conviction of the accused, and upon appeal to the District Judge the findings of facts of the Sub-divisional Court were confirmed and the sentences confirmed.

The application comes before us in revision on two grounds. Firstly, that the petition of the 10th of February was in fact a petition of compromise and, secondly, the sentence of three months' imprisonment is excessive.

BAYAN ALI *v.* KING-EMPEROR.

The first point for consideration in this case is—Was the petition of the 10th of February clearly a petition of compromise? The Sub-divisional Magistrate and the Superintendent of Police did not regard it as such. The actual words used are "*sulah ho gaya*". No mention is made of the section under which the petition was filed. The first half of it might be taken as a petition of compromise; the second half of it as a petition of withdrawal. The words which have been translated "without hearing" are "*bila tajwiz file bakian se kharij farmaya jawe.*" "Compromise" is a word which in itself contemplates an arrangement to which there are two parties. "Withdrawal" has no such meaning. A case is compromised if with the consent of the accused it is withdrawn. A case is withdrawn under sec. 248 without the consent of the accused. It was clearly open to the Sub-divisional Magistrate to satisfy himself under what section this petition was before him. In order to satisfy himself it was open to him to question the complainant. The answers of the complainant clearly indicate that the case had not been compromised but was being withdrawn without the consent of the accused. The subsequent action of the accused shows clearly that he had never consented to the compromise of the case. The fact that the European officers of the Raj were personally interesting themselves in the matter indicates that through them the accused must have been aware that the police were willing that the case would be compromised and unwilling that it should be withdrawn. If in fact, the case had been compromised there was no reason why the accused should not have drawn the attention of the Magistrate to the fact. Not only did he not do so in the Sub-divisional Court but nowwhere in his grounds of appeal or in the argument in appeal has he suggested to the Sessions Judge that the case had with his consent been compromised.

On behalf of the Crown our attention has been drawn to the decisions in *Murray* v. *Queen-Empress* (1) and on behalf of the Appellant to the case of *Abdool Biswas* v. *Khater Mondal* (2). That case is authority only for the proposition that where a Magistrate has satisfied himself that the complainant understood his petition and really desired to compound the case, the case must be compromised. Even this decision contemplates a question of the complainant in order that the Magistrate may be satisfied that the application is in fact one for composition and not for withdrawal.

On this point Mr. Baxter further urges that inasmuch as the case was a warrant case it could not be withdrawn and therefore the petition could not have been one under sec. 248. In this connection we may refer to the case of *Ganesh* (3). "The Magistrate had no authority to allow the complaint to be withdrawn and he ought to have informed the complainant thereof." It appears to us that this is precisely the course which the Magistrate took. He was willing that the police should enter a *nolle prosequi* but he was not willing that the complainant should withdraw the case and informed him that he would not allow him to do so.

The Superintendent of Police went further and said "apart from the provisions of sec. 345 the complaint shall not be withdrawn." We are of opinion that the trial did not come to an end upon the petition of the 10th of February 1916; that that petition was not a petition made

(1) I. L. R. 21 Cal. 103 (1893).
(2) 3 C. W. N. 382 (1899).
(3) I. L. R. 13 Bom. 600 (1889).

under sec. 345; and that the subsequent proceeding were in order and that no error of law exists upon which we can interfere under sec. 439.

With regard to the sentence of three months' imprisonment, we are in agreement with the remarks of the learned Sessions Judge and of the Sub-divisional Magistrate in respect to the serious nature of the Applicant's interference with the liberty of Makuth. At the same time it is difficult to lose sight of the remarks made by the Sub-divisional Magistrate in the course of his judgment "that the occurrence could not be considered by the submissive and backward people living to the north of his sub-division, a very abnormal one or one that they should get wildly excited about. The surprising thing is that it has come to Court at all."

The actual facts of the case are that Makuth Nath was tied to a post by a grass rope and was given a *shawl* in which to wrap himself and on his release was so little indignant at the treatment he had received that he sat down cheerfully and listened to the recitation of psalms in the house in which he had been tied up. It is clear that the people were unconscious of any offence involving grave criminality and that the Applicant did not realise that he was doing anything heinous. The Applicant has been only three days in jail but has been taken to jail twice; once upon the completion of the trial in the Sub-divisional Court and once on his surrendering to his bail on the 9th of May. He was released by the Sessions Judge on the day after his conviction and by ourselves one day after his surrender. Nevertheless we think that the punishment inflicted is sufficiently deterrent to his offending in this manner again, and justice does not require that we should send him back to jail. We do not propose to increase the fine imposed upon him for the reason that although the Raj has done all it could in giving him the best legal advice available, it will not overlook such unwarrantable abuse of power. We direct that the sentence of imprisonment be remitted. The Applicant is released from his bail.

With the conviction and the sentence of fine imposed upon him and his co-accused the peons, Sheopujan Singh, Sarup Rai and Timal Main, we do not see any reason to interfere.

There is no finding of fact that the Patwari Jaleswar Lal did anything to facilitate the commission of this offence. The conviction of, and sentence upon, Jaleswar Lal are set aside.

A. K. R.

PATNA HIGH COURT.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 83 OF 1916.

CHAMIER, C. J.
SHARFUDDIN, J.
1916,
3 & 4, May.

SHEIKH HABOO,
Petitioner,
v.
SHEIKH KARIMAN,
Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 379—Value—Magistrate's jurisdiction to try the case summarily—Criminal Procedure Code (Act V of 1898), sec. 260, cl. (1), (d)—Bengal Tenancy Act (VIII, B. C., of 1885), sec. 71—Paddy cut and carried away by landlord from tenant's land, value of, for summary trial for theft.

Since a tenant is entitled to the exclusive possession of the whole produce until it is divided under sec. 71 of the Bengal Tenancy Act, his complaint against landlord for theft for having cut and carried away paddy worth Rs. 88 of which the latter was only entitled to one-half, cannot be summarily tried by a Magistrate as the value of the property in this case must be regarded as Rs. 88 and not Rs. 44 only.

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High Court Notification.

The following rules and amendments in the rules are made by the High Court in exercise of the powers vested in it under clause 37 of the Letters Patent, 1865 (24 and 25 Vict., c. 104) :—

I. *Insert* the following after the second proviso to Rule 1, Chapter II, Part I, page 7 of the Rules of the High Court, Calcutta, Appellate Side, 1914 :—

"(3) Provided further that it shall be competent for the Registrar to deal with all matters coming under the head of Lawazima or reports by the Deputy Registrar as specified in clause (1)* of the subjoined schedule.

It shall also be competent to the Registrar to deal with—

(*a*) Applications to dispense with copy of judgment under Order 41, Rule 1 (1), Civil Procedure Code, and Chapter VIII, Rule III, of the Rules of Court.

(*b*) Applications in Appeals from Appellate Decrees to receive copies of judgment and decree of the first Court after the expiry of the time prescribed for the institution of the appeal.

(*c*) Requisitions by Subordinate Courts for documents and records.

Nothing in these Rules will be deemed to authorise the Registrar to make an order of dismissal of an appeal for default or to entertain applications for revival or abatement of appeals (after the expiry of the period of limitation prescribed therefor), or to determine disputed questions of representation under Order 22, Rule 5, Civil Procedure Code, or to pass final orders on contested applications for appointment or removal of next friends and guardians *ad litem*."

II. The above rules and amendments in the rules shall take effect from the 16th August 1916.

By order of the High Court,
H. M. VERTCH,
Registrar.

HIGH COURT,
The 11th August 1916.

* These are :—
(*a*) Service of processes.
(*b*) Substitution of parties.
(*c*) Appointment of next friends and guardians *ad litem* of minors.
(*d*) Preparation of paper-books.
(*e*) Return of documents.

The late Mr. T. J. Waite.

The sudden death of Mr. T. J. Waite, the Deputy Registrar on the Appellate Side of the Calcutta High Court, which sad event took place on Sunday last the 13th instant, was a great shock to all connected with the High Court. Mr. Waite had served as the Private Secretary to three Chief Justices of the Calcutta High Court—Sir Comer Petheram, Sir Francis Maclean and Sir Lawrence Jenkins. In this capacity he had come to know intimately the members of the legal profession and the officers of the Court. It is no exaggeration to say that there was no officer of the Court who was more universally popular. Being naturally of a very genial temperament he made friends with everybody. In his official capacity he was as civil and courteous as he was affable and good-natured in his private life. It had become a matter of habit with him to come and see his old acquaintances amongst the members of the legal profession almost daily both in the Bar Library and in the Attorneys' Library. His jovial nature, good humour, power of appreciation of jokes and general power of conversation made him a most welcome visitor to these places and afforded to many a very enjoyable relaxation to talk and

laugh with him, and this is all the more reason why he is being missed so much. In his official capacity as Deputy Registrar he *made himself equally popular with the members of the Vakil Bar. In social life he had many accomplishments.* As a pianist, an organist and a singer of comic songs, he met with much appreciation with all lovers of music. No less remarkable was his cosmopolitan spirit. He had a deep and genuine love for India and almost everything Indian. His Lordship the Chief Justice on last Monday mentioned from the Bench in very appreciative terms the great loss that the High Court has sustained from the death of such an experienced and popular officer. His sudden death has come upon the members of the profession as a personal bereavement and we convey to Mrs. Waite and to her son and daughter our most heart-felt condolence.

LEGITIMACY OF A MOSLEM CHILD, BORN WITHIN TWO YEARS AFTER DISSOLUTION OF MARRIAGE

The special rule of Mahomedan Law that legitimises a child born of a Moslem woman within two years from the dissolution of her marriage either by divorce or the death of her husband, has been the subject of much discussion among the modern text-writers. The authorities are divided in their opinion as to the soundness of this rule as well as its applicability in modern times. In an old case *Ashruff v Meer Ishad*, (1871) 16 W. R. 260, the Calcutta High Court refused to accept the validity of this rule of Mahomedan Law. The learned Judges in this case thus observed :—" Notwithstanding Mahomedan Law, a Court of Justice cannot pronounce a child to be the legitimate offspring of a particular individual when such a conclusion would be contrary to the course of nature and impossible." Consequently it was held in this case that notwithstanding Mahomedan Law, a child born 19 months after the divorce of its mother by her former husband was not the legitimate offspring of that husband. This case was decided in 1871. Since then various Acts have from time to time been passed regarding the administration of Mahomedan Law by the British Indian Courts, such as the Madras Civil Courts Act (III of 1873), the Oudh Laws Act (XVIII of 1876), the Bengal, N.-W. Provinces and Assam Civil Courts Act (XII of 1887) and so forth. In order to determine how far Mahomedan Law, pure and simple, will still be applicable in this country, we must turn to these enactments. Now, sec. 37 of Bengal, N.-W. Provinces and Assam Civil Courts Act declares that in matters of succession, inheritance, marriage, etc., *Mahomedan Law is to be applied* when the parties are *Mahomedans, except in so far as it has, by legislative* enactment, been altered or abolished. Consequently, unless we can say that the aforesaid rule of Mahomedan Law has been superseded by some enactment or other, the same must still continue to be good law. Mr. Mulla is of opinion that the aforesaid Islamic rule of legitimacy has been abrogated by the provisions of sec. 114 of the Indian Evidence Act, which lays down that " the Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events." Therefore, according to Mr. Mulla, a child born after 280 days from the dissolution of marriage by death or divorce, cannot now be the legitimate offspring of its parents. Now, if Mr. Mulla's theory of the abrogation of Mahomedan Law by the Evidence Act be correct, then it will affect only Bengal and the other provinces where the application of Mahomedan Law has been recommended *except in so far as such law has, by legislature enactment, been altered or abolished.* It is worth our while to notice that Madras Civil Courts Act (Act III of 1873) and L. B. Courts Acts which are of later dates than the Evidence Act, recommend the application of Mahomedan Law, pure and simple, and do not restrict its applicability to its so-called unrepealed portion. So Mr. Mulla's view, if it is correct, comes to this that in certain provinces the Evidence Act has altered Mahomedan Law and in certain other provinces it has not. Mr. Justice Tyabji has of course handled the question but has practically left it unanswered. In one place the said learned author points out sec. 2 of the Evidence Act and seems to conclude that the above rule of Mahomedan Law has been saved from the operation of the Act by reason of the saving clause of that section, which runs thus, " Nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby repealed." But Mahomedan Law being neither a *Statute*, nor an *Act or Regulation*, we fail to see how it remains unaffected by the Indian Evidence Act. Besides, it is worth our while to notice that sec. 2 of the Act has repealed " all rules of Evidence not contained in any Statute, Act or Regulation in force in any part of British

India." Consequently, it will necessarily follow that if the aforesaid rule of legitimacy of Mahomedan Law be really a rule of evidence, *then it must have been superseded by the Indian Evidence Act (sec sec. 2, cl. 1).* So Mr. Mulla's theory of express repeal of Mahomedan Law by the Evidence Act can be supported only on the supposition that the said Moslem rule is a rule of evidence. It appears, however, that the old Islamic jurisprudence did not recognise the modern juristic distinction between substantive and adjective laws. The mode in which the questions of legitimacy have been dealt with by the Islamic jurists leads us to the conclusion that the rule under discussion was rather looked upon as a branch of substantive law than of adjective law. Sir R. W. Wilson was the first writer to point out this radical distinction between substantive and adjective laws, and on that basis to negative the theory of abrogation of Mahomedan Law by the Indian Evidence Act. Mr. Mulla, however, refuses to consider these niceties; he sums up his views by a sweeping observation that "whether the rule of the Evidence Act be a rule of substantive law or of adjective law, the fact stands that the rule finds its place in an enactment which applies to all classes of persons in British India: there is therefore no valid reason why it should not be applied to Mahomedans." From a reference to sec. 1 of the Act, however, it will be found that it does not contain the words "*all classes of persons*" as Mr. Mulla contends. This section simply says that "it extends to the whole of British India and applies to all *judicial proceedings in or before any Court.*" It seems, therefore, that the application of the Act to all *judicial proceedings* and not to *all classes* of persons is a clear indication of its non-interference with the substantive rights of the people. Moreover, it is worthy of notice that some of the enactments that prescribe the application of Mahomedan Law are posterior in date to the Evidence Act; therefore, when these enactments do not confine its applicability to its so-called unrepealed portion, they ought to prevail in case of direct conflict with the latter.

The status of legitimacy is a serious matter and should therefore on no account be trifled with by academic discussions. All laws relating to the subject of legitimacy should invariably be construed rather liberally and to the full advantage of the affected parties so as to save them from the stigma of bastardy. Mr. Field, in his work on the law of evidence (p. 552), has strongly criticised the above rule of Mahomedan Law as *absurd*. If the mere absurdity of a rule of law can affect its legality then sec. 112, *which is no less absurd than the aforesaid rule of Mahomedan Law, ought to be expunged from the* Evidence Act; because under this section a *child*, though born immediately after its mother's marriage, can be affiliated to her husband notwithstanding the possibility of its being the result of an uncertain intercourse. Likewise, the Scotch Law, which legitimises a bastard by subsequent marriage between its parents, is absurd. It has repeatedly been pointed out by our Courts as well as the Courts in England that law is seldom logical. The aforesaid Moslem rule for legitimising a child of doubtful paternity is really a benefit conferred by law on a race of unfortunate creatures who have no control over their own birth, by means of a legal fiction, irrespective of any consideration for the logicality thereof. It was only out of sentiments of humanity that the Moslem jurists extended the period of gestation to two years after the dissolution of her mother's marriage. Of course, ignorance of the physiological conditions in the early times might have conduced to the unusual prolongation of the period. Admitting it to be illogical and unscientific it would not be quite reasonable on the part of any law Court to refuse to follow this express rule of Mahomedan Law on such account, when a hundred other *illogical* or *absurd* propositions of law are being given countenance to by the Courts of Justice here as well as abroad.

Unfortunately enough, we have no judicial opinion on this subject: Mr. Justice Mahmood first pointed out this disagreement between the Mahomedan Law and the Evidence Act in the case of *Muhammad Illahad* v. *Mhmd. Ismail*, 10 All. 289; but to the great misfortune of the profession the circumstances of that case did not call for any decision on the point, consequently the said learned Judge refrained from expressing his opinion thereon. We have thus most regrettably missed the valuable opinion of so high an authority as that eminent Judge whose opinion, we feel sure, would have stifled all controversy on the subject.

A. C. GHOSE, M.A., B.L.,
Vakil.

CURRENT INDIAN CASES.

(Civil.)

Civil Procedure Code—Right of suit.

Wasappa bin Tenappa, I. L. R. 40 Bom. 200.

The Plaintiff's house was searched by the police and certain properties were seized. The Magistrate by a proclamation issued under sec. 523 (2), Cr. P. C., required any person having a claim to the ornaments to appear and establish his claim. The Plaintiff's claim was disallowed and the Magistrate made an order under sec. 524, Cr. P. C., for sale of the properties and the sale-proceeds were eventually credited to Government. The Plaintiff then brought a suit alleging that the properties were his and were illegally attached and prayed that the amount realised by the sale might be awarded to him.

Held, that the present suit had nothing to do with rights created by statute, for the enforcement of which a special remedy was given and the Plaintiff was not deprived of his right of suit.

Reviews.

The Indian Companies Act (VII of 1913) *By P. L. Buckland, B.L., Bar.-at-Law, Advocate, Calcutta High Court. Second Edition, 1916. Publishers—Thacker, Spink & Co., Calcutta.*

This new edition published within three years of its first publication testifies to the appreciation that the work has met. In this edition the amendments made in the provisions of the Act since the publication of the first edition have been embodied. The most important of these is the one relating to the Directors and Agents of Companies and the annotations have been adapted to the changes made. But the most important additions to the present edition are the Statutory Rules passed by the Government of India and the Rules framed by the High Courts of Calcutta and Bombay and the Chief Court of Burmah. The other High Courts have not so far framed any new Rules and the Punjab Chief Court has adapted the old rules to the new Act. This new edition by embodying the Rules and forms *in extenso* has increased its usefulness.

The Provincial Small Cause Courts Act. *By Mian Muhammad Shafi, Bar.-at-Law. Second Edition. By Mian Muhammad Rafi, B.A. (Oxon), Bar.-at-Law, Advocate of the Chief Court, Punjab. 1916.*

This is an annotated edition of the Provincial Small Cause Courts Act (IX of 1887) as amended by Act VI of 1914. The book bears ample evidence of the industry, insight and thoroughness which the author has brought to bear on his work. The notes on the sections are copious and the references to decided cases fairly exhaustive. There are several Appendices at the end of the volume containing the statement of objects and reasons, the reports of the Select Committee, abstracts from Proceedings in Council, a full text of Act XI of 1865 and other useful matters. For facility of reference the bare text of the Act has also been separately printed at the beginning. The book we have no doubt would prove useful to legal practitioners.

Sanjiva Row's All-India Digest—Criminal 1836-1915. Vol. II. Second Edition. *By P. Ramanatha Iyer, B.A., B.L., and P. Hari Rao, B.A., B.L., High Court Vakils, Madras. Published by the Law Printing House, Madras. 1916.*

The second volume of the Digest under notice has been due for some time, the first volume having appeared towards the close of last year. The present edition runs on the lines of the previous edition which was so well received by the profession. The Digest embodies cases from all reports, official and non-official, in India and Burma, and the present edition includes cases up to the end of the year 1915, the cases decided in 1916 during the preparation of the work being given in the shape of a supplement. We have no doubt the present edition will prove as useful as its predecessor.

Indian Decisions (New Series), High Court Reports, Bengal, Vol. II. *Edited by the Lawyer's Companion Office. Published by the Law Printing House, Madras. 1916.*

The book under notice contains a verbatim reprint of the Bengal Law Reports, Vols. 3 and 4 (1869-70) and is characterised by the usual neatness and accuracy we have learnt to associate with similar previous publications issued by the Law Printing House.

SHEIKH HABOO *v.* SHEIKH KARIMAN.

This revision case arose out of the judgment and order of Babu Nagendranath Mitra, Deputy Magistrate of Bhagalpur.

The facts out of which this case arose are shortly as follows :—

Sheikh Kariman made a complaint that the Petitioner cut and carried away paddy from his field and he valued the paddy removed at Rs. 88 only. The Deputy Magistrate who heard and tried the case was possessed of first class powers and he tried the case summarily under sec. 260 of the Criminal Procedure Code as he was specifically empowered in this behalf by the Local Government and convicted the Petitioner under sec. 379, I. P. C., and sentenced him to pay a fine of Rs. 50 or in default to suffer rigorous imprisonment for one month. The Petitioner thereupon moved the Hon'ble High Court and obtained this rule.

Mr. Khursed Hossein for the Petitioner.

Mr. Akbari for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Applicant was convicted by a Magistrate of the first class of having cut and carried away some paddy the property of one Kariman and was sentenced under sec. 379 of the Indian Penal Code to pay a fine of Rs. 50 or in default to suffer rigorous imprisonment for one month. The case was tried summarily and the first point taken in revision is that the Magistrate had no jurisdiction to try the case summarily inasmuch as the charge was one of theft of property exceeding Rs. 50 in value. The complainant's case was that he was tenant of the land and entitled to share the produce with the landlord. In his complaint he valued the paddy that was carried away at Rs. 88. This valuation is not disputed but it is contended on behalf of the complainant by way of supporting the conviction that the case was really one of theft of Rs. 11 worth of paddy inasmuch as the landlord and the tenant were each entitled to half of the crop. The answer to this is that under sec. 71 of the Bengal Tenancy Act a tenant is entitled to the exclusive possession of the whole produce until it is divided. It seems to us that the Applicant was charged with having stolen property worth Rs. 88 and therefore the Magistrate had no jurisdiction to try the case summarily. We set aside the conviction and sentence and direct that the case be retried according to law by some other Magistrate to be nominated by the District Magistrate. The fine if paid will be refunded.

A. K. R. *Rule made absolute.*

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

LORD ATKINSON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1916,
2, June.

MUSAMMAT MAQBUL FATIMA and ors., Appellants,
v.
AMIR HASAN KHAN and ors, Respondents.

Foreign Court, suit in, on cause of action tried, and determined between the parties in a British Indian Court—Latter Court if may issue perpetual injunction to restrain proceeding in Foreign Court —Res judicata—***Civil Procedure Code (Act V of 1908), secs. 11, 13—Specific Relief Act (I of 1877), sec. 56 (B).***

A A, a Mahomedan, died leaving estates situate partly within British India and partly within the ceded district of the Feudatory State of Rampur, and leaving him surviving a widow, a daughter and her children. The daughter and her children alleging that A A was a Shia and that therefore the daughter excluded the residuary heirs from inheritance instituted a suit against the latter in a British Indian Court, (viz., the Court of the Subordinate

MUSAMMAT MAQBUL FATIMA *v.* AMIR HASAN KHAN.

Judge at Bareilly), where their claim was opposed by the residuaries, and finally obtained an ex parte *decree upholding their claim, the Defendants having failed to obtain an adjournment which they said was necessary to enable them to call witnesses. This decree was affirmed by the High Court at Allahabad. Meanwhile the residuaries instituted against the daughter and her children a suit in a Court of the Rampur State for possession of a moiety of the estate of A A situate in the ceded district of Rampur State, claiming, as they had done in their defence in the other suit, that A A was a Sunni. The daughter and her children thereupon instituted another suit in the Court of the Subordinate Judge at Bareilly praying for a declaration that the previous decree of that Court was binding between the parties and operated as* res judicata *and that the Defendants (the residuaries) be restrained by a perpetual injunction from continuing their suit in the Court of the Rampur State. The Subordinate Judge as well as the High Court at Allahabad on appeal having held that they had no jurisdiction to grant the injunction and dismissed the suit, the Privy Council on the appeal of the Plaintiffs affirmed that decision and dismissed their appeal.*

MAQBUL FATIMA *v.* AMIR HASAN KHAN (1) *affirmed.*

Appeal from a judgment of the Allahabad High Court. (Sir Henry Richards, C. J. and Tudball, J.), which is reported in I. L. R. 37 All., p. 1. The question raised was whether a British Court ought to restrain a British subject residing within the jurisdiction of that Court from proceeding with a suit in a Court in the Rampur State. The facts were as follows:—Nawab Altaf Ali Khan died leaving considerable estate situate partly in the District of Bareilly, and partly in the Rampur State. He left him surviving a widow, and a daughter, and her children. The daughter and her children claimed that the deceased Nawab was a Shia and that the daughter excluded the residuary heirs (Assabas) from inheritance. The Assabas on the other hand alleged that the Nawab was a Sunni at the time of his death and that they were entitled to share in the inheritance. The daughter and her children, namely, Maqbul Fatima and others, present Appellants, instituted a suit against the "Assabas"—that is, the Respondents—in the Court of the Subordinate Judge of Bareilly, for a declaration that the Plaintiffs were the exclusive owners of the properties left by the said Nawab and which were partly situate in the district of Bareilly. The Plaintiffs asserted that the Nawab died a Shia, and also relied upon an award. The Defendants denied the award and alleged that the Nawab was a Sunni. The Subordinate Judge of Bareilly delivered judgment on the 2nd February 1911, after trying the case *ex parte* against the Defendants. (It was tried *ex parte*, because the Subordinate Judge refused to grant an adjournment to the Defendants, in order to enable them to call witnesses). He held that the Nawab died a Shia, and that the award was good and valid and that the Defendants had no right of inheritance in the Nawab's estate, and accordingly made a decree allowing the Plaintiffs' claim. On the Defendants' appeal, the said decree of the Subordinate Judge was affirmed by the High Court on the 6th November 1912. After the decision of the suit by the said Subordinate Judge, but before appealing to the High Court, the Defendants instituted a suit in the Court of the District Judge of the Ram-

(1) I. L. R. 37 All. 1 (1914).

pur State against the Plaintiffs for possession of a moiety of the estate of the deceased Nawab, situate in the ceded district of Rampur. They claimed on the same grounds on which they defended the previous suit in the Court of the Subordinate Judge of Bareilly. The Plaintiffs thereupon instituted the present suit in June 1913, in the Court of the Subordinate Judge of Bareilly, and prayed for the following reliefs: (*a*) A declaration that the previous decree dated 2nd February 1911 was binding between the parties and operated as *res judicata* against the Defendants in all subsequent proceedings even in the Rampur Court, (*b*) That the Defendants be restrained by a perpetual injunction from continuing their suit in the Court of the District Judge of Rampur. The Defendants impugned the jurisdiction of the British Court to interfere with the proceedings of a Foreign Court. The Subordinate Judge held that, in view of sec. 16 of the Code of Civil Procedure, and sec. 56 (B) of the Specific Relief Act, he had no jurisdiction to grant the injunction, and therefore dismissed the suit. The High Court also dismissed the appeal and in the course of its judgment observed as follows:—

"The issues in the suit in Rampur are said to be, and probably are identical, with the issues in the suit that was tried in Bareilly; but the Subordinate Judge in Bareilly was not competent to try the suit in respect of the property which is situated in Rampur. It seems, therefore, that so far as sec. 11 of the Code of Civil Procedure is concerned, the judgment of the Subordinate Judge of Bareilly does not operate as *res judicata* in Rampur.

"It is contended that if in the Rampur Court the judgment of the learned Subordinate Judge of Bareilly was produced, that Court would be at once bound to pronounce judgment against the Defendants in the Rampur State, and in favour of the Defendants by reason of the language of sec. 13. If this argument be sound, the result would be somewhat startling. A Court in Rampur, which was only competent to try suits where the value of the property was very small, might give judgment in favour of a party and in a suit subsequently brought in British India between the same parties in respect of different property worth many lakhs, if the judgment of the Rampur Court was produced nothing more could be said, and the Court in British India (no matter how high its jurisdiction) would be absolutely bound. This would mean that it was the intention of the legislature to give greater effect to judgments of a Foreign Court, no matter how petty, than to judgments of as high or possibly higher Courts in British India. In British India it is only when the first Court is competent to try the second suit that the matter is *res judicata*. Such a result, we think, would be almost absurd.

"It is contended that no matter how absurd the result, the words of sec. 13 are quite plain. A 'Foreign judgment' is defined in our Code of Civil Procedure to be the judgment of a 'Foreign Court,' and a 'Foreign Court' is defined to be a Court which has no authority in British India, and is not established or continued by the Governor-General. A 'Foreign judgment' has no force or authority as such in British India. It is of course true that a Foreign judgment may give a cause of action and a suit may be brought based upon it to obtain the same relief as was given by the Foreign judgment. If we read the words of sec. 13 as meaning that the Foreign judgment shall be conclusive as to any matters thereby

directly adjudicated upon in any proceedings based upon such judgment, the meaning of the section becomes perfectly clear. In our judgment it is only in proceedings based upon 'Foreign judgments,' that the question of the effect of the Foreign judgment can properly arise. We may here point out that if the Code printed in Rampur is simply a copy of our Code and contains the same definition of 'Foreign judgment' and 'Foreign Court,' it is difficult to see how sec. 13 appears at all. We would be inclined if such be the case to infer that the Code was only printed as a guide to judicial officers in Rampur while dealing with cases in the '*ilaqa*.' For these reasons we are of opinion that the Plaintiffs are not entitled to the declaration they ask for. If they are not, they clearly are not entitled to the injunction claimed."

Hence this appeal, which was heard *ex parte*.

Sir Robert Finlay, K. C. (with him *Mr. E. B. Raikes* for the Appellant) submitted that the Courts below ought to have granted an injunction to restrain the Defendants from prosecuting vexatious proceedings in the Rampur Court. (The learned Counsel conceded that, in view of the decision in *Lachmi Narayan* v. *Raja Pratap Singh* (2), the ceded districts of the Rampur State ceased to be part of British India and that the Rampur Court was a Foreign Court). The two issues on which the Defendants claimed title to the property in Rampur are the same which were finally heard and decided against the Defendants by the British Courts. It was against good conscience to allow the Defendants to harass the Appellants by litigating the same questions over again in a Foreign Court. The Code of Civil Procedure in force in British India was *mutatis mutandis* the same as in Rampur. The judgment of the Bareilly Court was *res judicata* and conclusive in the Rampur Court under secs. 11 and 13 of Civil Procedure Code, 1908.

[LORD PARKER.—But the Subordinate Judge of Bareilly had no jurisdiction to try a suit relating to property in Rampur.]

Sir Robert Finlay.—That was so, nevertheless, the Subordinate Judge of Bareilly had jurisdiction to decide the issues on which the title of the parties depended. The High Court was wrong in holding that sec. 13 of the Code of Civil Procedure applied only to a case where a suit was brought on a Foreign judgment. Under that section, which was in force in Rampur as well, the judgment of the Bareilly Court was conclusive in the Rampur Court.

[SIR JOHN EDGE.—The Rampur Court might say that in its opinion the judgment of the Bareilly Court was not given on the merits of the case, because the Defendants had no opportunity to produce evidence.]

Sir R. Finlay.—That could not be reasonably held because the judgment of the British Courts were well considered and proceeded on the merits of the case. In any case, the Defendants ought to be restrained in equity from carrying on vexatious proceedings. Reference was made to the following authorities :—

Booth v. *Leycester* (3), *Fletcher* v. *Rodgers* (4), *Carron Iron Works Company* v. *McLaren* (5), *Bunbury* v. *Bunbury* (6) and *Hope* v. *Carnegie* (7).

(2) I. L. R. 2 All. 1 (1878).

(3) 1 Keen 579 (1837).
(4) 27 W. R. 97 (1878).
(5) 5 H. L. C. 416 (1855).
(6) 1 Beav. 318 (1839).
(7) L. R. 1 Ch. App. 320 (1866).

MUSAMMAT MAQBUL FATIMA *v.* AMIR HASAN KHAN.

Their Lordships intimated that they would humbly advise His Majesty to dismiss the appeal.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—Their Lordships do not see their way to reverse the decision appealed from, and will humbly advise His Majesty to dismiss the appeal. As the Respondents have not appeared, there will be no order as to costs.

B. D. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 79 OF 1913.

SANDERSON, C. J.
MOOKERJEE, J.
1916,
Heard, 9 and 10, May.
Judgment, 10, May.

MEAJAN MATABOR, Plaintiff, Appellant,
v.
ALIMUDDIN MEAN and ors., Defendants, Respondents.

Indian Evidence Act (I of 1872), secs. 18, 23—Conversation between one of several Defendants and the Plaintiff's pleader about compromise of suit, if admissible in evidence—Admission of one Defendant when evidence against others.

The Plaintiff sued the Defendants for recovery of arrears of rent due on a lease executed in favour of their father. The substantial defence was a plea of payment which was overruled by the Courts below. The material evidence in the case was that of the Plaintiff's pleader with whom one of the Defendants had two interviews, once about a month before the institution of the suit, when a form of settlement was suggested, namely, diminution of interest, and again on the day the suit was instituted, when the pleader was asked to make a compromise.

Held—*That as there was admittedly no express condition that the evidence of the interviews should not be given, and it could not be inferred from the circumstances that the parties had agreed that the evidence should not be given, the evidence could not be excluded under sec. 23 of the Evidence Act.*

That the evidence of the Plaintiff's pleader as to what had passed between him and the Defendants who interviewed him for the settlement of the case was admissible and could be used even against the Defendants other than the Defendant who made the admission, all of them being jointly liable to the Plaintiff as the representatives in interest of their father.

Per SANDERSON, C. J.—*That so far as the first interview was concerned the mere fact that it was contemplated between the parties that the suit was about to be instituted did not prevent the conversation as regards a settlement of the claim from being given in evidence.*

That the second conversation was a natural consequence of the first conversation and was not privileged.

That the question whether the evidence of the interviews could be given against the Defendants other than the Defendant who made the admission depended upon sec. 18 of the Indian Evidence Act, which enacted the principle that for making statements with reference to the joint concern or common subject of interest one partner or co-contractor is considered to be the agent of the other.

Per MOOKERJEE, J.—*In the absence of any express or strongly implied restriction as to confidence an offer of compromise is clearly admissible and may be material as some evidence of liability although it may not be proper to enquire into the exact terms offered.*

That under sec. 18 of the Evidence Act an admission by one Defendant may in certain circumstances be admissible in evidence as against another Defendant.

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The principle is that when several persons are jointly interested in the subject-matter of the suit, an admission by any one of these persons is receivable not only against himself but also against the other Defendants whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.

This was an appeal under sec. 15 of the Letters Patent preferred on the 21th June 1913 against the judgment of Mr. Justice Chapman, dated 11th March 1913, in Second Appeal No. 3375 of 1911, which had been preferred on the 20th February 1911 against the decree of Mr. G. N. Ray, District Judge of Zillah Dacca, dated the 20th July 1910, affirming a decree of Babu Kumud Kanta Sen, Munsif at Munshigunj, dated the 19th March 1910.

The Judgment of Chapman, J. was as follows :—

CHAPMAN, J.—The question in this case was whether the rent sued for had been paid or not. The learned District Judge says the determining fact in this case is the evidence of the Plaintiff's pleader, and that evidence was to the effect that one of the Defendants had approached him at the time when the suit was filed and subsequently for the purpose of compromise. Now the Courts below have not considered the application of sec. 23 of the Evidence Act. It seems to me quite clear, having regard to the time when this offer of compromise was made, that it was made on the understanding that evidence of it would not be given in the case. The evidence was inadmissible. Moreover the evidence referred to only proved an admission by Defendant No. 2 and his admission is no evidence against the other Defendants in the case.

The judgment and decree of the learned District Judge is set aside and the case is remanded for decision upon the evidence after leaving out of consideration the evidence given by the Plaintiff's pleader.

The costs will abide the result.

Babus Jogesh Chandra Ray and *Prokash Ch. Majumdar* for the Appellant.

Babu Rajendra Ch. Guha for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal from the judgment of Mr. Justice Chapman by which he set aside the judgment of the Officiating Additional District Judge of Dacca, whereby he affirmed the judgment of the learned Munsif.

The action was brought for rent by the Plaintiff, and the defence was that the rent had in fact been paid. The learned Munsif found that it had not been paid.

The learned Officiating District Judge investigated the facts and came to the conclusion, as the learned Munsif did, that the rent had not in fact been paid, and he said in his judgment, "The learned Munsif has disbelieved the witnesses to payment for cogent reasons and these have not been met." Then after making a few other observations he goes on to say, "the determining factor in the case is the evidence of the Plaintiff's pleader. He deposes that Defendant No. 2 came to him before the suit and asked him to make a settlement"—and, on reference to the evidence, it appears that the interview to which the learned District Judge was referring was about a month before the suit was instituted. "The form of settlement was suggested, *viz.*, diminution of interest : on the day the suit was filed Defendant No. 2 again came with a relation and asked the pleader not to file the deficit

Court-fee stamps but to make a compromise." Now, the learned Judge, who has allowed the appeal from the District Judge, came to the conclusion that this evidence of the Plaintiff's pleader ought not to have been admitted; and the learned Vakil for the Defendants has supported his judgment upon this ground. He says, that reference must be made to sec. 23 of the Indian Evidence Act, which runs in this way, "In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." Now, it is admitted by the learned Vakil for the Defendants that this case does not come within the first branch of that section; or, in other words, he agrees that there was no express condition that the evidence of this conversation or interview should not be given. But he says that it does come within the second branch of it, because, he argues, that there were circumstances from which the Court could infer that the parties agreed together that the evidence of it should not be given. The learned Judge, Mr. Justice Chapman, has taken that view, and he says, "That evidence was to the effect that one of the Defendants had approached him at the time when the suit was filed and subsequently for the purpose of compromise." It is to be pointed out, first of all, that the learned Judge has somewhat misunderstood the evidence in the case, because the first interview between the Defendant No. 2 and the Plaintiff's pleader was at least a month before the suit was instituted, and was not at the time when the suit was filed, as the learned Judge says, it was. We have to see, whether there are any circumstances in this case from which we can infer that there was an understanding between the Plaintiff's pleader and the Defendant No. 2, that the conversation which they had about the settlement of this suit shou'd not be given in evidence against the Defendants. I did not see those circumstances, and I asked the learned Vakil yesterday what they were: and, so far as I can make out from his argument, they were that, inasmuch as there was a suit about to be instituted, and inasmuch as this conversation was about a compromise of the claim, it must be inferred that it was intended by the parties that that conversation should be a privileged conversation or should be a conversation without prejudice. I do not think that the mere fact that it was contemplated between the parties that the suit was about to be instituted prevents the conversation as regards a settlement of the claim from being given in evidence.

My opinion is supported by the case to which my attention was drawn by my learned brother Mr. Justice Mookerjee, and which was decided so long ago as 1830 by Chief Justice Lord Tenterden, in *Wallace* v. *Small* (1). There "the action was upon an assumpsit on a charter party. There was some difficulty in fixing the Defendant with the contract. It appeared, however, that after the action was brought"—I draw attention to *that* because the conversation in the present case was at least a month before the action was brought, while in that case [*Wallace* v. *Small* (1)] it was after the action had been brought—"an offer of a specific sum had been made; and evidence was given on the part of the Plaintiffs that a friend of theirs in consequence went to the Defendants and advised them to increase their offer, and that the Defendants refused to do so, saying, "we shall

(1) 1 Moody and Malkin's Rep. 446 (1830).

lose enough by the charter party as it is." The witness stated that nothing was said about that communication being without prejudice. The Attorney-General for the Defendants argued that the evidence was inadmissible. And he said that "from the very nature of the transaction it appears to have been a negotiation for a compromise,"—the very argument which the learned Vakil put forward in this case—"and if so, it must be understood to be without prejudice, although nothing is said on that subject at the time; nor does it, even if admitted, amount to any proof of liability." There the learned Chief Justice said that the evidence ought to be admitted; and he also said he thought it good *primâ facie* evidence of liability. He said "it is not said to be without prejudice, and an offer to compromise may be very well made, without any restriction as to confidence." That is entirely in accordance with my judgment, and not only that but with my experience, the mere fact of the conversation taking place when the parties were contemplating that a suit might be instituted, is not in itself sufficient to prevent the conversation from being put in evidence. That really disposes of the first conversation. I ought to mention in connection with that, that when the case was being tried in the Court of first instance, no objection was taken by those who were appearing on behalf of the Defendants to the conversation which took place a month before the institution of the suit, being given in evidence. That of course is not conclusive, but it is some evidence at least that the parties themselves did not regard that conversation as being a privileged conversation.

Then it is said that the second conversation which took place about the time of the filing of the suit is privileged. It is quite true that objection was taken to that being given in evidence in the first Court. But it seems to me that the second conversation was a natural consequence of the first conversation which took place a month before. As I understand, it only amounted to this, that the Defendant must have obtained information that the suit was filed and that the deficit Court-fee had not yet been paid, and he and a relation went to the Plaintiff's pleader, and in fact asked for time in order to see whether the suit might not be compromised. Having formed the opinion as I have said before, that the second conversation followed as a natural consequence of the first and that the first conversation was not privileged, I do not think that any difference can be drawn between the first and the second conversation, as to their being admissible in evidence.

A subsidiary point was taken by the learned Vakil on behalf of the Defendants that the learned District Judge had misunderstood the effect of the evidence as to the second conversation, namely, that the learned District Judge said that it was the Defendant No. 2 who took part in the conversation on the second occasion—whereas, as a matter of fact, it was the relation who went with him who made the offer of compromise. I really think that it is too small a point to require any serious consideration, because that was a conversation which took place in the presence of Defendant No. 2 and it must be taken to have been made with his authority.

The other point upon which the learned Vakil relied was that even if the conversation was rightly admitted, it ought to have been admitted only as against the Defendant No. 2, who is supposed to have made the admission. I think that the learned Judge did take it as being an ad-

mission against all the Defendants, and therefore it is necessary to consider whether the admission made by the Defendant No. 2 can be taken in evidence against all the Defendants. In my judgment, it can. The question depends upon sec. 18 of the Indian Evidence Act which runs in these terms, "Statements made by a party to the proceeding, or by an agent to any such party whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions." Here, again, there is no express authorisation of the Defendant No. 2 to make these admissions. If these admissions are to be taken against all the Defendants, they must come within the implied authority by the other Defendants to him. Now it was pointed out by Sir Richard Garth, when he was the Chief Justice of this Court, in the case of *Kausullah Sundari Dasi* v. *Muktasundari Dasi* (2), that this section, which I have first read, is a concise statement of the law which was, I think, correctly laid down in Mr. Taylor's book on Evidence, because the learned Chief Justice says at p. 590 "where there are several co-contractors or persons engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business has always been held admissible as evidence as against the others." Then he refers to the passage in Taylor on Evidence, Vol. I, 1st Ed., p. 489, sec. 525 (which is now sec. 543) :—"When several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered." Then he further says, "The principle of this rule is, that for the purpose of making these statements with reference to the joint concern or common subject of interest one partner or co-contractor is considered to be the agent of the others, and this rule, as I take it, is enacted, though in a somewhat concise form, in sec. 18 of the Indian Evidence Act." In my judgment the Defendants in this case can be looked upon as co-contractors as they were joint tenants of the Plaintiff. In one sense they may be looked upon as partners. When one of those contractors or partners comes to the Plaintiff's pleader for the purpose of seeing whether he cannot settle the action which was brought by the Plaintiff against all the Defendants, it seems to me that he must be implied to have authority to act on behalf of all the Defendants. For these reasons, I think the evidence was rightly admitted not only as against the Defendant No. 2 but as against all the Defendants: and consequently, that evidence having been rightly admitted, I think the learned Judge, Mr. Justice Chapman, was wrong and that this appeal ought to be allowed. The result of that is that the judgment of the District Judge is restored. The Defendants will have the costs both in this appeal and the appeal before Mr. Justice Chapman.

MOOKERJEE, J.—I am of opinion that upon each of the two questions of law involved in this appeal, the rule has been too broadly formulated by Mr. Justice Chapman, and that if the principles applicable are duly qualified, his judgment cannot possibly be sustained.

The Plaintiff brought this suit against the Defendants for recovery of arrears of

(2) I. L. R. 11 Cal. 588 (1885).

rent due under a lease executed in favour of their father on the 3rd February 1897. The substantial defence was a plea of payment. This plea was overruled concurrently by both the Courts below. Upon appeal to this Court Mr. Justice Chapman has reversed the decision of the District Judge and has remanded the case for reconsideration on the ground that the decision of the District Judge was based on evidence inadmissible in law.

The evidence to which exception is taken is that of the pleader for the Plaintiff, who deposed that the second Defendant had come to him before the institution of the suit and had asked him to arrange for a settlement by way of remission of interest. The District Judge held that this request for remission of interest was an indirect admission that the whole of the amount claimed was due; in other words, that the plea of payment was untrue. On behalf of the Defendants, it was argued before Mr. Justice Chapman, *first*, that evidence was not admissible to prove that the Defendant had proposed a settlement and had thereby indirectly admitted the claim; and, *secondly*, that even if the admission was held admissible as against the second Defendant, it cannot be used as against the other Defendants. Mr. Justice Chapman has given effect to both these contentions.

As regards the first objection Mr. Justice Chapman observed that the Courts below did not consider the application of sec. 23 of the Indian Evidence Act and that it was quite clear that having regard to the time when the offer of compromise was made, it was made on the understanding that evidence of it would not be given in the case. Now, sec. 23 provides that "in civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given."

It is not disputed that in the case before us, there was no such express condition. Consequently, the Defendants can rely only on that portion of sec. 23 which provides for the exclusion of an admission made under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given. The judgment of Mr. Justice Chapman does not specify the circumstances from which, in the present case, this inference could be drawn. Apparently he assumed that because an offer of compromise was made, there was necessarily an implied understanding that evidence of it would not be given in the case. This view is supported, to some extent, by the observation of Mr. Justice Phear in the case of *Mohabeer Singh* v. *Dhujjoo Singh* (3) where the following statement will be found: "It is a rule which all Courts of Justice find it right to observe that nothing which passes between the parties to a suit in any attempt at arbitration or compromise, should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court; unless this were so, the only thing which could be prudently recommended to suitors would be never to listen for one moment to any proposal to settle the matter, or to compromise it, after it had come into the Civil Court." This proposition was enunciated in respect of a case not governed by the provisions of the Indian Evidence Act, 1872. It is consequently not necessary for me to consider whether the statement was a correct exposition of the law as it stood before 1872. But, in my opinion, the rule enun-

(3) 20 W. R. 172 (1873).

ciated in the judgment mentioned is expressed too broadly, in view of the provisions of sec. 23 of the Indian Evidence Act. An offer of compromise, the essence whereof is that the party making it is willing to submit to a sacrifice of to make a concession, is rejected, though nothing was expressly said at the time respecting its confidential character, only if it clearly appears to have been made on the faith of a pending treaty into which the party was led by the confidence of an arrangement being effected. In the absence, however, of any express or strongly implied restriction as to confidence, an offer of compromise is clearly admissible and may be material as some evidence of liability, although, as has been said, it may not be proper to enquire into the exact terms offered, as such an offer might have been made for the sake of purchasing peace and without any intention to admit liability to the extent of the claim. That this is the true rule is obvious from the decisions in *Wallace* v. *Small* (1), *Watts* v. *Lawson* (1) and *Nicholson* v. *Smith* (5). The rule is also well illustrated by the decision in *Whiting* v. *Jones* (6) where the fact that the drawer of a bill, whose signature was in issue, had proposed a settlement was used against him as an admission. Reference may in this connection be also made to the observations of Lord St. Leonards in *Jorden* v. *Money* (7), with reference to negotiations between an attorney on one side and the Opposite Party: "when an attorney goes to an adverse party with a view to a compromise or to an action, you must always look with very great care at his evidence of what then occurred. There must be such a disposition in an attorney, who has brought an action, to maintain it, that it is always very desirable that the attorney should abstain as much as possible from talking to a person, when he means afterwards to swear to the conversation and upon that conversation to found a right which otherwise might not be found to exist." These observations would have been obviously superfluous, if, as has been contended by the Respondent in this case, all negotiations for settlement between the attorney on one side and the Opposite Party had been, by reason of a rigid and inflexible rule, always inadmissible in evidence. I hold accordingly that the evidence of the pleader for the Plaintiff as to what had passed between him and the second Defendant for the settlement of the case was admissible in evidence. This view is strengthened by the circumstance that no objection was taken in the trial Court to the reception of a portion at any rate of the statement made by the pleader.

As regards the second objection Mr. Justice Chapman has held that the evidence of the pleader only proved an admission by the second Defendant and that such admission is no evidence against the other Defendants. In support of this view, reference has been made on behalf of the Respondents to the decision in *Kali Kisore Chowdhury* v. *Gopi Mohan Roy* (8). In my opinion, the contention that an admission by one Defendant is not receivable in evidence as against another Defendant is too broadly formulated. The cases to which reference has been made on behalf of the Appellant, *viz.*, *Kausullah Sundari* v. *Muktesundari* (2) and *Chalho Singh* v. *Jharo Singh* (9), show that under sec. 10 of the Indian

(1) 1 Moody and Malkin's Rep 446 (1830).
(4) Mody and Malkin 447n (1830)
(5) 2 Stark 128 (1822).
(6) 1 Tyrwhitt and Granger 135 (1835).
(7) 5 H. L. C. 185, 245 (1854).

(2) I. L. R. 11 Cal. 598 (1885).
(8) 2 C. W. N. 106 (1897).
(9) I. L. R. 32 Cal. 965 (1905).

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Evidence Act, an admission by one Defendant may, in certain circumstances, be admissible in evidence as against another Defendant. The principle is that when several persons are jointly interested in the subject-matter of the suit, an admission by any one of these persons is receivable not only against himself but also against the other Defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. Now, in the case before us the Defendants have been jointly sued as the representatives in interest of the original tenant. As was explained in *Ahinsa Bibi* v. *Abdul Kader Saheb* (10), in cases of contracts where one of the contracting parties dies, the right or obligation under the contract passes to his representatives as one entire juristic person. In the case before us, the Defendants are jointly liable to the Plaintiff as the representatives in interest of their father, who was the original tenant and obtained the lease. We cannot consequently hold that the evidence is admissible as against the second Defendant and not admissible as against the others. The result of the acceptance of the contrary view would be that as against the second Defendant the Court would have to hold that the plea of payment was untrue and that the Plaintiff was entitled to a decree for the entire sum: while, as against the other Defendants, the Court would be driven to the conclusion that the plea of payment was established, and that, so far as they were concerned, the Plaintiff was not entitled to a decree for the whole sum. But it is perfectly clear that the only possible decree which can be made in the suit is a joint decree for the entire sum found payable by all the Defendants jointly as representatives of the original tenant. In my opinion, it is plain, upon principle as also upon the authorities, that the admission was rightly used by the District Judge not merely against the second Defendant but also against the other Defendants. On these grounds, I agree that the decree made by Mr. Justice Chapman must be reversed and that of the District Judge restored with costs.

S. C. M. *Appeal allowed.*

(10) I. L. R. 25 Mad 28 (1901).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES Nos. 160, 171 AND 183 OF 1912

N. R. CHATTERJEA, J.
RICHARDSON, J.
1916,
Heard, 5, 6 and 11, January.
Judgment, 7, April.

ABDUL AZIZ BEPARI and anr., Plaintiffs, Appellants,
v.
JOGENDRA KRISHNA RAY and ors., Defendants, Respondents.

Indian Contract Act (IX of 1872), secs. 81, 82, 83—Usage of jute trade at Chandpur—Jute brought by fariahs and stored in Companies' godowns, burnt before weighment—Jute insured by Company—Incidence of loss—Title, passing of—Unascertained goods—Intention—English law.

Plaintiffs who were fariahs *used to purchase loose jute from dealers* (beparis) *and sell them to, amongst others, Defendants' firm at Chandpur. The jute brought by the* fariahs *used to be stored in a godown called the "* fariahs' *godown," and according to the usage of trade at Chandpur sale was not complete until the jute had been examined, selected and weighed by the purchasing firm. The goods were, however, kept subject to the firm's lien for advances to the fariah, and it appeared that, once the goods were*

ABDUL AZIZ BEPARI *v.* JOGENDRA KRISHNA RAY.

stored in the godown, the fariahs *were not allowed to remove or sell them to other persons. Some jute which was stored by Plaintiffs in Defendants' godown, and was insured by the latter as belonging to the firm, caught fire before it had been tested, selected and weighed and was burnt:*

Held—*That title in the jute had not passed to the Defendants, and the loss fell on the Plaintiffs.*

That the contract being one for the sale of unascertained goods, what remained to be done by the buyer to the goods appropriated to the contract by the seller was not merely for the purpose of ascertaining the price but was also for the purpose of placing the buyers in a position to say whether and to what extent they would for their part accept the goods offered to them.

That the fact that the seller could not remove or sell the goods from the godown did not show that the property in the jute had passed to the firm.

That the Defendants who had an interest in the goods, were justified in insuring them to protect that interest, and were entitled to receive the whole amount of the policies of insurance to indemnify themselves against their loss and were not bound to apply any portion of it to the Plaintiffs' benefit.

When nothing remains to be done to the goods by the seller for the purpose of ascertaining the price, then prima facie *the property in them passes although they have not been weighed by the buyer. It would be otherwise in England if the parties intended that property in the goods should not pass until the goods had been weighed.*

The Indian law is the same and the provisions of sec. 81 do not exclude the question of intention which is laid down in the English cases as the determining factor.

These were appeals against a decree of Babu Satkari Haldar, Subordinate Judge of Zillah Tipperah, dated the 19th February 1912.

The material facts are set out in the judgment.

Babus Gopal Chandra Das, Bipin Chunder Bose and *Jatindra Mohan Ghose* for the Appellants.

Babus Joges Chandra Roy and *Akshoy Kumar Banerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

R. A. No. 160 of 1912.

This appeal arises out of a suit for recovery of the price of jute supplied by the Plaintiffs to the Defendants. The jute, while it was in the custody of the Defendants in their godowns, caught fire and was burnt, and the question is whether the Plaintiffs or the Defendants are to bear the loss. The determination of that question depends upon whether or not property in the goods had passed to the Defendants before they were destroyed by fire.

The Plaintiffs and the Defendants carried on business in jute at Chandpur, where there are many big firms who deal in jute. The Plaintiffs who are called "*fariahs*" in the locality, used to purchase loose jute from dealers (*beparis*) and supply it to the Defendants' firm.

The Plaintiffs in their plaint set up an express contract with the Defendants, the terms whereof are stated to be as follows :—

That the Plaintiffs would purchase loose jute for the Defendants during the jute season, and that the latter would take the said jute from the Plaintiffs upon weighment, and would pay the price of

the same according to the market rate. The Defendants would advance money from time to time for purchase of jute, and would pay the price of jute after the close of the *karbar* after deducting the amounts so advanced. The Plaintiffs would buy jute and store the same in the godowns of the Defendants and under their care, and report to the Defendants the goods stored on the very day they are stored. The Plaintiffs would have no right to the goods so stored, nor would they be entitled to remove them from the godowns of the Defendants, and that having once stored the goods in the godowns of the Defendants, the Plaintiffs would retain no other rights or interest in them than the right to receive the price of the said goods, and that the ownership in the goods would pass to the Defendants.

It is further stated in the plaint that this has been the local usage and practice observed at Chandpur, and the business of the Defendants' firm ever since the establishment of their jute office at Chandpur had been carried on in accordance with the usage.

The Plaintiffs state that the price of jute supplied by them to the Defendants was Rs. 84,747-7 including that of the jute burnt, and deducting the amount advanced (Rs.. 68,408-5-6) they claim Rs. 18,585-8-0, being the balance due together with interest thereon.

The Defendants denied that there was any express contract and also denied the usage set up in the plaint. They stated that the Plaintiffs purchased jute after taking advances from the Defendants, and having no godown of their own, stored it in the Defendants' godowns at their own risk, that after the goods had been selected and weighed they were sold to the Defendants and the price set off against the advance taken, and the goods which were rejected by the Defendants were removed and sold by the Plaintiffs to other persons. That according to the usage and practice observed in the dealings with the Plaintiffs, the ownership in the jute which had not been selected and weighed, had not passed to the Defendants, and the Plaintiffs must therefore bear the loss of their own goods, destroyed by fire.

The Court below held that ownership of the goods did not pass to the Defendants and accordingly dismissed the suit. The Plaintiffs have appealed to this Court.

As to the contract alleged by the Plaintiffs, the Court below has held that it has not been satisfactorily proved. The only evidence on the point is that of the Plaintiff Abdul Aziz and Mokunda. On the other hand, the Defendant No. 1, Sarat, swore that there was no contract, and the Defendant No. 2, Ramani Mohon, who was examined after remand by this Court, also denied it. We have considered the evidence on the point, and agree with the Court below in holding that the agreement set up by the Plaintiffs has not been satisfactorily proved.

The transactions between the parties should therefore be held to be governed by the local usage of trade which prevails at Chandpur.

The Plaintiffs have examined a number of witnesses, some of whom are very respectable, and the Court below has set out the material portions of the depositions of some of the witnesses in its judgment.

The mode of dealing between the "*fariahs*" and the Jute Companies at Chandpur, appears from the evidence of Mr. Mackertich (the Manager of Messrs. Landale and Clark) to be as follows: The "*fariahs*" purchase jute at their own

risk and store it in the import godowns of the Companies (sometimes called the *fariahs'* godown), where all sorts of jute goods, bad and indifferent, are mingled together, out of which the Company makes its selection for purchase. The *fariahs* report only the quantity, but not the quality, and they are accustomed to over-report the quantity in order to get larger advances from the firms. On measurement the quantity is generally found to be short. Before the Company purchases the jute from the import godowns (*fariahs'* godowns) they select, approve and then weigh the goods. If there be moist goods, they are dried and sometimes sold to the Company, who has the option to reject moist jute, and bad and rotten stuffs. The Company does not pay for rejected goods and the *fariahs* have a right to sell, and do sell rejected goods to other firms. From the import godown the goods are taken after weighment to the selecting godowns, where they are assorted. The price is settled after weighment, and the Company's purchase is complete after the price is settled, which may be done a week after. After the weighment in the import godown it is taken that the goods are sold to the Company. The Company does not pay for the quantity found to be short, and the *fariahs* suffer the loss if any portion of the goods before weighment be stolen from the import godown. "The Company has got a lien on the *fariahs'* goods so long as their advances are not paid off, and the property in the goods remains with the *fariahs* so long as the weighment is not made by the Company."

Plaintiffs' witness No. 7, Kailash Chandra Ghosh, the Book-keeper of Messrs. C. C. Betts & Co., in his examination-in-chief, says—"The goods are weighed when the Company takes them. After this weighment the Company becomes their owner. Before the weighment the goods are under their care only and on their trust," and Jogadish Chandra Ganguli, a Sub-Agent of Messrs. Jardine Skinner & Co., says—"If any loss takes place after the goods are stored and before they are purchased by the Companies, the loss is borne by *fariahs*."

The Plaintiff Abdul Aziz himself says that at Chandpur it is the rule of sale of goods that the bundles of jute are first counted, then weighed and then the price is settled per maund. He however says—"Our transactions with the Defendants were not in accordance with this rule. Our mode of transaction is noted in the plaint." But the contract or usage set up in the plaint has not, as we have seen, been proved, and the evidence of the Plaintiffs' own witnesses establish the fact that according to the usage of trade at Chandpur the sale is not complete until the goods are examined, selected and weighed by the Company.

The provisions of the Indian Contract Act relating to sale of goods which have any bearing on the case, are secs. 79 to 81 and also secs. 82 and 83. Sec. 79 says that where there is a contract for the sale of a thing which has yet to be ascertained, the ownership of the thing is not transferred to the buyer until it is ascertained. Sec. 80 provides that where by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done, and sec. 81 lays down that where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done. The distinction between a case where the seller is to do

something to the goods, and a case where nothing remains to be done by the seller is pointed out in the two illustrations to the section. In illustration (*a*), which is taken from the case of *Simmons* v. *Swift* (1), the stack of bark is to be weighed and delivered by the seller, part of it is weighed and delivered to the buyer: the ownership of the residue is not transferred to the buyer until it has been weighed pursuant to the contract. In illustration (*b*), which is taken from the case of *Turley* v. *Bates* (2), the contract is to sell a heap of clay (as a whole) at a certain price per ton, the seller is to load the clay in his own carts and to weigh each load at a certain weighing machine. Here nothing remains to be done by the seller, the sale is complete and the ownership of the heap of clay is transferred at once. Referring to the cases on the point, and to the rule that property does not pass where anything remains to be done to the goods for the purpose of ascertaining the price, Channel, B., observed in *Turley* v. *Bates* (2): "From a consideration of these cases it appears that the principle involved in the rule above quoted is that something remains to be done by the *seller*. It is therefore very doubtful whether the present case comes within the principle of the rule. But however that may be, it is clear that this rule does not apply if the parties have made it sufficiently clear whether or not they intend that the property shall pass at once, and that this intention must be looked at in every case."

Similarly in the case of *Soshi Mohon Pal Choudhury* v. *Nobokristo Poddar* (3), there was a contract for the sale of 975 maunds of rice being the contents of a certain *gola* at a certain rate, the buyer to remove the whole of the rice after weighing on or before a certain date. The assignee from the buyer took delivery of a portion, but refused to take delivery of the residue on the ground that it was of inferior quality. The *gola* was accidentally burnt and the rice destroyed. It was held that the sale was complete and the ownership with the risk of loss in the rice sold passed to the buyer. With reference to the contention that the sale was not complete, because the rice remained to be weighed, the learned Judges observed that, so far as the vendor was concerned, nothing remained to be done on his part to the rice sold, "for the purpose of ascertaining the amount of the price," and that the rice was to be weighed for the satisfaction of the purchaser.

It will be seen that in both the cases cited above, *Turley* v. *Bates* (2) and *Soshi Mohon* v. *Nobokristo* (3), the contract was for the sale of the whole of the goods, in the first case for the entire heap of clay, and in the second for the entire contents of the *gola*; the rate was fixed, and the buyer was to weigh the goods apparently for his own satisfaction. Nothing therefore remained to be done by the seller, as the parties obviously intended that the ownership of the goods should pass forthwith.

In the case of *Martineau* v. *Kitching* (4), Cockburn, C. J., observed:—"I take it now to be perfectly clear especially after the case of *Turley* v. *Bates* (2), that the real question in all these cases, is whether the parties did intend that the property should pass." The learned Chief Justice further observed as follows:—"We are dealing with the case of a specific chattel. I agree to sell to a man a specific thing—

(1) 5 B. & C. 857 (1826).
(2) 2 H. & C. 200 (1863).
(3) I. L. R. 4 Cal. 801 (1878).
(4) L. R. 7 Q. B. 436 (1872).

say a stack of hay or a stack of corn : I agree to sell him that specific thing and he agrees to buy it, the price undoubtedly remains an element of the contract, but we agree, instead of fixing upon a precise sum, that the sum shall be ascertained by a subsequent measurement. What is there to prevent the parties from agreeing that the property shall pass from one to the other, although the price is afterwards to be ascertained by measurement? I take it that is the broad substantial distinction. If with a view to the appropriation of the thing, the measurement is to be made as well as the price ascertained, the passing of the property being a question of intention between the parties, it did not pass because the parties did not intend it to pass. But if you can gather from the whole circumstances of the transaction that they intended that the property should pass, and the price should afterwards be ascertained what is there in principle, what is there in common sense, or practical convenience which should prevent that intention from having effect?"

See also Blackburn on Sales, 3rd Ed., pp. 182 to 186.

It is clear therefore that when nothing remains to be done to the goods by the seller for the purpose of ascertaining the price, then *primâ facie* the property in them passes although they have not been weighed by the buyer.

It would be otherwise however in England if the parties intended that property in the goods should not pass until the goods had been weighed.

In our opinion the Indian Law is the same and the provisions of sec. 81 do not exclude the question of intention which is laid down in the English cases as the determining factor.

We are also of opinion that the contract in the present case being in the first instance a contract for the sale of unascertained goods what remained to be done by the buyer to the goods appropriated to the contract by the seller was not merely for the purpose of ascertaining the price but was also for the purpose of placing the buyers in a position to say whether and to what extent they would for their part accept the goods offered to them. The following observations are relevant in either view of the case so far as they show on the one hand the actual intention of the parties and on the other the precise position of the buyer after the jute was placed in the *fariahs'* godowns.

As we have already said the Plaintiff's own witnesses prove that according to the usage of trade at Chandpur ownership of the jute does not pass to the buyer until it is examined, tested and weighed, and the transactions of the parties having been carried on in accordance with that usage, it is clear that when the contract with which we have to deal was made, the parties did not intend that the property in the jute should pass until it had been tested and weighed.

Upon the question of weighment, it was contended that the weighment was only for the satisfaction of the buyer and that the latter could not by delay in weighing the goods prevent the transfer of ownership to him, and as the evidence shows that the Company is bound to accept all "passable" goods stored in the import godowns, it is urged that the ownership passes to the buyer subject only to his right to reject bad goods.

It appears however from the plaint itself, that the Defendants were to take the jute from the Plaintiffs "upon weighment," and the evidence shows that the *fariahs* and the Company have both got "Tally Books"; both enter the weights in their respective books when the goods

are weighed, and it is after the weighment that the Company removes the goods from the store godown to another godown. It is not therefore altogether clear although this particular point need not be pressed, that the seller had nothing to do in connection with the weighing of the jute.

Then, again, there is the question of selection. The evidence shows that jute, good and bad, is stored in the import godown, and the Company selects good jute, and has the option of rejecting bad jute. Some stress was laid on behalf of the Appellants, upon the fact that the Company is bound to purchase all "passable" goods stored in the import godown, and although they have the right to reject wet jute, there is some evidence to show that they are bound to purchase such jute when dried. But it is clear that the Company has the option to reject bad jute altogether, and even if the Company is bound to purchase wet jute when dried, the *fariahs* have to dry it. The seller, therefore, in such a case has to do something to the goods to make them marketable.

Then the fact that the *fariahs* are not entitled to remove the goods nor to sell the same to other persons, once the goods are stored in the import godowns, is relied on. It is contended that the fact that the Company has a lien because they make advances for purchasing jute, cannot prevent the *fariahs* from selling it to other persons subject to the lien, and the fact that they cannot sell the jute to others shows that ownership passes to the Company. If, however, the usage of the trade is that the *fariahs* are not entitled to sell the goods to persons other than the Company who advance monies for purchasing jute, or remove the goods from the godowns, the fact that the *fariahs* are not entitled to sell them to others, under those circumstances, does not show that the property in the jute passes to the Company. The position seems to be that the buyer has a right to the custody of the jute as security for his advances, and that in addition while the seller has no right to sell to others, the buyer is under a corresponding obligation to buy as much of the jute as is of the requisite standard.

It may further be observed that the Plaintiff Abdul Aziz refers to the store godown as "my godown" and the godown to which the goods are removed after weighment as the "Defendants' own godown," although both godowns belong to the Defendants. Mukunda Saha, the Plaintiff in the analogous case, says with reference to entries of goods sold (*bikri*) in his books of account that, the "goods not weighed and goods the price of which was not settled, were not entered as "*bikri*." This shows that the Plaintiffs themselves recognised that the sale was not complete until the goods had been tested and weighed and the price settled.

Lastly the fact that the jute was insured by the Defendants as their own is relied upon as strong evidence of the transfer of ownership. It appears that two insurances were effected—one for Rs. 10,000 and another for Rs. 20,000. An application was made for effecting a third insurance to the extent of Rs. 10,000, but the application arrived late at the insurance office, the jute having been burnt in the meantime. The application for insurance and the policies were not produced. The letter written by the Defendant No. 3, who was the agent of the Insurance Company, for effecting the third insurance, however, speaks of the jute as "belonging to the Defendants," and under the circumstances it may be taken that the first two insurances were also effected on the jute as belonging to the Defendants. But the Defendants had an interest in the goods,

and the insurance appears to have been intended for protection of their own interest in the jute, not for the protection of the seller's interest which they were not bound to insure. The insurance did not cover the entire quantity of the jute which was burnt.

The Defendants, therefore, were entitled to apply the whole of the amount which they received under the policies of insurance to indemnify themselves against the loss which they themselves had actually sustained, and were not bound to apply any portion of it to the benefit of the Plaintiffs.

It appears from the evidence, that several jute firms at Chandpur bore the loss when jute was destroyed by fire, but Mr. Mackertich says, "there is no one system or one rule at Chandpur by which all the Companies should bear the loss in case the goods stored in the *fariahs'* godowns are burnt. Each firm has got its own system."

It appears that in most of the cases spoken to by the witnesses, the jute was fully insured. It cannot be said therefore that any usage had been established to show that the loss is borne by the Company in cases where the jute is not insured to the full extent.

We are of opinion that the decree of the Court below is correct, and the appeal should be dismissed with costs.

Appeals Nos. 171 and 183.

These two appeals arise out of two cross-suits—one by the Plaintiff Mokunda Chandra Saha (a *fariah*); and the other by the firm of Jogendra Krishna Roy and Sarat Ch. Shome. The claim of the former is analogous to that of the Plaintiffs in the above case, and the claim of the latter is for recovery of the balance of the advances made by the latter to the former. The questions involved in them are similar to those in the above case, and our judgment in the above case will govern these appeals also. These appeals therefore should also be dismissed with costs. We allow one pleader's fee for both the appeals.

N. G. *Appeals dismissed.*

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE No. 902 OF 1913.

MOOKERJEE, J. RICHARDSON, J. 1915, Heard, 2 and 3, March. Judgment, 3, March.	ABHURAM SIL and others, Plaintiffs, Appellants, *v.* HARA CHANDRA DAS and ors., Defendants, Respondents.

Estoppel—Mortgage, suit for redemption of—Mortgagee if can deny mortgagor's title.

A mortgagee cannot resist a claim for redemption on the ground that the mortgagor had no title to the property included in the mortgage although he may establish that the title of the mortgagor has expired since the creation of the mortgage, it not being open to him to prove that the mortgagor lost his rights before the mortgage was executed.

This was an appeal preferred on the 6th March 1913 from a decision of Babu Annada Kumar Sen, Subordinate Judge, Zillah Mymensingh, dated 28th of November 1912, confirming that of Babu Bepin Behary Mukerjee, Munsif, Iswargunj, dated 12th September 1911.

The facts of the case will appear from the judgment.

Babu Birendra Kumar De for the Appellant.

Babu Kali Kumar Chakravarty for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiffs in a

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suit for redemption of a mortgage by way of conditional sale. The mortgage was granted on the 14th October 1889 by the predecessor in interest of the Plaintiffs, to a lady named Anandamayee, now represented by the Defendants. The mortgagee entered into possession under the terms of the contract which entitles her to apply the profits partly in payment of the dues of the superior landlord and partly in satisfaction of the interest on the mortgage. The mortgage deed further provided that the mortgagor would be entitled to redeem the security on payment of the principal sum of Rs. 65 at any time. The present suit was commenced on the 25th June 1910. The Defendants have successfully resisted the claim of the Plaintiffs on the ground that the mortgagor had no right in the property mortgaged by her. In our opinion, it was not competent to the Defendants to urge that the mortgagor had no title to the property given by way of security, and the view taken by the Courts below is erroneous.

There is no room for controversy that a mortgagee cannot be permitted to resist a claim for redemption on the ground that the mortgagor had no title to the property included in the mortgage. Cottenham, L. C., enunciated this principle in *Taskar* v. *Small* (1) in these terms: "A mortgagee can never refuse to restore to his mortgagor or those who claim under him, upon payment of what is due upon the mortgage, the estate which became vested in him as mortgagee. To him it is immaterial, upon repayment of the money, whether the mortgagor's title was good or bad. He is not at liberty to dispute it, any more than a tenant is at liberty to dispute his landlord's title." The Lord Chancellor reiterated the same principle in *Wroe* v. *Clayton* (2) affirming the decision in *Wroe* v. *Clayton* (2): "The mortgagee, after admitting the title of the mortgagor, by taking the mortgage, was precluded from raising any objection to the mortgagor's right of redemption on the ground that his title was defective." [*Roberts* v. *Clayton* (3)]. The principle has been applied in this country in the case of *Abdool Ruzzak* v. *Sadik Ali* (4). It cannot be disputed, however, that the mortgagee may establish that the title of the mortgagor has expired since the creation of the mortgage; in other words that the equity of redemption is no longer vested in him so as to entitle him to redeem the mortgage. This is illustrated by the cases of *Nakchedi Bhagat* v. *Nakchedi Misr* (5) and *Ammu* v. *Rama Kishna* (6). Consequently in the case before us, it was not open to the representatives of the mortgagee to prove that the mortgagor had lost all right to the holding, the subject-matter of the mortgage transaction, by abandonment before the mortgage was granted. It has been found that on the 11th June 1877 a *kabulyat* was executed on behalf of the mortgagor and her co-sharers by Rameswar in favour of the superior landlord, and that after Rameswar had left the village, the landlord made a settlement with Durga Charan on the 22nd June 1883. It is plain that Durga Charan has disappeared from the scene, but, under what circumstances, has not been explained in this case. The fact is incontestable that on the 14th October 1889, when the mortgage in suit was executed, the mortgagor

(1) 3 Myl. & Cr. 63, 70; 44 R. R. 212 (1837).

(2) 8 L. J. (N. S.) Ch. 356: affirmed on app. 9 L. J. Ch. 107 (1839).

(3) 3 Anstruther 715 (1816).

(4) 3 Agra H. C. R. 142 (1869).

(5) I. L. R. 18 All. 329 (1896); [1896] All. W. N. 90.

(6) I. L. R. 2 Mad. 226 (1879).

was in possession and transferred possession of the mortgaged property to her mortgagee. It is consequently not open to the mortgagee to prove that at the commencement of the mortgage transaction under which she obtained possession of the premises, the mortgagor had no title to the property, though it is open to her to show that the title of the mortgagor has terminated since the creation of the mortgage. This has not been established; all that has been proved is that on the 4th May 1895 the mortgagee, while in possession as mortgagee, attorned to the superior landlord in derogation of the rights of her mortgagor. This clearly can not, on the principle explained in *Rakestraw* v. *Brewe* (7), affect the title of the mortgagor as between the mortgagor and mortgagee. We are not here concerned with the rights of the landlord who is not a party to this litigation; but as between the mortgagor and mortgagee, it is plain that the attornment by the latter to the superior landlord cannot in any way prejudice the rights of the former.

The result is that this appeal is allowed, the decree of the Court below set aside and the suit decreed with costs in all the Courts. A redemption decree will be drawn up in accordance with r. 7 of Or. 34 of the Code of Civil Procedure and the Plaintiffs will be allowed three months from the date when the decree is actually drawn up to deposit in this Court the amount due.

S. C. M. *Appeal allowed.*

(7) 2 P. Wms. 510 (1728).

[ORDINARY ORIGINAL CRIMINAL JURISDICTION.]

CHAUDHURI, J. 1916, 20, July. } In the matter of CHARU CH. MAJUMDAR.

Criminal Procedure Code (Act V of 1898), sec. 491—Directions of the nature of a habeas corpus— ***Application to be made to Judge on the Original Side of the High Court—Sec. 54, scope of—Circumstances justifying arrest—"Credible information" and "reasonable suspicion," meaning of.***

An application under sec. 491, Cr. P. C., is to be made to the High Court in its Ordinary Original Criminal Jurisdiction.

The Petitioner who was the managing agent of a certain Provident Company of Calcutta was arrested by the Calcutta Police under sec. 54, Cr. P. C., on receipt of a letter written by an Inspector of Police in a certain district in the Bombay Presidency to the Commissioner of Police, Calcutta, in which it was stated that on enquiries into complaints against the Company and their local agent in Bombay it appeared, there being prima facie *evidence to that effect, that the managing agent and the local agent committed offences under secs. 409, 420, I. P. C. The letter contained a request to cause the arrest of the Petitioner and was forwarded by the District Magistrate with a note that the Petitioner might be arrested under sec. 54, Cr. P. C., and sent to the Magistrate, 1st class, of the District, to be tried by him. It was admitted that the officer effecting the arrest in Calcutta relied solely on the aforesaid letter and had no personal knowledge of the facts of the case:*

Held—*That the arrest of the Petitioner under sec. 54, Cr. P. C., was not proper.*

That sec. 54, Cr. P. C., gives wide powers to a police-officer to make an arrest without an order from a Magistrate and without a warrant only in certain circumstances limited by the provisions contain-

IN THE MATTER OF CHARU CH. MAJUMDAR.

ed in the section, and it is necessary in exercising such large powers to be cautious and circumspect.

The section gives a police-officer personal authority and involves personal responsibility, and the "reasonable suspicion" and "credible information" must be based upon definite facts which the police-officer must consider for himself before he acts under the section. He cannot delegate his discretion or take shelter under the belief or judgment of another police-officer.

In the circumstances of the case the High Court under sec. 491, Cr. P. C., directed the release of the Petitioner.

This was a Rule in the nature of a *habeas corpus* issued by Sanderson, C. J., under sec. 491 of the Code of Criminal Procedure on an application by the Petitioner above named.

The facts as stated in the petition of the applicant were as follows :—

Charu Chandra was a member of the firm of Messrs. C. C. Mazumdar and Sons, having its place of business at Bhowanipore. This firm were the Managing Agents of the Bharat Luxmi Provident Co., Ld., having its Head Office at No. 81, Clive Street. On the 26th of June last, while the Petitioner was at the Head Office, two members of the Calcutta Police force took him to the Lal Bazar Police Office, where he was informed that he was under arrest on charges under secs. 420 (cheating and dishonestly inducing delivery of property) and 409 (criminal breach of trust) of the Indian Penal Code as the Managing Agent of the Bharat Luxmi Provident Co., Ld., under instructions from the District Superintendent of Police at a place called Karwar in the Presidency of Bombay. The petition stated that there was no warrant against the Petitioner and that he was arrested in pursuance of a letter from some Bombay Police Officers to the Commissioner of Police, Calcutta. The Petitioner had moved the Deputy Commissioner of Police for bail, but the application was rejected on the ground that the Police had instructions to send the Petitioner to Bombay that evening. The Chief Presidency Magistrate of Calcutta was then moved but with no effect. The Petitioner next moved the High Court under secs. 491 (for issue of directions in the nature of a *habeas corpus*) and 498 (for admission to bail) of the Criminal Procedure Code, whereupon the present Rule was issued and the Petitioner was admitted to bail, and pending the hearing of the Rule the Petitioner was ordered not to be removed to Bombay. On the above Rule coming up for hearing before Sanderson, C. J., and Walmsley, J., who were then sitting on the Criminal Revisional and Appellate Bench :—

The Advocate-General (Sir S. P. Sinha) appeared for the Crown and drew their Lordships' attention to the fact that in order to preserve the unanimity of practice in the Court it was necessary to consider whether the rule should be heard by their Lordships, or one of the Judges of the Original Civil Side or by the learned Judge exercising the Original Criminal Jurisdiction. It was a very serious matter and if the rule came on for hearing on the Original Side and if the application was refused, there was a right of appeal. If a Divisional Bench heard the application the Petitioner would lose his right of appeal. From 1870 downwards the uniform practice was, with the exception of one case, that if it was a criminal case, to make the application before the Judge exercising the Original Criminal Jurisdiction, if it was a civil case, to make the application before the Judge exercising the Original Civil Jurisdiction. Sec. 491 of the Crimi-

nal Procedure Code made it quite clear that the application should be made before the Judge exercising the Original Criminal Jurisdiction. If your Lordships would constitute yourselves into a Bench exercising the Original Jurisdiction in this Court the Rule might be heard before you but that would mean that there would be no right of appeal in that case.

[SANDERSON, C. J.—This of course is a case within the Original Jurisdiction of this Court.]

Mr. Avetoom who appeared with *Mr. C. R. Das* and *Mr. R. N. Mitter*.—That is so.

THEIR LORDSHIPS then ordered that the Rule would be heard before Mr. Justice Chaudhuri sitting on the Original Side.

On the Rule coming on before Mr. Justice Chaudhuri for hearing :—

Mr. C. R. Das and *Mr. R. Mitter*, appeared for the Petitioner, Charu Chandra Mazumdar. *Mr. Avetoom* represented Bharat Luxmi Provident Company.

Sir S. P. Sinha, Advocate-General, and *Mr. B. C. Mitter, Standing Counsel*, appeared for the Commissioner of Police.

The *Advocate-General* (*Sir S. P. Sinha*) said that before Mr. Das began, he ought to mention how this matter came before his Lordship. It was desirable that the procedure to be adopted shou'd be settled definitely once for all. The application was made, because the matter was urgent and there was no other Judge available, by Mr. Avetoom, before the Chief Justice who granted a Rule, although the rule was issued as a rule on the Crown side of this Court. When the matter came on for hearing before the Chief Justice and Mr. Justice Walmsley he (Sir S. P. Sinha) mentioned that the practice of this Court was that all these matters should be heard by a Judge on the Original Side. He being the Judge who exercised the Original Criminal Jurisdiction of this Court, it would be for his Lordship to lay down definitely the practice of the Court in this respect.

Mr. Das said that he endorsed what had fallen from the learned Advocate-General. He stated that Charu Chandra Mazumdar was the Managing Agent in Calcutta of the Bharat Luxmi Insurance Company. There were certain proceedings, the exact nature of which the Petitioner was not aware of, against a man named Soman, who was an Agent of the Company at Karwar, a place about 200 miles from Bombay. Certain charges were being investigated by the Police at Karwar. What the foundation of the allegation against the Petitioner was he did not know but a letter was sent by the District Superintendent of Police, Karwar, to the Commissioner of Police here requesting the latter to arrest the Petitioner. That letter was countersigned by the District Magistrate who expressed the opinion that the Petitioner might be arrested on suspicion under sec. 51 of the Criminal Procedure Code. On receiving that letter the Calcutta Police arrested the Petitioner on June 26th in his office. He was kept in custody the whole of that day and that night, and the next day the Petitioner had information that he wou'd be sent to Karwar. On that, at half past five in the evening, the Chief Justice was moved and this rule obtained.

Counsel then read the letter. It was to the effect that from enquiries made into the complaint against the Bharat Luxmi Provident Company and their Agent, Soman, it was found that the Managing Agent, Charu Chandra Mazumdar of Calcutta, had committed offences under secs. 409 (criminal breach of trust) and 420 (cheating) and there was *primâ facie* evidence to that effect. The Commissioner of Police here was requested to arrest

Charu Chandra Mazumdar and send him to Karwar for trial. His contention was that it was not a warrant of any Court. The question was whether upon this information the arrest under sec. 54 was a legal arrest and a proper arrest. Sec. 51 of the Criminal Procedure Code, no doubt, gave very large powers, at the same time the larger the powers so conferred the greater ought to be the caution.

[Mr. Justice Chaudhuri.—What do you contend, is it in excess of their authority?]

Mr. Das.—I contend, *first*, that it is in excess of the powers conferred by sec. 51, and, *second*, that in any event it is an improper arrest.

[Mr. Justice Chaudhuri.—Sec. 51 is rather wide.]

Mr. Das.—Yes. I contend that sec. 54 must be interpreted to mean that suspicion or information—whatever it is—must be based on facts. What was done immediately after this rule was granted was that we sent a telegram to the Police at Karwar for information. The Police at Karwar said in reply they had no information to give and that we had better apply to the C. I. D. at Poona. We did so by telegram and were referred back to Karwar. On the 6th instant we sent a telegram to the District Magistrate at Karwar and on the 9th we received a reply that a complaint was being recorded not against the Petitioner but against Sowan.

Mr. Das then pointed out that all these Companies were regulated by the Provident Insurance Companies Act, in which elaborate provisions were made for the investigation of charges against a Company.

The Advocate-General (*Sir S. P. Sinha*) said that the only point was whether sec. 54 of the Criminal Procedure Code gave authority to the officer here entrusted with the duty of arresting the Petitioner, to arrest him. It was quite clear that when the officer in question effected the arrest, all he had before him was this letter dated the 22nd April of the Police Officer at Karwar. This letter was followed by a number of reminders. The question was whether the police were justified on receipt of the information contained in this letter of the 22nd April in arresting the Petitioner without an order from a Magistrate and without a warrant? Although this letter was signed by the Magistrate, it was not a warrant. If this arrest was to be justified, it could only be justified under the first clause of sec. 51 which stated that there must be a "reasonable complaint" or "credible information" or "reasonable suspicion." He did not think that the other side would contend that the police had not acted *bonâ fide*.

[Mr. Justice Chaudhuri.—A person is entitled at the time of his arrest to know what he is arrested for.]

The Advocate-General.—The letter in question from the Police Inspector was countersigned by the District Superintendent of Police and the District Magistrate. The signatures of these two superior officers could have no force or effect beyond this that they made the information in the letter of the 22nd April more credible and more worthy to be acted upon than it would otherwise have been.

[Mr. Justice Chaudhuri.—Could the Commissioner of Police delegate his power to arrest?]

The Advocate-General.—The arrest was actually made by laying hands but the officer who really arrested was the Commissioner of Police.

There was no case exactly on the point though the question was a very important point.

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Mr. Das in reply cited *Queen* v. *Behary Sing* (1).

The JUDGMENT OF THE COURT was as follows :—

CHAUDHURI, J.—This is an application under sec. 491 of the Criminal Procedure Code for the production of one Charu Chandra Majumdar who was arrested under sec. 54 by the Calcutta Police. A rule was issued by the Chief Justice and Mr. Justice Walmsley constituting the Criminal Bench; but a question having been raised as to what the proper procedure is, in a case of this character, as to whether such applications ought not to be made to the Judge exercising the Ordinary Criminal Jurisdiction of this Court, the matter has been sent to me for disposal. For a great number of years all these applications have been made as a rule to the Original Side of this Court. With the exception of one case, namely, that of Rudolf Stallmann, I do not remember any single case in which that practice was departed from. An application was made in that case to a single Judge of this Court, but the rule was evidently heard by three Judges forming a Special Bench constituted by the Chief Justice. Having regard to the practically uniform procedure of this Court, and the rules framed by the Court under sec. 491 (2), Cr. P. C., I hold that the Original Side in its Criminal Jurisdiction is the proper Court to deal with these applications. I find that the same is the procedure in Bombay—applications being made on its Crown side. I apprehend the application was made in Stallmann's case following the practice obtaining in England, where such an application may be made to any Judge of the Supreme Court, but such a procedure, so far as I know, has no sanction, so far as we are concerned. I have made the above observations as I have been asked by both sides to deal with the question of procedure in my judgment in this matter. It is to be noticed that an order made by me in the exercise of my Original Criminal Jurisdiction, is appealable under our rules, whereas an order made by the Criminal Bench is not appealable.

Now coming to the matter of the application, sec. 54, Cr. P. C., authorises arrest without an order from a Magistrate, and without a warrant only in certain circumstances, limited by the provisions therein contained. I need not deal with any other proviso except the first. In this case there was no complaint before the police-officer who arrested the applicant, and the question is as to whether he had received "credible information," or whether it can be said that "reasonable suspicion" existed that the applicant was concerned in a cognizable offence. There was no information before the officer except the following letter :—

No. 267 of 1916.

Karwar, 22nd April 1916.

To

THE COMMISSIONER OF POLICE,
Calcutta.

SIR,

Re: enquiry into the affairs of the Bharat Luxmi Provident Company of Calcutta.

I respectfully beg to state that on enquiry made into the complaints against the above-named Bharat Luxmi Provident, Ld., 81, Clive Street, Calcutta, and their Agent, D. R. Soman of Khanapur, Bombay Presidency, it is found out that the Managing Agent, Charu Chandra Majumdar, of Calcutta, and Agent, D. R. Soman, of Bombay, have committed offences under secs. 409—420, I. P. C., as there is *primâ facie* evidence to that effect. I therefore request that you will kindly arrange to have the said Charu Chandra Majumdar, the Managing Agent of the Company, 81, Clive Street, Calcutta, arrested and

(1) 7 W. R. (Cr.) 8 (1867).

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sent to the District Magistrate, Kanara, Karwar, for trial.

I beg to remain,
SIR,
Your most obedient servant,
(Sd.) R. V. KOWSHIK,
Police Inspector, C. I. D.,
Poona, on special duty, in
Kanara District, Bombay
Presidency.

Respectfully forwarded through the District Superintendent of Police, and the District Magistrate, Kanara.

No. 1391 of 1916.

1. $\frac{3242}{\text{No } 75\text{-}16.}$

Karwar, 29th April 1916.

23-4-16.

Forwarded with compliments.

(Sd.) DANIEL DONALD,
D. S., Police, Kanara.

I. R. $\frac{1367}{\text{No. } 4\text{-}5\ 16.}$

Karwar, 3rd May 1916.

Forwarded with compliments.

The person in question may be caused to be arrested under sec. 54 of the Criminal Procedure Code and forwarded to the Magistrate, 1st class, Karwar, by whom the case will be heard.

Signature illegible,
Dist. Magte., Kanara.

Below No. 3416, dated 3rd May 1916, from District Magistrate, Kanara.

No. 1466 of 1916.

Karwar, 4th May 1916.

Forwarded with compliments to the Commissioner of Police, Calcutta, for whom this is intended.

(Sd.) DANIEL DONALD,
D. S., Police, Kanara.

The letter, it will be noticed, contains no particulars. The note made by the Magistrate is merely a recommendation, which may be neglected. It is not suggested by the Crown that it may be read as warrant or that it should be considered as of any value. If the Magistrate had materials before him, he was the proper officer to issue a warrant, but if he did not feel competent to exercise his power, his recommendation is worth nothing.

A statement of an indefinite character is all that was before the police-officer who acted upon the letter, and apparently he did so being frequently applied to by the police-officer at Kanara. It seems clear to me that the information upon which a police-officer may act under this section, must be such as enables him to conclude that it is credible, there must be facts before him to base his judgment upon. I do not think it can be said that a police-officer has credible information, merely because a brother police-officer in some remote part of the country writes a letter that he has information upon which he thinks that there is "*primâ facie* evidence," and that action ought to be taken under this section. The discretion which is given to the officer who has to arrest, must mean discretion exercised by him upon consideration of the materials placed before him, not merely on intimation that some other police-officer thinks that some offence or other has been committed. What the precise nature of the offence is, the letter does not state. A police-officer acting under this section has to act on his personal responsibility. If he could act on a representation made to him as in this case by a brother police-officer that he had some information, the responsibility could be shifted from person to person, and the provisions of sec. 220, I. P. C., entirely nullified. Sec. 54 gives him personal authority and must involve personal responsibility. He has to be satisfied that he has credible information, and he has to show it.

I have next to consider the proviso about "reasonable suspicion." It may be argued that a police-officer is justified in thinking that "reasonable suspicion" exists when he is informed by a brother

police-officer holding a responsible position, that the latter has information upon which he thinks a cognizable offence has been committed. I do not think the section can mean such suspicion. If it be so construed, it may be carried to this extent, that any officer may write to any other officer, that he suspects a man of having committed a cognizable offence and cause his arrest. The section gives wide powers and ought to be rigorously construed. It is not mere suspicion, but the suspicion must be "reasonable"—reasonable according to the opinion and in the judgment of the officer called upon to arrest. I do not think the argument can be accepted that suspicion entertained by another officer, however responsible the office he may hold, is sufficient for the arresting officer to act upon, or that it is reasonable for him to entertain a suspicion because some one else suspects, as thereby he practically consigns his reason to another person, and gets rid of his personal responsibility. I think that "reasonable suspicion" means reasonable suspicion based upon facts which have been brought to the knowledge or cognizance of the officer called upon to arrest—not suspicion which may be aroused in his mind by a communication from a brother officer without particulars. I am strengthened in my opinion by the case of *Queen* v. *Behary Sing* (1) where Markby, J., says, "The widest power is that conferred by para. 2 of sec. 100 (the then corresponding section) which provides that a police-officer may arrest without orders from a Magistrate and without warrant any person against whom a reasonable complaint has been made or a reasonable suspicion exists of his having been concerned in any offence specified in the schedule to the Act as offences for which police-officers may arrest without a warrant," in other words "cognizable offences" in the words of the present Code. "What is reasonable complaint or suspicion must depend on the circumstances of each particular case; but it must be at least founded on some definite facts tending to throw suspicion on the person arrested and not on mere vague surmise or information." This case has been cited in later cases both here and in Bombay, and been tacitly followed. The Deputy Commissioner of Police, in his affidavit in answer to the application, says that he had no information about the case except what was contained in the letter above quoted. He had no personal knowledge of the facts, but he thought that upon the letter it was a fit and proper case in which he could exercise the powers conferred upon him by sec. 54. He does not tell us whether he acted because he thought there was reasonable suspicion entertained by him or whether he thought he had credible information. A Magistrate's power to take cognizance of an offence under sec. 190 (1), (*c*), Cr. P. C., is guarded by the words "upon his own knowledge or suspicion," and I do not think that larger powers were intended to be given to a police-officer. It is necessary in exercising such large powers to be cautious and circumspect, and I hold that "reasonable suspicion" and "credible information" in sec. 54 must be based upon definite facts which the police-officer must consider for himself before he acts under the section. He cannot delegate his discretion, or take shelter under another person's belief or judgment. Any other interpretation would tend to diminish the sense of responsibility of the officers concerned, and make the exercise of the power dangerous, possibilities which ought to be guarded against. The Crown has placed this matter before me in the fairest

(1) 7 W. R. (Cr.) 8 (1867).

IN THE MATTER OF CHARU CH. MAJUMDAR.

manner possible, and has not desired that my decision should be based upon further materials which have come to the possession of the police-officer since the arrest was effected. The applicant has also placed certain facts he has since ascertained, but under the circumstances I am not called upon to consider them, or discuss their relevancy. I make the rule absolute and direct that the accused be set at liberty.

Babu S. C. Mukerjee, Attorney, for the Petitioner.

Mr. J. T. Hume, Public Prosecutor, for the Crown.

S. C. M. *Rule made absolute.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 3835 OF 1912.

SHARFUDDIN, J.
ROE, J.
1916,
14, June.

BISHUN NARAIN DASS PODDAR and ors., Principal Defendants 1—6, Appellants,
v.
CHANDRA KANTA NAIK, Plaintiff, Respondent.

Act X of 1859, sec. 82—Status of under-raiyat where raiyat evicted from occupancy-holding or non-payment of rent in Chota Nagpur—Interest of under-raiyat, void or voidable—Distinction between proceedings with respect to a tenure-holder and a raiyat—Right of under-raiyat to contest the validity of the decree against his lessor.

Where a holding of an occupancy raiyat is sold, the interest of an under-raiyat is not void but voidable.

But when the occupancy holding has been destroyed by eviction of the raiyat for non-payment of rent, sec. 82 of Act X of 1859 provides that the decree-holder shall be put in physical possession of the land.

There is a clear distinction between proceedings in regard to a tenure-holder and proceedings in regard to a raiyat. Where the proceeding has been with regard to a tenure-holder or under-tenant the decree is to take the form of an order to all raiyats to pay rent to the decree-holder, and the decree-holder cannot be put into actual physical possession of the land.

An under-raiyat cannot contest the validity of the decree against his lessor as a defence to a suit in which it is sought to declare him a trespasser.

This was a Second Appeal against the decree of T. S. Macpherson, Esq., District Judge of Manbhum, dated 2nd September 1912, confirming the decree passed by Babu Prabha Chandra Singh, Subordinate Judge of Manbhum, dated 19th April 1912.

The facts which led up to this appeal are as follows :—

The Plaintiff's case was that the disputed properties comprised the holding of Raj Chandra Chowdhury and others under the *pro forma* Defendants, the Equitable Coal Company, that their rent fell into arrears and the Coal Company sued them and got a decree for ejectment under sec. 78 of Act X of 1859 and in execution of that decree took possession of the property through the Court on 9th June 1908, and on the 4th Sraban 1316 they settled the land with the Plaintiff; that after the *pro forma* Defendants had got possession of the property on the 17th June 1908, the old tenants applied for revival of the case by setting aside the decree, but that application was rejected; that later on they brought a regular suit No. 603 of 1909 in the Munsif's Court, Raghunathpur, for setting aside that decree, but on the 11th December 1909 they were allowed to withdraw the case with leave to bring a fresh suit on condition that they paid up the Defendants' costs within two months, but they had neither paid up these costs nor instituted any fresh suit, so that the

decree for ejectment became final. That the Defendants in this suit claimed to hold the land as sub-tenants under these Chowdhuries and had wrongfully kept the Plaintiff out of possession of the land, though they had no right to hold the land, as even if they were sub-tenants under the Chowdhuries, their tenancy had been determined when the Chowdhuries had been ejected. The Plaintiff further gave them a notice to vacate the land. The Plaintiff therefore brought this suit for declaration of his title to and recovery of possession of the disputed property by ousting the principal Defendants and they further claimed mesne profits.

The Defendants Nos. 1 to 6 filed a written statement and the *pro forma* Defendants filed another.

The *pro forma* Defendants supported the Plaintiff's case; the principal Defendants contested it and averred *inter alia* that they and their ancestors held as tenants from before the Decennial Settlement paying rent to the Raja of Pachete, then to his *ijardars*, then to the *brohmuttardars*, Sricharan Goswami and others, then to the Chowdhuries who purchased in 1882 the interests of the Goswamis in a sale in execution of a rent-decree under sec. 105 of Act X of 1859, and that the subsequent decree of ejectment of the Chowdhuries under sec. 78 of that Act was invalid.

The first Court held that the Defendants had no occupancy right to the land and were not *khudkasht* raiyats from before the Permanent Settlement, the story to that effect and of payment of rent to *ijaradars* and to *brohmuttardars* being wholly untrue, and that there never was any *brohmuttar* grant to the Goswamis, who like the Chowdhuries had only an ordinary holding, as even the Plaintiff's own documents showed. That Court further held that the Defendants failed to prove the transferability of the holding, and that the Defendants had a *korfa* tenancy at the highest which was determined with that of the Chowdhuries. The Plaintiff's suit was therefore decreed with mesne profits. The principal Defendants appealed to the District Judge, who also dismissed the appeal. Thereupon they preferred this second appeal.

Mr. Naresh Chandra Sinha for the Appellants.

Mr. Lal Mohan Ganguli for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

ROE, J.—In this case the Appellant is a cultivator of the District of Manbhum, who, prior to the passing of the Chota Nagpur Tenancy Act, was an underraiyat in an occupancy holding from which the occupancy raiyat had been evicted for failure to pay rent. He retained possession after the decree against the occupancy raiyat and also after the execution of that decree by delivery of possession to the decree-holder. That decree was obtained on the 6th April 1908 and possession was delivered on the 8th June 1908 and the present suit instituted on the 3rd July 1911. The Chota Nagpur Tenancy Act was extended to the locality in which this holding is situate in the year 1909. The proceedings before us, therefore, prior to the present suit, were under the Rent Act, X of 1859, and the present suit itself is to be considered in the light of the Chota Nagpur Tenancy Act.

The Plaintiff claims to evict the Defendant as a trespasser. To be on the safe side he also issued a notice upon him to quit, but as he states in his plaint he is confident that any such notice was unnecessary. The Defendant puts up three defences.

First, that he is a tenant and that there-

fore under the Chota Nagpur Tenancy Act he is not liable to eviction by any Civil Court save that of the Deputy Commissioner of Manbhum. *Secondly*, that he is an under-raiyat and that the interest of an under-raiyat is an incumbrance upon the holding not void but only voidable and that his under-tenancy has never been avoided in the manner contemplated by the Rent Act, and, *thirdly*, if he is to be regarded as a trespasser, he has a right to enter into a contest upon the validity of the decree made against the occupancy raiyat for ejectment for failure to pay rent. Practically, therefore, we have to consider only one question in this case and that is whether the Defendant was a trespasser or a tenant. If his interest was an incumbrance obviously he was a tenant. If he was a tenant no suit against him would lie; if he is a trespasser action may be taken against him in the ordinary Civil Court.

The lower Courts have concurred in finding that he is a trespasser. After full consideration of this question we feel that we must agree with the conclusions arrived at by the lower Courts. We have searched the Weekly Reporter for any expression of opinion in respect to the status of an under-raiyat in the case of an occupancy holding from which a raiyat has been evicted for non-payment of rent. There is ample justification for the proposition that where a holding of an occupancy raiyat is sold, the interest of an under-raiyat is not void but voidable. But there is no case of an under-raiyat's status being recognised in a case in which the occupancy holding is entirely destroyed under the old Rent Law. Sec. 82 seems to us to completely decide the question by its direction that when a decree is for eviction the decree-holder shall be put in actual physical possession of the land. There is a clear distinction between proceedings in regard to a tenure-holder and proceedings in regard to a raiyat. Where the proceeding has been with regard to a tenure-holder and undertenant the decree is to take the form of an order to all raiyats to pay rent to the decree-holder, and it seems to us that it is impossible to say that the decree-holder can be put into actual physical possession of the land unless, indeed, it be conceded that the under-raiyat is completely ignored and treated as having no *locus standi*.

The remaining point for decision is whether the under-raiyat can, in the proceedings now before us, contest the validity of the decree against his lessor. His lessor was Rajendra Chowdhury and he obtained the holding by a sale for arrears of rent. It is clearly set out in Act X of 1859 that a sale for arrears of rent can only take place in the case of an interest which is transferable. It is clearly laid down that a decree for ejectment can only be made in a case in which the holding is not transferable. Therefore Mr. Noresh Ch. Sinha argues that the two decrees are contradictory in terms; one or other of them must be wrong, and he contends that it was open to his client to come forward and contest the second decree. Here, again, it is clear that the under-raiyat could not contest the validity of that decree in this suit as Defendant unless he had a *locus standi* to contest the validity thereof in a separate suit in which he would have been the Plaintiff. We can find nothing whatever in any part of Act X of 1859 which could give an under-raiyat a *locus standi* to institute such a suit or proceeding as Plaintiff. He might perhaps have maintained a suit for a declaration that the decree was fraudulently obtained and therefore a nullity. But he had no *locus*

standi to have it declared that it was contrary to law. Therefore he cannot put forward the illegality of that decree as a defence to a suit in which it is sought to declare him a trespasser.

In these circumstances we feel the decision of the lower Court is correct and that the appeal must be dismissed with costs.

A. K. R. *Appeal dismissed.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER No. 4 OF 1916.

SHARFUDDIN, J.
ROE, J.
1916,
19, June.

NILMONI GOSWAMI, Defendant, Appellant,
v.
ROBAN MAJHI, Plaintiff, Respondent.

Mortgage-decree—Execution sale – Purchase by decree-holder – Application by judgment-debtor to set aside sale – Limitation Act (IX of 1908), Sch I, Art 166, or sec. 231, Chota Nagpur Tenancy Act (VI, B. C., of 1908), applicable.

In execution of a mortgage-decree, the mortgaged property was sold on 21st December 1912 and was purchased by the decree-holder and the sale was confirmed on the 15th February 1913. On 28th August 1914, the judgment-debtor applied to set aside the sale on the ground that under sec. 47 of Chota Nagpur Tenancy Act, the sale was null and void:

Held—*That the application was barred by limitation, if not under Art. 166 of the Limitation Act, at any rate under sec. 231 of the Chota Nagpur Tenancy Act.*

This was an appeal against the order of S. B. Dhable, Esq., Officiating District Judge of Manbhum, dated 29th July 1915, reversing the order of Babu Suresh Chandra Sen, Munsif, Purulia, dated 30th January 1915.

The facts out of which this appeal arose were briefly as follows :—

The Plaintiff-Respondent instituted a suit No. 1048 of 1911 in the Court of the Munsif at Purulia on a mortgage-bond executed by the Defendant-Appellant in Jaista 1312 (B. S.) corresponding to June 1905 and obtained a preliminary decree on the 12th January 1912. In the original suit an objection was taken as to the saleability of the holding on the ground that it was a *raiyati* holding and could not be sold under sec. 47 of the Chota Nagpur Tenancy Act. The objection was, however, not decided at the trial and the reasons for the omission were not apparent from the judgment. The decree was made absolute on 15th June 1912 and the mortgaged property was sold on 21st December 1912 and was purchased by the decree-holder. The sale was confirmed on the 15th February 1913 on partial satisfaction of the decree. On the 30th June 1914, the decree-holder applied under Or. 34, r. 6, for realisation of the balance of the decretal amount. On the 18th July 1914 the judgment-debtor put in an objection to the same. On 28th August 1914 an application was filed by the judgment-debtor to set aside the sale on the ground that the Court had no jurisdiction to hold the sale under sec. 47 of the Chota Nagpur Tenancy Act, the property being a *raiyati* holding. The Munsif held that as the application was not made within 30 days from the date of sale or from the date of his so-called knowledge of the sale, which was sufficiently evidenced by his petition of objection filed on the 18th July 1914 and as there was no allegation of fraud in the application, it was barred under Art. 166 of the Limitation Act. The Defendant judgment-debtor thereupon preferred an appeal to the District Judge of Manbhum who, although he held that Art. 181 of the Limitation Act was not applicable but Art. 166 of the Limitation Act was, yet held that as the sale was

a nullity, it could be set aside under the authority of *Lakshmi Bibi* v. *Atul Behari* (2) and so set aside the sale. Thereupon the Plaintiff decree-holder preferred this Second Appeal.

Mr. Abanibhusan Mukerjee for the Appellant.

Mr. Surendra Mohan Das for the Respondent.

The Judgment of the Court was as follows :—

Sharfuddin, J.—This miscellaneous appeal has been preferred by the decree-holder. It appears that the decree-holder obtained a decree on a mortgage bond executed by the present Petitioner and in execution of that decree the holding in question was sold and purchased by the mortgage decree-holder. The sale took place on the 21st December 1912 and was confirmed on the 15th February 1913. The application to set aside the sale was made by the judgment-debtor on the 28th August 1914. The learned Munsif held that Art. 166 of the Limitation Act applied to the application and hence it was barred by limitation, because the judgment-debtor had put in the application to set aside the sale more than thirty days after the date of the sale. On this there was an appeal to the District Judge by the judgment-debtor who allowed the appeal and directed the sale to be set aside. But that learned Officer also held that it was Art. 166 that applied to the application. Thereupon the decree-holder preferred the present appeal.

It seems to us that the application of the judgment-debtor to set aside the sale is barred by limitation. In the Chota Nagpur Tenancy Act, there is a special provision for limitation as regards suits and applications and sec. 231 of that Act clearly provides that if there is no provision of limitation in that Act for any suit or application, the limitation provided is one year and under the provisions of this special provision of the Chota Nagpur Tenancy Act, the judgment-debtor should have applied to have the sale set aside within one year from the date of the sale. His application is after a year and some months from the date of the sale. On behalf of the judgment-debtor it was contended that the holding, which was sold in execution of the mortgage decree, was a *raiyati* holding and under sec. 47 of the Chota Nagpur Tenancy Act such a holding could not be sold in execution of a decree and hence it is contended that the sale was null and void. In this connection we have been referred to the case of *Samandan* v. *Maliandi* (1) wherein we find in the head-notes mentioned that when the sale is a nullity, Art. 166 has no application. The head-notes of that ruling are misleading. We do not find in that report any such proposition of law. Even if sec. 166 has no application in the case of a sale which is a nullity, the special provision of the Chota Nagpur Tenancy Act has laid down that sec. 231 may be applicable. As already observed even under that section the judgment-debtor's application to set aside the same is barred by limitation, and we do not propose to discuss the question as to whether by reason of sec. 47 of the Chota Nagpur Tenancy Act the sale was null and void. The appeal is therefore decreed.

Roe, J.—I agree. The application to set aside the sale was clearly barred by limitation, and the District Court had no jurisdiction to set aside the sale of its own motion.

A. K. R. *Appeal allowed.*

(1) 23 I. C. 251 (1914).

(2) I. L. R. 40 Cal. 534 (1913).

THE

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REPORTS (See Index).

High Court Notices.

ORIGINAL SIDE.

The High Court, Original Side, will be closed for the Annual Vacation (including Mahalaya, Durga, Lakshmi and Kali Pujahs, Id-uz-zuha and Bhratridwitia, Mohurrum and Jagaddhatri Pujah) on and from Monday, the 4th September, to Tuesday, the 14th November, 1916, both days inclusive, and also on Wednesday, the 15th November, 1916, on account of Kartik Pujah, and will resume its sittings on Thursday, the 16th November, 1916.

The offices of the Court, Original Side, will be closed for general business for the Annual Vacation on and from Saturday, the 16th September, to Saturday, the 11th November, 1916, both days inclusive.

One Judge will remain in town for urgent business and arrangements will be made for the attendance of such superior and subordinate officers as may be required for the disposal of urgent business.

By order,
J. H. HECHLE,
Registrar.

HIGH COURT, O. S.,
The 22nd August, 1916.

APPELLATE SIDE.

It is hereby notified that the High Court, Appellate Side, will be closed for the annual vacation from Monday, the 4th September, to Tuesday, the 14th November 1916, both days inclusive.

The Hon'ble Mr. Justice Chaudhuri and the Hon'ble Mr. Justice Newbould will sit as the Vacation Judges, except during the following Court and Gazetted (Exclusive) holidays, *viz.* :—

Gazetted holiday on account of Mohalaya.	Tuesday, the 26th September 1916.
Gazetted holiday on account of Durga and Lakshmi Pujas including Court holiday for Ed-uz-zoha.	Saturday, the 30th September, to Wednesday, the 11th October 1916.
Gazetted holiday on account of Kali Puja.	Thursday and Friday, the 26th and 27th October 1916.
Court holiday on account of Bhatriditia.	Saturday, the 28th October 1916.
Gazetted holiday on account of Jagadhatri Puja.	Saturday and Sunday, the 4th and 5th November 1916.
Court holiday on account of Mohurrum.	Sunday, the 5th November, to Tuesday, the 7th November 1916.

Notice as to the days on which the Vacation Bench will sit for the hearing of motions and cases in which vakils are engaged and as to the distribution of business, will be given from time to time.

The office of the Appellate Side will be closed for the vacation from Tuesday, the 26th September, to Saturday, the 28th October 1916, both days inclusive.

Such Translators, Examiners, Copyists and Assistants of the Record Department as may be required, will attend throughout the vacation, except on the Court's sanctioned holidays and the Gazetted holidays above specified.

The 27th August 1916.

H. M. VEITCH,
Registrar.

Government of India Amending Act.

The Government of India Bill which proposed to confer powers on the Indian Legislature to restrict the right of the subject to sue the Secretary of State for India, has now passed through both Houses but the objectionable clause, regarding which there was protest from all parts of India, was omitted from the Bill on the recommendation of a Joint Committee of both Houses which had been appointed for considering the Bill. It is said that Lord Loreburn's Committee after perusal of the representations from India refused to retain it in any form and Lord Islington, who was ex-

pected to support the case of the Government of India, made a very feeble defence. The provision sought to be introduced in the Bill authorising the Governor-General in Council to nominate "sleeping partners" in business firms to be members of the Executive Council of the Governor-General or a Provincial Governor was likewise rejected by the Committee. It will be remembered that we had pointed out in these columns that there was no power in the Government of India to make officiating appointments to the office of the Advocate-General of Bengal, Madras or Bombay, and provision has been made in the amending Act to remove this defect. Provision has also been made for the amendments of the Letters Patents establishing High Courts in India by further Letters Patents of His Majesty.

Refusal to renew certificate of pleader pending criminal proceedings.

The decision of the Allahabad High Court in *In the matter of a pleader*, I. L. R. 38 All. 182, is worth noticing. It sometimes happens that a professional man practising in a Court of Law has to appear before it as a litigant. In such a case it is surely hard on him if he is placed in any worse position than that of an ordinary individual only because besides being subject to the general law relating to offences the pleader is also subject to the jurisdiction of the Court under the Legal Practitioners' Act. In the case under notice a certain pleader instituted two suits which were decreed by the Munsif but the cases coming on in appeal before the District Judge the suits were dismissed and the Court ordered the prosecution of the Plaintiff under sec. 209, I. P. C. Appeals were filed in the High Court against the decisions of the District Judge and pending the hearing of the appeals the criminal proceedings were stayed. Thereafter when the pleader applied to the District Judge for the renewal of his certificate, his application was refused on the ground that he was not a proper person to whom a renewal of license should be granted. Their Lordships held that the action of the District Judge was inconsistent. Two courses were open to him—either to direct a prosecution or to proceed under sec. 14 of the Legal Practitioners' Act—and having directed a prosecution the District Judge should have waited until the determination of the criminal prosecution before he took any other step which would have the effect of suspending or dismissing the pleader from practice and in refusing to renew the certificate the District Judge in effect found the pleader guilty before he was tried.

CURRENT INDIAN CASES.

(Civil.)

Suit for damages against Secretary of State for India in Council

The Secretary of State for India in Council *v.* A. Cockcraft, I. L. R. 39 Mad. 351.

The Plaintiff's carriage was capsized by one of its wheels running over a heap of gravel stacked on the road by a contractor under the Public Works Department of the Government of Madras. The road was a military road leading to the barracks where soldiers are quartered. The Plaintiff sustained injuries; he sued the Secretary of State for India in Council for damages on the ground that the accident to him was entirely due to the gross negligence and carelessness displayed by the servants of Government.

Held—That the maintenance of roads is one of the functions of Government and the liability of the Secretary of State for India being similar to that of the East India Company which could not be made liable for the negligence of its servants in the course of their employment in respect of acts done by the company in the exercise of its sovereign powers the Plaintiff had no cause of action.

Limitation Act—Art. 89.

Venkatachalam Chetty *v.* Narayanam Chetty, I. L. R. 39 Mad. 376.

Money is moveable property within the meaning of Art. 89 of the Limitation Act. That Article applies to suits by a principal against an agent for moveable property received by the latter and not accounted for and time begins to run when the account is, during the continuance of the agency, demanded and refused or when no such demand is made when the agency terminates. The agency is determined when the agent ceases to represent the principal though his liability in respect of acts done by him as agent may continue.

Civil Procedure Code—Right to sue—Legal representative.

Gandi Ramaswami *v.* Puramsetti Pedamunayya, I. L. R. 39 Mad. 382.

A daughter brought a suit to recover posses-

ion of certain properties which belonged to her ather; she died during the pendency of the uit and the grandsons of her father's brother ere brought on the record as heirs of her father :

Held—That the substituted Plaintiffs were ightly brought on the record as legal represenatives to whom the right to sue survived.

Appeal, hearing of—Death of one of the Respondents.

VILLAYAN CHETTY *v.* JOTHI MAHAMBUJA AIYAR, I. L. R. 39 Mad. 386.

Two days before an appeal came on for hearng one of two Respondents to the appeal died. Neither the Appellant's vakil nor the vakil who iled a *vakalatnama* on behalf of the deceased Respondent was aware of this. The appeal vas heard and judgment delivered dismissng it.

Held (on an application by the Appellant for ehearing)—

That under the Code of Civil Procedure the leath of one of the Defendants or Respondents loes not abate a suit and in the interests of ustice it is not desirable to give a right to an nsuccessful litigant to argue his case more than nce merely on the ground that one of the other arties to the proceeding was dead at the time f the hearing.

Hindu Law—Maintenance of junior member of the family of the holder of an impartible zemindari.

SRI RAJA ROW VENKATA MAHIPATHY *v.* SRI RAJA VENKATA RUMAN MAHIPATHY, I. L. R. 39 Mad. 396.

A junior member of the family of the holder f an impartible zemindari is entitled to mainenance only as in a Dayabhaga family on acount of his relationship and not on account of ny interest in the property.

Notes of Cases.

ENGLISH LAW COURTS.

CHANCERY DIVISION.—Before MR. JUSTICE PETERSON. *Mackereth and anr.* v. *Wigan Coal and Iron Co., Ld.* 17th May 1916.

Whether a company is bound to recognize a trust brought to its notice—Company's lien on shares.

A testator appointed his son Hodgson, and he Plaintiff, and others his executors and trustees, and devised the residue of his estate on certain trustees.

At the date of his death, the testator was a registered holder of some shares of Defendant Company. The trustees deposited probate with the company. Subsequently the company refused to pay the dividend on the shares to the trustees a id claimed a lien in respect of the alleged indebtedness of Hodgson in his personal capacity to the company, and sold the shares.

Artic'e 9 of the Articles of Association of the Defendant company provided that :—

> No person shall be recognized by the company as holding any share upon any trust, and the company shall not be bound by or recognize any equitable, contingent, future, or partial interest in any share . . . or any other right in respect of any share except an absolute right to the entirety thereof in the registered holder thereof.

The Plaintiffs sued the company for damages, etc. The learned Judge held that the act of the company was wrongful. He said :—

The question was whether the company had acted wrongfully in retaining the dividends and selling 265 shares and appropriating the money so received to James Hodgson's indebtedness. The answer to that question depended on two questions; one, whether the company had notice that the shares were held in trust, and if so (2) what was the effect of sec. 27 of the Companies Act, 1908, and cls. 9 and 12 of the Articles of Association. There was not any evidence that the company, before April 1912, when James Hodgson gave a charge to the company on his interest in his father's estate, had knowledge or notice who were the persons beneficially interested in the shares. (See *Grundy* v. *Briggs* [1910] 1 Ch., 449). It had, however, complete information that the shares were in the first instance held by the Plaintiffs, James Hodgson and the testator's widow, as executors of the testator; and it had notice in January 1910, that the shares were held by the Plaintiffs and James Hodgson as trustees of the testator's Will. The company therefore had notice that these shares were held by those three gentlemen as trustees for the persons who were interested in them under the testator's Will, and, if that was material, there was no evidence that that fact had in 1912, when James Hodgson's liability was incurred, escaped the memory of the company's officers.

If a private person who had received a notice of this description took a charge on a trust estate from the trustee as security for a debt of the trustee, he would take notice of a breach of trust, and could not set up the charge against the beneficiaries. But the question was

whether the company, having regard to sec. 27 of the Companies Act, 1908, and the 9th and 12th Arts. of the Articles of Association, was in a better position, so that it could say that, notwithstanding the notice that the shares were in fact held in trust, it was able to assert against the beneficiaries a lien or charge on the shares for the private debt of one of the trustees Sec. 27 of the Act was :—

" No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland."

The precise point was determined in favour of the persons beneficially entitled and against the company claiming in *Rearden* v. *Provincial Bank of Ireland* [(1896) 1 Ir. R., p. 532], in the first instance by the Master of the Rolls and finally by the Court of Appeal. That decision was not, of course, binding on this Court, and he had to form his own opinion, based on other decisions by Courts in this country, and assisted in arriving at a conclusion by the reasoning of the learned Judges in the Irish Courts.

For the company it was argued that under sec. 27 of the Act of 1908, and the Articles of Association, no notice of any equitable interest or trust could affect the company in any way; and that as the notice of the trust in the present case which the company in fact received must be treated as non-existent, or at least ineffectual, the lien which was conferred by the articles was operative. The argument led far, for it would follow that if a trustee of shares in a company informed the company that he held the shares for the benefit of other persons, and that he had not as against his *cestui qui trust* any power of mortgaging them for his own benefit, he could yet effectually charge them to the company as security for money lent to him by the company. It was urged that cl. 9 of the Articles of Association was wider in its scope than sec. 27 of the Act of 1908. Now, it was pointed out by Lord Justice Fry in the *Bradford Banking Company* v. *Briggs* (31 Ch. Div., 19, at page 28) that that section implied and involved that the company was not to be affected with notice of any trust; and he (his Lordship) agreed with the opinion of *Chief Baron Pallas in Rearden* v. *Provincial Bank of Ireland (supra)* and the present Art. 9 in effect amounted to a provision that no notice of any trust should be recognised by or should bind the company. That being so, decisions relating to the effect of sec. 27 of the Act had a material bearing on the question what were the scope and effect of Art. 9.

In several cases it had been stated in broa terms that a company need not take notice i any way of trusts [see *Lord Esher in the Soci Générale de Paris* v. *Tramways Compan (Limited)*—14 Q. B. D., 424], or that an notice was absolutely inoperative to affect company with any notice (see Lord Selborne i the same case in the House of Lords—11 A. C 20, at page 30). These observations had, hov ever, reference to the obligation of the compar to register transfers of shares. If the passag in the judgments referred to were intended t be of universal application they were not i accordance with the judgments of the House o Lords in *Bradford Banking Company* v. *Brig* (12 A. C., 29). There the Respondent compar claimed that by virtue of sec. 30 of the Com panies Act, 1862, it could, under an article co responding to Art. 12 in the present case, asse as against the Appellant bank a lien for money which became due to the company from one o its shareholders after the company had receiv notice from the bank that the certificates fo the shares, on which the lien was asserted, ha been deposited with the bank by the share holder as security for sums due to the bank, an that *Hopkinson* v. *Roll* (9 H. L. Cas., 514) ha not, in the circumstances, any operation. Th effect of this decision was briefly stated by Lor Justice Stirling in *Rainford* v. *James Keith an Blackman Company (Limited)* [(1905) 2 Ch. 147, at page 161] in these words :—

" Where the company in which the share are held sees fit to deal with the shares for it own benefit, then that company is liable to b affected with notice of the interest of a thir party."

He was therefore of opinion that sec. 27 o the Act of 1908, and Art. 9 of the Articles o Association did not protect the company which in the face of notice that the shareholder wa not the beneficial owner of the shares, mad advances or gave credit to the shareholder, an that the decision in *Rearden* v. *Provincial Ban of Ireland* was right.

Messrs. Tomlin, K.C. and *Holden* for th Plaintiffs.

Messrs. Hughes and *Hildyard* for the Com pany.

B. D.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ATKINSON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.
1916,
22, June.

MAHARAJA SRI RAM CHANDRA BHANJ DEO, since deceased (now represented by Maharaja Purna Chandra Bhanj Deo), Appellant,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL and ors, Respondents.

*Civil Procedure Code (Act XIV of 1882), sec. 584—Second appeal—High Court, if may remit case for re-hearing on a new case not raised in the pleadings, when decree as made correct on the issues raised and decided—Procedure, if competent, to be adopted in exceptional cases—Surprise, discovery of new facts—Costs, party at whose instance new issue raised to pay costs—Suit to eject "Paik" from tenure held for service—*Chowkidari chakran*—Police duties performed under supervision of Government—Control of Government over private* chakran, *if exists.*

In 1801, the predecessor of the Plaintiff executed a kabulyat *in favour of Government in respect of a newly-settled Pergunnah, under which the proprietor of the Pergunnah was bound "to maintain and keep the same Sardars and Paiks who had all along existed in the Pergunnah and to carry out whatever order might be passed by the Magistrate on the Paiks, and was precluded from dismissing the Sardars or Paiks and bound to depute the Paiks to watch and take care of the boundaries of the Pergunnah, and see that no theft or dacoity and no riot occurred anywhere." The Plaintiff's suit to eject a Paik was opposed by Government, which relying only on the* kabulyat *urged that the Paik in question was one whose tenure services included the performance of police duties, whilst the Plaintiff urged that he held on tenure services personal to himself and having no connection with the local police. The Subordinate Judge, the District Judge and the High Court all agreed in upholding this contention, but whilst the two former upon that finding decreed the suit, the High Court in second appeal permitted the Government to raise a fresh issue, viz., whether the lands comprised in the jaghir in question were Chowkidari Chakran lands, that is lands which at or before the settlement had been appropriated or assigned for the maintenance of the police force, and by reason of such appropriation excluded from the Zemindari assessment (vide Regs. I of 1793 and XIII of 1805), discharged the decree of the District Judge and remitted the action for rehearing—ordering at the same time that all the cos's already incurred would abide the result of the rehearing:*

Held—*That the Government ought not to have been allowed to raise a new issue not raised in the pleadings, although they appeared to have had full knowledge of it when they preferred their defence; and that therefore the order of the High Court should be discharged and the decree of the District Judge restored.*

That even if it was competent to the High Court to remit a case for hearing on an issue not raised by the Defendant in the pleadings or suggested in the lower Courts, this might be done only in exceptional cases for good cause shown and on payment of all costs thrown away.

That in this case the Government had shown no ground whatever for the indulgence they claimed, as they did not suggest that they had been in any way taken by surprise or had discovered fresh facts of which they were unaware when the case was before the lower Courts.

That the order that all costs already incurred should abide the result of the rehearing was bad inasmuch as the Plaintiff, if he had failed on a new case raised by the

MAHARAJA SRI RAM CHANDRA BHANJ DEO *v.* THE SECRETARY OF STATE FOR INDIA.

Defendants for the first time in second appeal, would have to pay the whole costs of the issues on which he had succeeded in the two Courts below.

This was an appeal from a judgment of the Calcutta High Court (Brett and Shamsuddin, JJ.) setting aside decrees made by the District Judge of Midnapur and the Subordinate Judge of Midnapur. The Appellant, Maharaja of Mourbhanj, instituted the present suit against the heirs of one Suba Naek, deceased, and the Secretary of State for India in Council. The Plaintiff's case was that the lands in dispute situate within his zemindari were held by the said Suba Naek in lieu of wages for personal service, that he had dismissed Suba Naek who had since died, and that the Defendants unlawfully refused to give possession of the lands to the Plaintiff. The Secretary of State pleaded in defence that Suba Naek was not a private servant of the Plaintiff, but that he did police duties, and that under the terms of a *kabulyat*, the Plaintiff was bound to maintain "Paiks and Sardars" and to obey the orders of the Magistrate and that the Plaintiff had no right or title to the lands in dispute. The *kabulyat*, dated January 1801, contained the following clause :—

"I shall maintain and keep on the same Sardars and Paiks who have all along existed in the said Pergunnah. I shall carry out whatever order may be passed by the Magistrate on the Paiks. I have no power to dismiss the Sardars and Paiks. I shall, year by year, file a list of the names of the individual Sardars and Paiks before the Magistrate and one such list before the Collector. I shall depute the Paiks to keep watch and take care of the boundaries of the said Pergunnah and see that no theft and dacoity and any riot may take place anywhere. I shall constantly be engaged for the good of the Government. I shall carry out any order that may be passed by Government, as best as I can. I shall not neglect in any way to pay the Government revenue and to comply with the several provisions. If I do not pay the above Government revenue according to the instalments or if I act contrary to any order that may be passed at any time in respect of the Paiks and (torn) as mentioned above, then the Members of the Board and of the Council shall be competent to eject me forthwith from the zemindari of the said Pergunnah and resume the zemindari of the said Pergunnah and grant the zemindari of the said Pergunnah to anybody they like (torn)."

The Subordinate Judge fixed the following issues for trial :—

1.—Whether the Plaintiff has any cause of action for this suit?

2.—Whether the Plaintiff's suit is barred by limitation?

3.—Is the suit in its present form maintainable?

4.—Has the Plaintiff any right to the land in suit? Is he entitled to its possession?

5.—Whether there are in estate Nayabasan two classes of Paiks as stated in the plaint? If so, is Government bound to recognise the division?

6.—Are Defendants Nos. 1 and 2 Dalpaiks? Are they mere servants of the estate?

7.—Can Plaintiff question an order of the Magistrate regarding a Paik of the Nayabasan estate? Is the order of the District Magistrate, dated the 16th December 1899, *ultra vires*?

8.—Is Plaintiff entitled to mesne profits. If so, what amount?

9.—What other relief, if any, is the Plaintiff entitled to?

The Subordinate Judge held that in

Pergunnah Nayabasan there existed two classes of Paiks, (1) Chowkidars who performed police duties, and (2) Dal-paiks, who performed only private services of the Zemindar; that Suba Naek performed private services for the Plaintiff, and that Suba Naek possessed the disputed lands in lieu of such services. The Subordinate Judge therefore allowed the Plaintiff's claim for possession. The Secretary of State appealed to the District Judge who affirmed the findings of fact at which the Subordinate Judge had arrived, and dismissed the appeal. The Secretary of State filed a second appeal. The High Court set aside the decisions of the lower Courts and remanded the cause for trial. The High Court concluded its judgment in the following words :—

" The finding of the lower Appellate Court on this point is not expressed in direct terms but it seems to amount to this that all Sardars and Paiks discharging police or public duties and holding Chakran lands as remuneration for their services, come under the terms of the *kabulyat* of 1801, which we have quoted. In our opinion that is the only construction of the document, which can possibly be accepted as correct.

" That being the correct construction of the terms of the lease, it is argued that the question which the lower Courts had to decide were (1) whether the lands held by Suba Naek were lands included in those which were excepted from assessment of Government revenue because they were at that time appropriated for the maintenance of the police force, and (2) if so, whether the Plaintiff had any right to resume those lands or to discharge Suba Naek whether he was employed on zemindari work or in the discharge of police duties. The first question is a question of fact material for the disposal of the suit and it is argued that the lower Appellate Court has not gone into it and has not decided it. The second question is a mixed question of fact and law and the case of *Luchmeshwar Singh* v. *Manowar Hossein* (2) is relied on as authority for the proposition that a second appeal lies when the question is really a mixed question of law and fact, depending on the proper legal conclusion to be drawn from the findings on single facts.

" In our opinion if this contention be maintained it affords a sufficient answer to the case set up for the Respondent, and a sufficient reason for our interference in second appeal.

" It has been argued for the Respondent that the findings of the lower Court sufficiently answer the first question in dealing with the documents, Ex. 16 (*a*), a parwana dated the 3rd November 1831, and Ex. G, a report dated the 23rd August 1858. Let us consider then the findings of the District Judge on these documents. . . . . "

" In fact, all the findings that the learned Judge appears to have arrived at on the evidence and on Mr. Reily's report are (1) that except Chowkidars and Digwars the other service-landholders by whatever name called, have not had any special police duties for years and (2) that from 1810 onwards there has been a distinction made between Paiks now known as Chowkidars and Digwars who are within the terms of the *kabulyat* of 1801 and Paiks now called Dal-paiks, Dal-sardars, Bullokes and Dal-beharas who do not come under that *kabulyat*. He adds (3) that on the evidence I find Suba Naek comes within the latter class.

" Now, the findings 1 and 2 do not touch the question whether the lands held by

(2) L. R. 19 I. A. 48 at p. 56 : s. c. I. L. R. 18 Cal. 253 (1891).

Suba Paik were included in the lands covered by the *kabulyat*, and no reference is made to the evidence on which the 3rd finding is arrived. A mere expression of opinion not supported by reasons or any reference to the evidence on which it is based, cannot be regarded in law as a sufficient finding of the fact.

"There is, moreover, the further and important question on which the determination of the present suit must depend and that is this :—If it be found that Suba Naek was exclusively employed on zamindari work and did not discharge any police duties and if at the same time it be found that the lands held by him as service-lands formed a part of the lands which originally were appropriated for public purposes at the time of the settlement in 1801, would the act of the landlord of appropriating a portion of the lands for the remuneration of his private servants, or the act of employing exclusively on his private work persons for whose employment on public and police duties the lands were appropriated, have the legal result of withdrawing those lands from the operation of the clause in the *kabulyat* so as to give to the landlord power to resume them and to discharge and appoint at his option the holder of such lands.

"In our opinion the judgment of the lower Appellate Court fails to deal with these three points which were material for the disposal of the suit, and this omission affords a good and sufficient ground for our interference in second appeal. The first question is one of fact but the two others are mixed questions of law and fact. The last one has not been dealt with at all. The second question has been disposed of imperfectly and inconclusively.

"We accordingly set aside the judgment and decree of the lower Appellate Court, and direct that the appeal be remanded for retrial after disposal of the three points mentioned in this judgment."

Hence this appeal.

Messrs. L. DeGruyther, K.C., and *E. B. Raikes* for the Appellant submitted that the findings of fact at which the District Judge had arrived were final and conclusive in favour of the Appellant. The High Court was not competent to interfere with or set aside the findings of fact on second appeal. Sec. 584, C. P. C., *Durga Chowdhrain* v. *Jawahir Singh* (3). There was no allegation or proof in the lower Courts that the lands in suit were Chowkidari Chakran lands. The nature of the lands was properly ascertained by the nature of the services rendered by the holders thereof. The case on which both parties went to trial was whether the lands were held by Suba Naek as a private servant or a public policeman. The case suggested in the High Court was entirely new. In any event, the onus of proving his title was upon the Respondent and he had failed to discharge it.

Reference was made to *Secretary of State for India* v. *Kirtibas Bhupati Harichandan Mahapatra* (1).

Sir Erle Richards, K.C. and *Mr. A. M. Dunne* for the Respondent submitted that the Respondent's case was covered by Issue No. 4.

[Lord Parker.—The onus is upon you to show that the land is yours?]

Yes, but that point has not been tried by the lower Courts. Those Courts applied a wrong test, in determining the real issue between the parties which was : what was the character or tenure of the land at the Decennial Settlement? Was the land in dispute exempted from assessment in 1793

(1) L. R. 42 I. A. 80 : s c. 19 C. W. N. 65 (1914).
(3) L. R. 17 I. A. 122-127 (1890)

or not? The mere fact that there were two classes of Paiks did not necessarily prove the Plaintiff's case. Private Paiks sometimes performed police functions. *Joykishen* v. *Collector of East Burdwan* (4). The lower Courts put a wrong construction on the terms of the *kabulyat* and the High Court was competent to interfere with the finding based on inferences drawn from the construction of the document. *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff* (5).

Was Suba Naek a "Sardar and Paik" within the meaning of those words in the *kabulyat*? The High Court had rightly exercised its discretion to have the real issue between the parties tried, and the Board ought not to interfere with it.

Their Lordships reserved judgment without hearing counsel for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PARKER OF WADDINGTON.—This was an action in which the Appellant, as Plaintiff, sought to recover possession from the first and second Defendants of a jaghir containing about 26 bighas of land situate within the territorial limits of the Pergunnah Nayabasan in the district of Midnapur, of which the Appellant was the proprietor. The Secretary of State, who alone has appeared as a Respondent in this appeal, and is hereafter referred to as the Respondent, was added as a third Defendant because the Government of India disputed the right which the Appellant was asserting in the action. The Appellant's case was that in 1898 one Suba Naek was in his personal service and held the jaghir on service tenure determinable when his employment ceased; that he had duly determined the employment of Suba Naek and given his notice to quit his jaghir; that Suba Naek had refused to deliver up possession of the jaghir, and had obtained from the Magistrate an order which precluded the Appellant from obtaining possession thereof without a civil suit; that Suba Naek had since died, and that the first and second Defendants wrongfully claimed to retain possession as his heirs.

The Pergunnah Nayabasan was settled in 1801 with Rani Sumitra Bhanj (the Appellant's predecessor in title), who in January of that year executed a *kabulyat* in favour of the Government. Under this *kabulyat* the proprietor of the Pergunnah was bound to maintain and keep the same "Sardars and Paiks" who had all along existed in the Pergunnah, and to carry out whatever order might be passed by the Magistrate on the Paiks. He was also precluded from dismissing the Sardars or Paiks, and bound to depute the Paiks to watch and take care of the boundaries of the Pergunnah, and see that no theft or dacoity and no riot occurred anywhere.

The Appellant has throughout contended that the Sardars and Paiks referred to in this *kabulyat* are Sardars and Paiks employed on police duty, and that the document has no reference to Paiks who hold on tenure services personal to himself, and having no connection with the local police. This contention has been upheld, and in their Lordships' opinion rightly upheld, by all the Courts below. On the other hand, it has been throughout contended by the Respondent that the provisions of the *kabulyat* preclude the Appellant not only from dismissing Paiks whose tenure services include the performance of police duties, but from resuming their jaghir lands, even though he might provide for their remuneration in some

(4) 10 M. I. A. 16, 38-45 (1864).
(5) L. R 39 I. A. 237 : s c. 16 C. W. N. 937 (1912).

other way. The Appellant having accepted this contention, their Lordships will assume, as was assumed in all the Courts below, that it is correct.

On reference to the written statement of the Respondent by way of defence to the action, it will be found that, so far as material for the purposes of the present appeal, he relied entirely on the provisions of the *kabulyat*. In order to succeed, he had, therefore, to prove that Suba Naek held by service tenure involving the performance of police duties. Curiously enough, the first two Defendants put in a statement, by way of defence, repudiating this. Their case was that they were in possession by hereditary right on a service tenure which did not involve the performance of any police duty, but that the Appellant had no right to dismiss them if they were ready and willing, as they in fact were, to perform their proper services. They subsequently applied for leave to withdraw this statement and substitute another. This application was refused, but they appear to have given evidence at the trial in support of the Respondent's case.

The Subordinate Judge found first that there had always been two classes of Paiks within the Pergunnah : (1) Paiks who hold their jaghirs in consideration of the performance of police duties, and (2) Paiks whose tenure services were personal to the Zemindar. He also found that Suba Naek belonged to the latter class. On these findings of fact he held, and in their Lordships' opinion rightly held, that the defence of the Respondent failed, and gave judgment in favour of the Appellant.

The first and second Defendants were content with this decision, but the Respondent appealed to the District Judge, who came to the same conclusions both of fact and law as had been come to by the Subordinate Judge, and dismissed the appeal with costs.

The Respondent thereupon presented an appeal to the High Court. By sec. 501 of the Civil Procedure Code then in force the High Court as second Court of Appeal was bound by the findings of fact of the District Judge. In their Lordships' opinion the High Court was not at liberty to disregard the finding that Suba Naek belonged to the class of Paiks having no police duties, on the ground that the District Judge gave no reasons for coming to this finding. The reasons of the District Judge are clear. He had considered the evidence and saw no reason for differing from the conclusions at which the Subordinate Judge had arrived. The High Court therefore could only allow the appeal on grounds of law, and as they agreed with the Court below on the construction of the *kabulyat*, it is not obvious what other questions of law arose. The Respondent, however, urged upon the High Court that the Courts below had entirely misconceived the issue they had to try. This issue was, he contended, whether the lands comprised in the jaghir in question were Chowkidari Chakran lands, that is, lands which at or before the settlement had been appropriated or assigned for the maintenance of the police force, and by reason of such appropriation excluded from the zemindari assessment. It is in their Lordships' opinion quite clear that no such issue was raised by the pleadings. Had this been the issue raised by the pleadings the question whether Suba Naek was a Paik with police duties would have been of little importance if not quite immaterial. The Appellant would be precluded by Regulations I of 1793 and XIII of 1805 from utilising Chowkidari Chakran lands for remunerating persons who were his personal servants and performed no police

duties, but as appears from the case of *The Secretary of State for India* v. *Kirtibas Bhupati Harichandan Mahapatra* (1), the onus of proving that the lands in question were so appropriated or assigned would lie on the Respondent. The *kabulyat* contains no reference whatever to any such lands.

It was admitted before their Lordships that this contention was put forward for the first time before the High Court. Such admission could hardly be avoided. The real question upon the pleadings was whether the Appellant could rightly terminate Suba Naek's tenancy. The new issue suggested raises the question not whether Suba Naek's tenancy could be determined, but whether it ought not to be determined and the jaghir utilised for maintaining some police officer appointed by the Government. Nevertheless, the High Court held that this was the real issue, and, as it had not been tried, discharged the order of the District Judge and remitted the action for rehearing. It not only did this, but it ordered all the costs already incurred to abide the result of the rehearing. In other words, if the Appellant failed on a new case set up for the first time on the second appeal, he would have to pay whole costs of the issues on which he had succeeded in the two Courts below.

In their Lordships' opinion, even if it be competent to the High Court to remit a case for rehearing on an issue not raised in the pleadings or even suggested in the Courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away. In the present case the Respondent showed no ground whatever for the indulgence he claimed. He did not suggest that he had been in any way taken by surprise or had discovered fresh facts of which he was unaware when the case was before the lower Courts. The possibility of the lands in question being Chowkidari Chakran lands, which could not, according to the Regulations, be resumed, must have been present to the minds of his advisers when his statement by way of defence was filed. It had been suggested by the Magistrate whose order necessitated the action. The action of the Respondent's advisers in not raising the point must have been deliberate. With knowledge of it, he elected to fight the action on the question whether Suba Naek could rightfully be dispossessed of his jaghir rather than on the question whether he ought not to be dispossessed and the jaghir utilised for police purposes. The record contains little or no evidence pointing to there being any Chowkidari Chakran lands which could not be resumed within the Pergunnah. On the contrary, the *Rubokari* in Persian, the genuineness of which was accepted by the District Judge, points the other way. The Respondent does not suggest that he has any further evidence.

Their Lordships are therefore of opinion that this appeal should be allowed with costs here and below, and that the order of the District Judge should be restored, and they will humbly advise His Majesty accordingly.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellant.

The Solicitor, *India Office* for the Respondent.

B. D. *Appeal allowed with costs.*

(1) L. R. 42 I. A. 30 : s c 19 C. W. N. 65 (1914).

[CIVIL APPELLATE JURISDICTION.]

SANDERSON, C. J.
MOOKERJEE, J.
CHAUDHURI, J.
1916,
14, June.

In the matter of LINOTYPE & MACHINERY, LD., OF LONDON AND CALCUTTA AND THE WINDSOR PRESS OF CALCUTTA.

Indian Stamp Act (II of 1899), Art. 5, cl. (c), Sch. I—Agreement to hire with option of purchase, stamp duty on.

An instrument was executed between the Linotype and Machinery, Ltd., and the Windsor Press whereby a machine was hired by the latter for a period on condition that the hirer would pay a fixed amount on execution of the deed and another fixed amount by equal monthly instalment with interest and that on payment of the full sum with interest the machine would become the property of the hirer but that until such payment was made the machinery would continue to be on hire:

Held (*on a reference by the Board of Revenue under sec. 57 of the Stamp Act*). —*That the document in question was an agreement within the meaning of Art. 5, cl. (c) of Sch. I to the Indian Stamp Act and was therefore liable to a stamp duty of eight annas.*

This was a reference by the Board of Revenue under sec. 57 of the Indian Stamp Act (II of 1899).

The Reference was as follows :—

1. On the 8th June 1914, Linotype and Machinery, Ltd., of London and Calcutta, and Windsor Press of Calcutta, executed an instrument which is described as a Hire-Purchase Agreement whereby one duplex double-letter linotype machine was hired by the latter for 27 months upon terms and conditions set forth in the document. The principal conditions agreed to are that the hirers shall pay £135 on the execution of the deed and thereafter £540 by 27 equal monthly instalments, together with interest, and that, upon payment of the full sum with the interest in the manner specified in the document, the hired machinery shall become the property of the hirers, but that until such payment is made the machinery shall continue to be on hire.

2. This document was submitted to the Collector of Stamp Revenue, Calcutta, by the Solicitors of Linotype and Machinery, Ltd., for the purpose of having it duly stamped. The Collector of Stamp Revenue, Calcutta, has raised the question whether a hire-purchase agreement is to be stamped as an agreement or as a conveyance. The applicants proposed to stamp it as an agreement and urged that in England such a document is chargeable as an agreement under sec. 7 of the Finance Act, 1907. They contend that even if the agreement is taken to be a conditional sale, it comes under cl. (*a*) of the exemptions mentioned in Art. 5, Sch. I, of the Indian Stamp Act, 1899. They point out that there is no obligation that the machine should be purchased, and state that, in a number of cases, the machine is returned to the owners after it has been hired for a certain period. The Collector points out that the provisions of sec. 7 of the English Act cannot be followed here, and that it is necessary to consider how such an instrument should be dealt with under the Indian Stamp Act, as there is no special provision for the stamping of a "hire-purchase" instrument in Sch. I thereof. He holds that the instrument comes within the term "conveyance" as defined in sec. 2 (10) of the Indian Stamp Act, and is liable to be stamped as such.

3. The Legal Remembrancer, who was consulted, considers that there are good grounds for holding that the instrument under consideration comes within the definition of conveyance and should be

stamped in the manner suggested by the Collector. The Board concurs with the opinion of the Legal Remembrancer, but considers that the question how a hire-purchase agreement should be stamped is of such importance as to render it necessary that a reference should be made to the Hon'ble High Court for an authoritative decision under sec. 57 of the Act.

4. Printed copies of the document in question, of the Collector's letter of the 28th Japuary 1916 and of the Solicitors' letter of the 6th January 1916, are submitted herewith.

No. 6 R. S., dated Calcutta, the 28th January 1916.

From—RAI J. M. DAS BAHADUR, Collector of Calcutta,

To—The Commissioner of the Presidency Division.

Under the provisions of sec. 56 (2) of the Indian Stamp Act II of 1899, I have the honour to submit the accompanying instrument with a view to obtain a decision of the Chief Controlling Revenue Authority as to the correct amount of stamp duty which the same attracts.

2. The document on which no stamp duty was paid at the time of execution was produced for validation under the Stamp Act on payment of annas 8 which was suggested by the applicants, Messrs. Watkins & Co., as the proper duty leviable thereon. The instrument which is described as a hire-purchase contract, was entered into on the 8th June 1914, between the Linotype and Machinery, Limited, of London and Calcutta, called the "Company" of the one part and the "Windsor Press," of Calcutta, called the Hirers" of the other part. The parties agree to let and to hire a machine for a term of 27 months, upon terms and conditions set forth in the document and for the purpose of the agreement the hired machinery is valued at £675 or Rs. 10,125. It is agreed that the hirers shall pay the Company as hire the sum of £675 and interest by 27 equal monthly instalments and that upon payment of the full sum the said hiring shall cease and determine and the hired machine shall thenceforth be the property of the hirers.

3. In their letter dated the 6th January 1916, the applicants have given their reasons for holding that a duty of annas 8 only is payable on the instrument. They say that in England a hire-purchase agreement is chargeable as an agreement with a stamp duty of 6*d*. under sec. 7 of the Finance Act of 1907. They state that the agreement is not a conditional sale and they contend that if it is taken to be a conditional sale it must be held that it comes under clause (*a*) of the exemptions mentioned in Art. 5 of Sch. I to the Stamp Act. The principal question for consideration they say is whether the ownership of the machine is transferred from one party to another. They express the opinion that the instrument in question falls short even of an agreement to convey, one party giving the other only an option to purchase the machinery at a certain price. It is said that there is no obligation on the other party to purchase the machine and that in a number of cases the machine is returned to the owner after the same has been hired for a certain period.

4. The contention that under sec. 7 of the English Finance Act of 1907 such an instrument is chargeable as an agreement with a stamp duty of only 6*d*. does not seem to be correct. An extract of sec. 7 is given below:—

"Para. 7.—Any agreement for or relating to the supply of goods on hire whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied, shall be charged with stamp duty as an agreement, or, if under seal (or in Scotland with a clause of registration), as a deed, as the case requires, and the exemption numbered (3) under the heading 'Agreement or any Memorandum of an Agreement,' in the First Schedule to the Stamp Act, 1891 (which exempts agreements for the sale of goods), shall not apply in the case of any such instrument."

It will be seen that a hire-purchase agreement is chargeable as an agreement if under hand only and as a deed if under seal. The instrument in question is a document under

seal and as such is liable to be charged as a deed. The distinction between an instrument under seal and an instrument under hand only is not recognized by the Indian Stamp Act. This is clear from the different definitions of the terms "Executed" and "Execution" in the two Acts which are given in parallel columns below:—

Definition in the Indian Stamp Act.

"Executed" and "Execution" used with reference to instrument mean "Signed" and "Signature."

Definition in the English Stamp Act.

The expression "Executed" and "Execution" with reference to instruments *not under seal* mean "Signed" and "Signature."

A deed under seal being not distinguished in the Indian Stamp Act from a deed under hand only, the provisions of sec. 7 of the English Stamp Act cannot be followed here. It is necessary, therefore, to consider how such an instrument should be dealt with under the Indian Stamp Act. The nature of such an instrument is very clearly described in sec. 7 of the Finance Act quoted above. It is an "agreement for or relating to the supply of goods on hire whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied." There is clearly a transfer in such a transaction within the meaning of sec. 5 of the Transfer of Property Act. The interest acquired by the transferee is of the nature of a contingent interest as defined in sec. 21 of the Transfer of Property Act. It seems that an instrument creating such a right comes within the scope of the term conveyance which, as defined in sec. 2 (10) of the Indian Stamp Act, includes not only a conveyance on sale, but every instrument by which property, whether moveable or immoveable, is transferred *inter vivos* and which is not otherwise specifically provided for in Sch. I. A "hire-purchase" agreement is not specifically provided for in Sch. I. A hiring agreement is so provided for, but a "hire-purchase" agreement is something more than a mere hiring agreement. It would seem, therefore, that the instrument in question is chargeable as a conveyance under the Indian Stamp Act.

5. As regards the contention that if the instrument be treated as a conveyance, it should be exempted from stamp duty altogether under cl. (*a*) of the exemptions under Art. 5 of Sch. I to the Stamp Act, I beg to state that sec. 7 of the English Finance Act specifically provides that the exemption is not applicable to a "hire-purchase" agreement. It does not appear that there is anything in the Indian Stamp Act favouring a contrary conclusion.

6. It will be seen from the letter of the applicants referred to above that hire-purchase agreements are executed in large numbers in this country. The question as to the proper stamp duty payable on such documents is, therefore, one of considerable importance. In England it has been necessary to make special provision for such documents. It is desirable, therefore, that there should be an authoritative ruling on the point here.

* * * *

Dated Calcutta, the 6th January 1916.

Demi-official from—MESSRS. WATKINS & Co., Solicitors,

To The Superintendent of Stamps, Calcutta Collectorate.

Re: *hire-purchase agreement.*

Your letter of the 4th instant. The agreement in question is in a form in common use in Calcutta and India and great numbers of these agreements, to our knowledge, are used by the vendors of machinery, motor-cars, typewriters and other engineering goods. During the past 15 years all such agreements that have passed through our hands, totalling some hundreds, have been stamped annas 8 each, and no question has ever been raised before as to the sufficiency of the stamp. In England, a hire-purchase agreement is chargeable with stamp duty as an agreement (*i.e.*) 6*d*. (see sec. 7 of the Finance Act, 1907).

The agreement is specially drawn so as to prevent any title in the goods passing and we fail to understand the Controller's contention that the agreement is a conditional sale. Even were his contention correct, it appears to us that the agreement would then fall under exemption (*a*) to Art. 5 of the Stamp Act, as being "an agreement for or relating to the sale of goods of merchandise

exclusively in which case it is not liable to duty at all."

The whole question really is as to whether the ownership of the machine is transferred from one party to the other. The deed itself clearly says that the property is hired and there is an option to the hirer to buy the property at a fixed price should he so desire. The matter is one of great importance to the mercantile community, as one of the main objects of a hire-purchase agreement is to prevent the machinery vesting in the Official Assignee in the event of the hirer becoming insolvent.

Lord Esher has clearly laid down that the duty on a conveyance only attaches when the parties proceed to that conveyance and an agreement to convey is not in itself a conveyance (see *Commissioners* v. *Angus* (2).

In our opinion the present instrument falls short even of an agreement to convey as, as already pointed out, one party gives the other an option to purchase the machinery at a certain price. There is no obligation whatever on the other party to purchase and in a number of cases they do not do so and the machine is returned to the owners after the same has been hired for a certain period.

Agreement for the hire of machinery (document).

H. P. C. (India.)

AN AGREEMENT made the eighth day of June 1914 between LINOTYPE AND MACHINERY LIMITED of 188 and 189 Fleet Street in the City of London and of Calcutta (hereinafter called "the Company") of the one part and the WINDSOR PRESS of 11 British Indian Street, Calcutta (hereinafter called "the Hirers") of the other part.

WHEREBY IT IS AGREED AS FOLLOWS:—

1. The Company hereby agree to let to the Hirers and the Hirers hereby agree to hire for the purpose of carrying on the Hirers' business of printing, one duplex double letter Linotype Machine (hereinafter referred to as "the hired machinery") for the term of 27 months from the date of delivery of the machinery upon the terms and conditions herein contained and for the purposes of this agreement the hired machinery is hereby admitted and agreed to be of the value of £675 or Rs. 10,125 f.o.b. English port.

2. The hired machinery shall be erected by the Company upon the premises of the Hirers at 11, British Indian Street, Calcutta, as soon as the Company are reasonably able to deliver the same but the Hirers shall not have any right or power to cancel or rescind this agreement in case of any delay in delivery of the hired machinery or any part thereof arising through strikes, combinations of workmen, lockout of workmen, or any other cause whatever beyond the control of the Company nor shall the Company under any circumstances be under any liability to the Hirers for any damage or loss directly or indirectly caused by or attributable to delay in delivery of the Hired Machinery or any part thereof arising from any cause whatever. The Company will supply free of charge the services of a skilled mechanic for the erection of the hired machinery, any other labour employed in erecting the hired machinery shall be at the cost of the Hirers.

3. The Hirers shall pay the Company as hire the sum of £675 or Rs. 10,125 and interest as follows:—£135 or Rs. 2,025 to be paid on the execution of this agreement and the sum of £540 or Rs. 8,100 by 27 equal monthly instalments of £20 or Rs. 300 each the first of such monthly instalments to be paid one month after erection of the machinery and the remaining instalments on the corresponding day of every first calendar month thereafter and also together with each such monthly instalments interest for that month upon that instalment and all the remaining future instalments at the rate of six per cent. per annum, such interest in the case of the first of such monthly instalments being calculated from the date of erection of the hired machinery. All charges for packing, freight, marine insurance, landing, clearing, &c., shall be paid by the Hirers to the Company on delivery of the machinery. If the Hirers shall fail to pay any such instalment and interest or any part thereof on the due date thereof the

(2) L. R. 23 Q. B. D. 594 at p. 596 (1889)

amount so in arrear shall bear interest until payment at the rate of seven and one-half per cent. per annum. The Hirers shall on the execution of this agreement hand to the Company customary trade bills for the respective amounts of the said instalments of hire and interest payable under this agreement and such bills shall respectively be made payable on the dates on which such instalments and interest are respectively payable under this agreement and shall bear interest at the rate of seven and one-half per cent. per annum after due date. The said bills shall be a collateral security for the payment of the said instalments and interest and the giving thereof shall not suspend or affect any of the remedies of the Company hereunder.

4. The Hirers shall not during the continuance of this agreement in any way sell, assign, sub-let or otherwise part with the possession of the hired machinery or any part or parts thereof or assume the ownership thereof or remove from the said premises or from one building to another the hired machinery or any part or parts thereof or attempt so to do or part with possession of their interest in the said premises where the hired machinery is kept without first informing the Secretary of the Company of such intended removal and receiving his consent in writing to do so. The hired machinery shall at all times be at the risk of the Hirers who shall bear any loss arising from the destruction or loss thereof or damage thereto, however caused and shall take all reasonable care thereof during the hiring period and shall permit the Company or its Agents at all reasonable times to inspect the same and if at any such inspection any part or parts of the hired machinery shall be found broken, damaged or destroyed the Hirers shall forthwith at their own expense and to the satisfaction of the Engineer of the Company replace and repair the parts so broken, damaged or destroyed. The Hirers shall not at any time during the hiring purchase any parts or matrices as may be required to be used with or in connection with the hired machinery except from the Company who shall from time to time supply the same at their ordinary prices current in India at the respective dates when such parts or matrices are ordered.

5. The Hirers shall punctually pay all rent, rates and taxes payable in respect of the premises where the hired machinery or any part thereof is kept and shall upon demand produce to the Company or its Agents the current receipts for the said rent, rates and taxes, and in the event of the same being in arrear the Company is hereby empowered to pay the same and any expenses attendant thereon and the Hirers shall on demand repay to the Company any sum so paid.

6. The Hirers shall at all times during the hiring keep affixed in a conspicuous position or positions on the hired machinery such plate or plates as the Company may provide for denoting that the hired machinery is the property of the Company and the Hirers shall not at any time during the hiring remove or obliterate any of such plates or allow the same to be removed or obliterated.

7. The Company shall insure the hired machinery against fire in a recognized Traiff Fire Insurance Office in the sum of £690 or Rs. 10,350 and the Hirers shall on demand repay to the Company the premiums paid. The Company shall if requested produce to the Hirers the policy of insurance and the receipts for the current premiums payable for such insurance.

8. If any of the said instalments of hire or any part thereof shall be in arrear and unpaid for one calendar month after the same shall have become due or if the Hirers shall at any time fail or neglect to perform or observe any of the agreements or provisions herein contained and on their part to be performed and observed or if a distress or execution shall be levied or issued upon or against any of the chattels or property of the Hirers or if an order shall be made or an effective resolution passed for the winding up of the Hirers or if a Receiver shall be appointed of the undertaking of the Hirers or any of their assets, then and in any such case the Company may without notice to the Hirers terminate the hiring and may by its servants or Agents without any previous notice to the Hirers enter upon and into any premises or buildings where the hired machinery or any part or parts thereof ma

be and seize, retake possession of and remove the same to such place as the Company may think fit notwithstanding any payments previously made by the Hirers.

9. If the hiring shall be determined under cl. 8 hereof no person shall have any claim or demand against the Company in respect of any payments previously made by the Hirers all of which shall in every such case as aforesaid be absolutely forfeited and the Company shall be entitled to recover from the Hirers or their estate all instalments of hire then in arrear (if any) with interest thereon as aforesaid and a proportionate part of the current instalment and interest up to the date of the determination of the hiring and in addition such sum (if any) as shall be required with the money so to be paid for hire (exclusive of interest) and the sum previously paid for hire (exclusive of interest) to make up a sum equal to 60 per cent. of the amount of £675 or Rs. 10,125 payable as hire under cl. 3 hereof and the Company shall also be entitled to recover from the Hirers or their estate all costs and expenses including levy incurred in or about the entry, seizure and removal under this agreement and the Hirers shall not nor shall any person claiming through them commence or maintain any action, counterclaim or proceeding against the Company its servants or Agents by reason of the Company taking possession of the hired machiney or by reason of the temporary possession by the Company of the premises where the hired machinery or any part thereof may be for such time as may be reasonably occupied in its removal.

10. The Hirers may determine the hiring on any of the monthly days hereinbefore appointed for payment upon giving to the Company three calendar months' previous notice in writing of their intention so to do specifying the date on which the hiring is to terminate and upon delivering up the hired machinery to the Company on or before that date carriage paid and in good repair as provided by cl. 4 hereof at such place in India as the Company may appoint and at the same time paying to the Company all monies payable hereunder up to that date and in addition such sum (if any) as with the sums then and previously paid for hire (exclusive of interest) shall be required to make up a sum equal to 60 per cent. of the total amount of £675 or Rs. 10,125 payable as hire under cl. 3 hereof.

11. If the hiring hereby constituted shall be determined under cl. 8 or cl. 10 the Company shall upon payment of all sums payable under cl. 9 or cl. 10 hereof as the case may be return to the Hirers duly cancelled such of the bills mentioned in cl. 3 hereof as shall not at the time of such payment have fallen due.

12. Upon payment by the Hirers to the Company of the full sum of £675 or Rs. 10,125 an interest payable hereunder before or on the days and in manner aforesaid the hiring shall cease and determine and the hired machinery shall thenceforth be the property of the Hirers but until such full payment the hired machinery shall remain the sole and absolute property of the Company, and is only let on hire to the Hirers.

IN WITNESS whereof the Hirers have caused their common seal to be hereunto affixed the day and year first above written.

The common seal of the Windsor Press was hereunto affixed--

G. F. BRIDGE, *Proprietor.*

In the presence of

R. ROWLAND, *Manager.*

A. N. WARDLEY, *Assistant Manager, Linotype Machinery, Limited.*

[*The Company's representatives are not authorized to consent to any alteration of this Agreement.*]

"MEMORANDUM FOR LANDLORD.

TO LINOTYPE AND MACHINERY, LIMITED.

In consideration of your supplying to the within-named Hirers the within-mentioned machinery upon the terms of the within agreement I, the undersigned..... of.....being the landlord of the premises within mentioned at which the said machinery is to be placed hereby agree with you that I will not at any time hereafter during the continuance of the said agreement distrain or take the said machinery or any part thereof for rent in arrear or otherwise, and that I will at any time or times allow the same to be removed by you or the said Hirers from the said premises

IN THE MATTER OF LINOTYPE MACHINERY, LD. AND WINDSOR PRESS OF CALCUTTA.

without notice and without any charge whatever."

The Advocate-General (Sir S. P. Sinha) for the Board of Revenue submitted that he could not support the view taken by the Board.

Mr. P. L. Buckland appeared for the Company.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case I am of opinion that the document in question is an agremeent and not a conveyance.

The document in question has been somewhat loosely described in the reference to us as a hire-purchase agreement. In order to ascertain what the real effect of the document is, we must of course look at the terms of the document ; and, I am bound to say that when I heard the document read by the learned Advocate-General, the thought that came to my mind was that the point was not arguable. Therefore I was not at all surprised to hear the learned Advocate-General say, as one would expect him to say under such circumstances, that in his opinion the point was not arguable. Even apart from the decision in *Helby* v. *Mathews* (1) which has been cited to us, it is obvious upon the face of the document in question that it is an agreement and nothing more than an agreement. Further than that it is not even an agreement to purchase but simply an agreement to hire the machinery in question with an option on the part of the hirer to purchase.

Under those circumstances in my judgment the answer which must be given to this reference is that the document in question is an agreement within the meaning of Art. 5, cl. (*c*) of Sch. I to the Indian Stamp Act and is therefore liable to a stamp duty of eight annas.

(1) [1895] L. R. App Cas. 471.

MOOKERJEE, J.—I agree.

CHAUDHURI, J.—I agree.

The Government Solicitor for the Board of Revenue.

Messrs. Watkinson & Co., Solicitors, for the Company.

S. C. M. *Reference discharged.*

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 59 OF 1914.

SANDERSON, C. J.
MOOKERJEE, J.
1916,
31, May.

BABU NARENDRA BHUSAN ROY and anr., Defendants, Appellants,
v.
BABU JOGENDRA NATH ROY and ors., Plaintiffs, Respondents.

Co-owners—Suit to recover joint possession, when lies—Ouster by other co-sharer, what amounts to—Claim and exercise of exclusive title under a lease from a stranger—When co sharer in possession may keep exclusive possession—Change of case in second appeal—Remand, prayer for.

The 5/6ths owners of an estate A sued the remaining 1/6th owners for recovery of joint possession with the latter of certain lands within the estate. The latter in defence stated the lands in suit were part of estate B, which the owners of that estate had given them in lease. This having been found against in the Court of first appeal, the Defendants in second appeal prayed to be allowed to set up the defence that they had been in occupation of the lands as co-sharers and were cultivating the same as such with the consent of the Plaintiffs. The prayer was disallowed, and

Held—*That this was a case of exclusion of co-sharers by other co-sharers and the Plaintiffs were entitled to a decree for joint possession.*

WATSON & CO. *v.* RAM CHUND DUTT (1), LACHMESWAR SINGH *v.* MANOWAR

(1) L. R. 17 I A. 110: s. c I. L. R. 18 Cal. 10 (1890).

BABU NARENDRA BHUSAN ROY *v.* BABU JOGENDRA NATH ROY.

HOSSEIN (2) *and* MOHESH NARAIN *v.* NAWBUT PATHAK (3) *distinguished.*

MOOKERJEE, J.—*The rule laid down in* WATSON & CO. *v.* RAM CHUND DUTT (1), *is a rule of justice, equity and good conscience and must be applied with reference to the circumstances of the individual case before the Court.*

Primâ facie *co-owners are entitled to hold joint possession of joint property, and consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession, special circumstances must be alleged and established to justify exclusive occupation by one of them.*

The principle deducible from the cases is that a co-sharer who has been ousted from joint property is entitled to recover joint possession.

To constitute ouster a physical eviction is not essential; if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the rights of the other co-owners, there is an ouster in law.

When one co-owner accepts a deed of the whole property from one who has no title and claims and exercises the rights of sole ownership under a denial of any other person's right in the premises, he is in adverse possession to the exclusion of his co-sharers.

This was an appeal under sec. 15 of the Letters Patent from a decision of the Mullick, J., dated the 19th May 1914, in S. A. No. 1468 of 1908, which had been preferred from a decision of Babu S. N. Mitra, Subordinate Judge of Faridpur, dated the 31st March 1908, modifying a decision of Babu Birendra Kumar Dutta, Munsif, Bhanga, dated the 15th June 1907.

The judgment of Mullick, J., was as follows :—

MULLICK, J.—The land in dispute consists of three plots measuring four bighas. For the sake of convenience I will describe them as plots (*a*), (*b*) and (*c*) corresponding respectively to plots ka, kha and ga. The Plaintiffs claim this land as part of their estate No. 5557, in which they were co-sharers to the extent of 13 annas 4 pies, and the Defendants Nos. 18 and 19 to the extent of 2 annas 8 pies. The Plaintiffs allege that these Defendants together with other Defendants have dispossessed them. The Defendants Nos. 20 and 21 claim the lands as appertaining to their Mouza Probhakardhi, estate No. 2540. They allege that plot (*c*) is *debutter* land in the possession of their tenants and that plots (*a*) and (*b*) together with the rest of the *mouza* have been leased by them in *patni* to the Defendants Nos. 18 and 19. The Defendants Nos. 18 and 19 support this case and claim to be in possession of plots (*a*) and (*b*) through their tenants for over 40 years. The remaining Defendants are tenants.

The Munsif found that the lands in suit were not included within the Plaintiffs' *mouza*. He also found that the suit was barred by limitation, and was bad for misjoinder of causes of action. On appeal, the Subordinate Judge found that the land was situated within the Plaintiffs' *mouza* and he has decreed the suit giving the Plaintiffs joint possession with the Defendants Nos. 18 and 19 with mesne profits to be ascertained in the execution department. The Defendants Nos. 18 and 19 prefer this present second appeal.

A preliminary objection is taken to the

(1) L. R. 17 I. A. 110 : s c I. L. R. 18 Cal 10 (1890).
(2) L. R. 19 I. A. 48 : s c I. L. R 19 Cal 253 (1893).
(3) I. L. R. 32 Cal. 837 : s. c. 1 C. I. J. 487 (1905).

effect that substitution has not been made in due time of the heirs of the Plaintiff Jogendra Nath Ray and the Defendant Debendra Nath Ray who died respectively on the 15th October 1909 and 27th November 1909. Substitution subject to objection was allowed to be made by the Bench in which the appeal was filed. I have now heard the parties and their objection to substitution after the proper time and am satisfied that there was sufficient ground for the delay. That ground is that owing to the death of an important servant of the Appellant, it was not known that Jogendra Nath Ray and Debendra Nath Ray have died. It is explained that there was great confusion among the papers of the deceased servant. The delay under the circumstances is justifiable.

I next proceed to discuss the merits of the appeal.

The first question is whether a decree for joint possession can at all be sustained in this case, or whether the proper remedy for the Plaintiffs is to sue for partition.

Primâ facie, it would appear that the case of *Watson & Co.* v. *Ram Chund Dutt* (1) is a bar to the Plaintiffs' prayer for joint possession. But that case is distinguished on the ground that in order that a co-sharer Defendant may avail himself of the principle laid down in that case, he must show that he has been engaged in a proper course of cultivation. In the present suit the co-sharer Defendants having set up a title adverse to that of the Plaintiffs and inconsistent with the plea of joint ownership, it cannot be said that they are carrying on a proper course of cultivation. I think that there is no substance in the distinction sought to be made.

In the case of *Lachmeswar Singh* v. *Manowar Hossein* (2) their Lordships observed as follows:—"But then they ask to have it declared that the river and the ferry are within Mouza Baigra and that the Defendants may be restrained from offering opposition to their possession. If the Defendants had not denied that title, it would clearly not have been proper to give them any such relief. Should it make any difference in this respect that when asked to account for the profits of the ferry, the Defendant has sought to protect himself by setting up a title in himself to the profits of the ferry and to the landing places? With some doubt their Lordships think not."

Upon the authority of the above case it would appear that even if the Defendants at the trial set up the plea that the lands were not situated within the *mouza* jointly held by them with the Plaintiffs, that plea would not be sufficient to deprive them of the benefits of the equitable principles laid down in *Watson's* case (1). These principles have been further discussed in *Mohesh Narayan* v. *Nawbu Pathak* (3) and the conclusion at which the Court arrived was that when the Defendant has not received more than his just share he is under no liability to account to his other co-sharers.

In the case before us there is no evidence that the profits made by the Appellants from the four bighas in suit are more than their just share. Therefore they are not liable to account to the Plaintiffs.

It is also to be noticed that there is no finding that there has been any exclusion

(1) L. R. 17 I. A. 110: s. c. I. L. R. 18 Cal. 10 (1890).

(2) L. R. 19 I. A. 48: s. c. I. L. R. 19 Cal 253 (1893).

(3) I. L. R. 32 Cal. 887: s. c. 1 C. L. J. 437 (1905).

of the Plaintiffs from enjoyment of the common property. The plea at the trial that the land was not part of the Plaintiffs' *mouza* does not in my opinion amount to exclusion.

In this view of the case the Plaintiffs are not entitled to a decree for joint possession.

It is not necessary therefore to consider the question whether mesne profits should or should not be allowed and whether the suit is bad for misjoinder.

The appeal succeeds. The decree of the lower Appellate Court is discharged and in its place there will be a decree merely declaring that the land in suit appertain to the Plaintiffs' *mouza*.

The Appellants will get their costs throughout.

Babu Surendra Chandra Sen for the Appellants.

Dr. Dwarka Nath Mitter (for *Babu Provas Chandra Mitter*) for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case, in my judgment, this appeal should be allowed.

The action was brought by the Plaintiffs claiming a declaration of their title to 5/6ths share in a certain property, and also claiming that on the declaration of that title the Plaintiffs should be admitted to joint possession with their co-sharers and they also claimed mesne profits.

In the first Court the suit was dismissed altogether. In the second Court, the Plaintiffs obtained a decree for a declaration of their title and for joint possession with their co-sharers who are Defendants Nos. 18 and 19. Defendants Nos. 18 and 19 appealed.

Mr. Justice Mullick upheld the decree so far as it concerned the title, but held that the Plaintiffs were not entitled to joint possession with their co-sharers. The issues in the case were : "First—Is the suit barred by limitation?

Second—Is the suit bad for defect of parties?

Third—Is the suit bad for misjoinder of parties and causes of action?

Fourth—Does the land in suit appertain to Mouza Muksudpur and zemindari No. 5557?

Fifth—What relief, if any, are the Plaintiffs entitled to?

Sixth—Have the Plaintiffs their alleged right to the lands in suit?

In the Court of first instance, one of the material points in dispute between the parties was as to whether the land in dispute belonged to zemindari No. 5557, or to estate No. 2540, the Defendants alleging that they admitted that the Plaintiffs were entitled to 5/6ths share in zemindari No. 5557, and that they, the Defendants, were entitled to 1/6th share in that zemindari : But they also alleged that the land in question did not belong to No. 5557 at all, but belonged to No. 2540. Their case was that the owner of estate No. 2540 granted to these Defendants, Nos. 18 and 19, a lease, by reason of which they settled the land with the tenants in the year 1896, so that the Defendants were alleging that the Plaintiffs had no interest whatsoever in the land in question; but that on the contrary the land belonged to the owner of estate No. 2540, and that they were tenants of the land.

The question stated by the learned Judge of the first Court of appeal were in substance the same as what they were in the first Court, but they were stated rather differently. The first issue was whether the Plaintiffs' claim was barred by limitation. The second was

whether the disputed land was within the Plaintiffs' zemindari in Mouza Muksudpur and whether the Defendants had the alleged right. That right is one which I have just now referred to, namely, the right of lessees under the owner of No. 2540. The third issue was whether the Plaintiffs were entitled to get *khas* possession and *wasilat*.

Now, the learned Judge of the first appellate Court held that the land in question was part of estate No. 5557, as the Plaintiffs alleged, and thereby decided that point against the Defendants. He also held that the case was not barred by limitation.

Then when the case came to the High Court, the Defendants Nos. 18 and 19 shifted their ground: They realised that they must now approach the case from the point of view that the land in question was part of No. 5557, although all along they, the Defendants, had asserted that it belonged to No. 2540, and they urged that inasmuch as they, the Defendants Nos. 18 and 19, were co-sharers with the Plaintiffs in that estate, No. 5557, and they had been in occupation thereof, they could not be deprived of possession, placing reliance upon the cases which have been referred to in the course of Mr. Justice Mullick's judgment. The first of these cases was *Watson & Co.* v. *Ram Chund Dutt* (1), the second was *Lachmeswar Singh* v. *Manowar Hossein* (2) and the third was *Mohesh Narain* v. *Nawbut Pathak* (3), in which Mr. Justice Harington and my learned brother Mr. Justice Mookerjee gave the decision. In my judgment, none of those cases covers this case. The Defendants Nos. 18 and 19 asserted all along that their right to the land in question depended upon the title of a third person, namely, the owner of estate No. 2540, and that they were in possession of the land under that person. They disputed the Plaintiffs' allegation that this land was part of the zemindari of which the Plaintiffs and the Defendants were co-sharers: and, consequently, this case does not come within the decision in *Watson & Co.'s* case (1), which is the basis of all these cases for this reason: In that case the land was held by two persons in common, one of whom was in actual occupation of a part cultivating it as if it had been his separate property; the other co-sharer attempted to enter on the land: the co-sharer in occupation resisted and it was held that as the resistance was made for the object of protecting himself in the profitable use of the land in good husbanding and not in denial of the other's title such resistance was no ground for proceedings on the part of the other to obtain a decree for joint possession. In this case Defendants Nos. 18 and 19, although, as a matter of fact it turns out now that they were co-sharers of the land in question, had in fact all along been setting up the interest of a third party and were denying the title of the Plaintiffs. For this reason I think that this case in no way comes within the decision in *Watson & Co.'s* case (1). The passage in the subsequent case [*Lachmeswar Singh* v. *Manowar Hossein* (2)] which was read at my request by Dr. Dwarka Nath Mitter shows that that decision was based upon the reason that al-

(1) L. R. 17 I. A. 110: s. c. I. L. R. 18 Cal. 10 (1890).
(2) L. R. 19 I. A. 48: s. c. I. L. R. 19 Cal 253 (1893).
(3) I. L. R. 32 Cal. 837: s. c. 1 C. L. J. 437 (1905).

(1) L. R. 17 I. A. 110: s. c. I. L. R. 18 Cal. 10 (1890).
(2) L. R. 19 I. A. 48: s. c. I. L. R. 19 Cal. 253 (1893).

though the co-sharer had set up the ferry and at one time had disputed the right of his co-sharers to have anything whatever to do with it, it was held that although he had taken up that position, he did not interfere with the Plaintiffs', co-sharers', possession of the river and he in fact did not exclude any co-sharers. In the present case, the Defendants did exclude the co-sharers: Through their servants, they occupied the land not as co-sharers but, as already pointed out, setting up the title of a third party and denying the Plaintiffs' title and by so doing they excluded the co-sharers, the Plaintiffs. For these reasons the cases to which I have referred do not cover this case. The learned Judge, I think with great respect to him, was misled when he thought there was any similarity between the facts of this case and those of the abovementioned cases.

With regard to the last point which was urged by Dr. Dwarka Nath Mitter, namely, that this case should be remitted to the Court of first instance, in order that an issue should be tried between the Plaintiffs and the Defendants, treating them both as co-sharers, and in order that the Defendants might be allowed to set up the defence that they had been in occupation of the land in question as co-sharers and were cultivating the land as co-sharers with the consent of the Plaintiffs, although personally I am always most anxious that the real issues between the parties should be investigated, especially if that can be done by making proper provision as regards costs, I do not think that this is a case in which we should do that. It has been pointed out by my learned brother Mr. Justice Mookerjee that this litigation has been going on for the last ten years and it was not until the last moment when the case came before Mr. Justice Mullick in the High Court that this point apparently was ever thought of. Besides it was quite inconsistent with the case set up in the Courts below. I do not think we would be doing justice to the Plaintiffs in this case if we were to accede to this argument of the learned Vakil.

For these reasons I think this appeal should be allowed, the judgment of Mr. Justice Mullick set aside and that of the first Appellate Court restored. The Plaintiffs are entitled to their costs of this appeal and the appeal before Mr. Justice Mullick.

MOOKERJEE, J.—I agree that the judgment of Mr. Justice Mullick cannot be supported.

The Plaintiffs instituted this suit on the 23rd February 1906, for recovery of possession of a parcel of land upon declaration of title. Their case, shortly stated, was that the disputed land was comprised in estate No. 5557 on the revenue rolls of the Collector of Faridpur, that they, along with the eighteenth and nineteenth Defendants, were proprietors of that estate in the proportion of five to one; and that on the 18th February 1897 their co-sharers and the other Defendants had unlawfully taken exclusive possession of the land. They prayed accordingly for recovery of joint possession on declaration of the aforesaid title to a 5/6th share of the land in suit. The defence in substance was that the disputed land was not comprised in estate No. 5557, that it did not constitute the joint property of the Plaintiffs and their co-sharer Defendants, that it was the property of two other Defendants who were proprietors of another estate No. 2540 on the revenue rolls of the Collector of Faridpur, and that the Defendants were lawfully in possession as lessees under the

proprietors of that estate. The Defendants further pleaded that the suit was barred by limitation, inasmuch as neither the Plaintiffs nor the Defendants as their co-sharers had been in occupation of land as included in estate No. 5557 within 12 years antecedent to the institution of the suit. The Court of first instance found upon the questions of title and limitation against the Plaintiffs and dismissed the suit. Upon appeal the Subordinate Judge came to the conclusion, first, that the land was included in estate No. 5557 as alleged by the Plaintiffs and not in estate No. 2540 as asserted by the Defendants, and, secondly, that the Plaintiffs had been in possession within 12 years of the institution of the suit. The Subordinate Judge accordingly made a decree in favour of the Plaintiffs, which entitled them to recover possession to the extent of their 5/6th share jointly with the co-sharer Defendants.

On appeal to this Court, the decree of the Subordinate Judge was assailed principally on two grounds, namely, first, that the decision was erroneous in respect of the question of title; and, secondly, that even if the question of title was deemed concluded by the decision of the Subordinate Judge the Plaintiffs were not entitled to a decree for joint possession of the land.. Mr. Justice Mullick has held that the Plaintiffs are not entitled to joint possession, and he has placed reliance upon two decisions of the Judicial Committee, namely, *Watson & Co.* v. *Ram Chund Dutt* (1) and *Lachmeswar Singh* v. *Manowar Hossein* (2).

This decision has now been assailed on behalf of the Appellants upon two grounds, namely, first, that the Defendants should not be allowed, at this stage of the case, to fall back upon their position as co-sharers and to defeat the claim for joint possession of the land on the ground that they were entitled as co-sharers to take exclusive possession of the disputed land: and, secondly, that even if the Defendants be permitted to rely upon their status as co-sharers, the decisions mentioned are of no assistance to them. In my opinion, these contentions are well-founded.

It is plain that the Defendants, even in their appeal to this Court, sought to maintain the position that they had entered upon the land as lessees under the proprietors of the estate No. 2540. It was not until after they had failed upon that point, that they turned round and relied upon their position as co-sharers of the Plaintiffs in respect of estate No. 5557.

Now, the rule laid down by the Judicial Committee in *Watson & Co.* v. *Ram Chund Dutt* (1), which is a rule of justice, equity and good conscience must be applied with reference to the circumstances of the individual case before the Court. *Primâ facie*, co-owners are entitled to hold joint possession of joint property. Consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession of joint property, special circumstances must be alleged and established, so as to justify exclusive occupation of the joint property by one of the co-owners. No foundation for such a case has been laid in the pleadings, in the issues or in the evidence. The Court cannot now after the matter has been fought for over ten years, upon entirely different lines, allow the Defendants to make a new case wholly inconsistent with what they had

(1) L. R. 17 I. A. 110: s. c. I. L. R 18 Cal. 10 (1890).

(2) L. R. 19 I. A. 48: s c. I. L. R. 19 Cal. 258 (1893).

(1) L. R. 17 I. A. 110: s. c I. L R. 18 Cal. 10 (1890).

made before, and to have a remand and retrial. Besides, it is perfectly plain upon the admitted facts of this case that the Defendants cannot possibly resist the claim for joint possession. The principle deducible from the cases is that a co-sharer who has been ousted from joint property is entitled to recover joint possession [*Mohesh* v. *Nawbut* (3), *Lokenath* v. *Dhakeswar* (4)]. In the present case, there is no room for doubt that the Plaintiffs were ousted by the Defendants. No other effect can possibly be attributed to the acceptance by the contesting Defendants of a lease of the disputed land from an adverse claimant and to their entry upon the land in assertion of the title so derived from the adverse claimant. [*Biseswar* v. *Bhagabati* (5), decided by Mr. Justice Roe and myself]. Reliance has been placed however upon a passage from the judgment of the Judicial Committee in *Lachmeswar Singh* v. *Manowar Hossein* (2), to show that the mere fact that a co-owner has set up an adverse title in himself does not disentitle him to the benefit of his position as a co-sharer. That case is clearly distinguishable on the ground that there the co-owner had not been excluded from the enjoyment of the joint property. In the case before us, on the other hand, the Plaintiffs have been excluded from the enjoyment of the joint property by the Defendants in assertion of a hostile title. To constitute ouster, a physical eviction is not essential; if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the rights of the other co-owners, there is an ouster in law. When a co-owner accepts, as here, a deed of the whole property from one who has no title, and claims and exercises the rights of sole ownership under a denial of any other person's right in the premises, he is obviously in adverse possession to the exclusion of his co-sharers. In these circumstances, the Plaintiffs are clearly entitled to a decree for joint possession.

In my opinion, the judgment of Mr. Justice Mullick is erroneous and cannot be supported; his decree must accordingly be reversed and that of the Subordinate Judge restored with costs.

N. G. *Appeal allowed.*

(2) L. R. 19 I. A. 43: s. c. I L. R. 19 Cal. 253 (1893).
(3) I. L. R. 32 Cal 837: s. c. 1 C. L. J. 437 (1905).
(4) 21 C. L. J. 253 (1914).
(5) S. A. No. 3914 of 1913. Decided: 13th May 1915

[CRIMINAL REFERENCE.]

REF. No. 78 OF 1916.

MOOKERJEE, J.
SHEEPSHANKS, J.
1916,
31, May.

TAYAB ULLAH,
Complainant,
v.
KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), secs. 195, 476—Information before police reported under sec. 173, Cr. P. C., to the Magistrate to be false—No application by complainant challenging police report—Order by Magistrate after taking evidence directing prosecution of complainant under sec 211, I. P. C.

A first information of theft lodged with the police was reported to the Magistrate under sec. 173, Cr. P. C., to be false. The complainant did not apply to the Magistrate for a judicial investigation into the matter but the Magistrate on receipt of the police report directed the complainant to prove his case and after examining witnesses produced by the complainant and the police sanctioned the prosecution of

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the complainant on a charge under sec. 211, I. P. C.:

Held—*That the complainant not having applied to the Magistrate for a judicial investigation as to the truth of his information after it was reported by the police to be false and the report of the police not being under sec. 157, Cr. P. C., so as to entitle the Magistrate to proceed under sec. 159, Cr. P. C., there was no judicial proceeding before the Magistrate, and the order for prosecution whether treated as a sanction under sec. 195, Cr. P. C., or as one passed under sec. 476, was illegal.*

That no sanction under sec. 195, Cr. P. C., is necessary when a false charge has been made to the police and has not been followed by a judicial investigation, nor can an order under sec. 476, Cr. P. C., be made when the alleged offence under sec. 211 has been committed, not in Court but in relation to a police investigation.

This was a Reference from Mr. J. H. A. Street, Additional Sessions Judge, Sylhet, dated 17th May 1916, recommending that the order of Moulavi Tajammul Ali, Extra Assistant Commissioner, Maulvi Bazar, dated 5th April 1916, granting sanction for the prosecution of the accused in the above matter under sec. 211, I. P. C., may be set aside.

The facts of the case appear sufficiently from the judgment.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference under sec. 438, Cr. P. C., by the Additional Sessions Judge of Sylhet. On the 17th January 1916 the Petitioner laid a first information, under sec. 154, Cr. P. C., at the Maulvi Bazar Police Station against Karam Sheikh and others and alleged that they had stolen his paddy and had thereby committed a cognizable offence under sec. 379, I. P. C. The police investigated into the matter and on the 31st January submitted a final report under sec. 173, to the effect that the case appeared to be false and that there was no evidence for false prosecution. The Sub-divisional Officer, on receipt of this report, passed an order on the 12th February in the following terms: "Complainant to prove his case." It will be observed that the complainant had not applied to the Magistrate to investigate into the matter. On the 18th March the Magistrate examined four witnesses and ordered the police "to adduce evidence on the 5th April to prove that the case was malicious." On the day fixed, six more witnesses were examined. The Magistrate then recorded the following order: "It is evident from their depositions that there is a party feeling in the village, but the witnesses examined by the complainant had suppressed it. The complainant has totally failed to prove his case. I declare the case to be maliciously false and dismiss it under sec. 203. I sanction the prosecution of the complainant Tayabulla under sec. 211, I. P. C." The Sessions Judge has on the application of Tayabullah recommended that the order be set aside. It is plain that the order for sanction cannot be supported.

No sanction was required in this case under sec. 195 (*1*) (*b*). A sanction is requisite in respect of an offence under sec. 211, I. P. C., only when such offence has been committed in, or in relation to, any proceeding in any Court; no sanction is necessary when a false charge has been made to the police and has not been followed by a judicial investigation thereof by a Court [*Karim Buksh* v. *King-*

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Emperor (1), *Bhimaraja* v. *Moove* (2) and *Emperor* v. *Ahamed* (3)]. The position is different where, upon the police report as to the falsity of the complaint, the complainant insists upon a judicial investigation; if he does so, he is deemed to have preferred a complaint to the Magistrate; if the Magistrate finds his case to be false, a sanction would be requisite under sec. 195 (*1*) (*b*) as the offence may be said to have been committed in a proceeding in a Court. *Queen* v. *Syamlal* (4), *Jogendranath* v. *Emperor* (5) and *Queen-Empress* v. *Beari* (6). In the case before us, the Petitioner never applied to the Magistrate for investigation; he did not impugn the correctness of the police report nor did he pray that the person accused by him might be brought to trial. He was never examined on oath by the Magistrate; he cannot by any stretch of language be deemed to have made a "complaint" under sec. 4 (*h*), and it is difficult to understand what the Magistrate meant when he dismissed the case under sec. 203. It is thus clear that the order for sanction to prosecute is bad, if it be deemed to have been granted under sec. 195. The order is equally bad, if we hold that the Magistrate has inaccurately expressed himself and that what he really intended was to make an order under sec. 476 (*1*). In the first place, as pointed out in *Dharamdas* v. *King-Emperor* (7) and *Jadunandan* v. *King-Emperor* (8), sec. 476 must be read with sec. 195 and is consequently restricted by the limitations contained in cl. (*b*) of that section. An order for prosecution under sec. 476 cannot thus be made where the alleged offence under sec. 211 has been committed, not in Court but in relation to a police investigation. In the second place, a Court is competent to take action under sec. 476, only when the alleged offence has been committed before it or brought under its notice in the course of a judicial proceeding. Here the alleged offence was not committed in Court; nor was it brought to the notice of the Magistrate in the course of a judicial proceeding. The report by the police was not under sec. 157 so as to entitle the Magistrate to proceed under sec. 159—the procedure he adopted is not contemplated by the Code [*Mauli Durzi* v. *Naurangilal* (9)]. There was thus no judicial proceeding before him, and he could not consequently have taken action under sec. 476. It follows accordingly that his order cannot be sustained, either under sec. 195 or under sec. 476. We must therefore accept the recommendation of the Sessions Judge and set aside the order of the 5th April 1916.

S. C. M. *Conviction set aside.*

(1) [1905] P. L. R. 74; 2 Cr. L. J. 66; [1905] P. R. 12.
(2) 18 Cr. L. J. 480 (1912).
(3) 18 Cr. L. J. 578 (1911).
(4) I. L. R. 14 Cal. 707 (1887).
(5) I. L. R. 32 Cal. 1: s. c. 2 C. L. J. 228 (1905).
(6) I. L. R. 10 Mad. 282 (1886).
(7) 7 C. L. J. 373 (1908).
(8) 14 C. W. N. 330: s. c. 10 C. L. J. 564 (1909).

[CRIMINAL APPELLATE JURISDICTION]

APP. No. 361 OF 1916.

SANDERSON, C. J.
WALMSLEY, J.
1916,
Heard, 29 and 30, June.
Judgment, 30, June.

ABDUL KADIR, Accused, Appellant,
v.
THE KING-EMPEROR.

Indian Penal Code (Act XLV of 1860), sec. 436—Arson—Evidence of previous fires, unconnected with the charge under enquiry—Conviction on inadmissible evidence.

(9) 4 C. W. N. 351 (1900).

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The accused was convicted of arson. During the trial the Sessions Judge admitted the evidence of previous fires in the locality with which, however, there was nothing to connect the accused and relying amongst others on that evidence convicted the accused:

Held—*That the Sessions Judge was wrong in admitting the evidence in question.*

The High Court set aside the conviction and sentence.

This was an appeal preferred on the 22nd May 1916 against an order of Mr. C. Tindall, Sessions Judge, Bankura, dated 2nd May 1916, convicting Appellant in the alternative under secs. 436, 436/114, I. P. C., and sentencing him to five years' rigorous imprisonment.

The case for the prosecution was as follows :—

There was a school in a certain village which was erected by the efforts of the villagers in general and specially by the efforts of the father of the accused according to his evidence.

The school was conducted by a Head Pandit assisted by a Second Pandit. On a vacancy occurring in the post of the Second Pandit the school committee on the Head Pandit's recommendation decided the claims of two candidates, of whom the accused was one and this decision was against the accused. After the appointment of the new Second Pandit some articles belonging to the school were stolen. The Permanent Head Pandit was at the time on tour as Inspecting Pandit and on his return the accused came to him and said that he would secure the return of the missing articles if he was appointed Second Pandit. With the concurrence of the father of the complainant, who was a Local Board member, the accused was appointed Second Pandit, but under instructions from the Sub-Inspector of Schools the Head Pandit lodged information of the theft with the police and the accused was removed from his post.

Within a few days the stack of straw belonging to the father of Chandi Biswas, who officiated as Head Pandit during the absence on tour of the Permanent Head Pandit, was burnt down and with it a portion of a neighbouring house.

Three or four days after this the Head Pandit's house was burnt down; this was followed by the burning of the school itself. Within a few days the house of the complainant, who is the son of the member of the Local Board referred to above and who helped the police in their investigation, was set fire to. The Sessions Judge admitted and relied on the evidence of the previous fires and disagreeing with the assessors convicted the accused and sentenced him as stated above.

Babus Dasarathi Sanyal and *Debendra Narain Bhuttacharjee* for the Appellant.

Mr. Camell for the Crown.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case we think that this appeal should be allowed. This is a case which has given us much cause for consideration. It is a serious case, one in which the accused was charged with the offence of arson, for which he has received a very considerable sentence, one which, in my opinion, is not too severe for an offence of this kind, if it were clearly proved that he was guilty of it.

Now, the learned Judge has given a very careful and elaborate judgment in

this case : and, unwilling as I am ever to interfere with the decision of a learned Judge who has had the opportunity of seeing and hearing the witnesses in the trial Court, in this case I think there are certain matters which lead us to think that it would not be safe to allow that judgment to stand. First of all, the learned Judge in summing up his conclusion says, " On these facts I believe the evidence of the Sub-Registrar " (that is the complainant) " and his servant Asdu supported as it is by the previous chain of events and the last link in that chain at Rohim Ali's house." Now, we have come to the conclusion that even assuming that the learned Judge was entitled to admit evidence of those events to which he has referred—as to which I will say a word in a minute—it is clear that he has laid a very considerable stress upon that chain, and it is doubtful whether he would have come to the conclusion at which he arrived, but for the chain of events to which he has referred. Now, what is that chain of events? Stating it quite shortly, it is this : Apparently this boy wanted the post of the Second Pandit in a school but he did not obtain it—I am not going into details—and consequently the learned Judge comes to the conclusion, that the boy and perhaps more particularly the boy's father had got a grudge against those who were connected with the school. The school itself was burnt down and the first Pandit's stack had been set on fire, and the evidence was that the Pandit had great difficulty in getting accommodation because the people were afraid that if they gave him accommodation, their property might suffer from fire in the same manner. Then the learned Judge refers to two cases. He refers first to *Makin* v. *Attorney-General* (1) in which some people were charged with the murder of a baby and on a part of their premises the bodies of other dead babies were found. Then he refers to the case of *King* v. *Smith* (2), where a man was charged with the murder of his wife by drowning her in her bath, and the evidence relating to the deaths of two of his previous wives had been admitted : And, upon the strength of those two cases, he admitted the evidence relating to the dispute about the school and the previous fires. With great deference to the learned Judge, I do not think that those two cases to which he referred had any bearing upon this case : In both the cases, it is obvious that the previous facts of which the prosecution wanted to give evidence related in a direct manner to the actions of the accused persons ; but in this case, although there is some evidence that the accused boy had mixed himself up in some way with regard to the theft of some articles from the school by saying he could give a clue and would secure the return of the missing articles if he were appointed to the post of the Second Pandit, there is nothing whatever to connect that boy in any shape or form with the previous fires which occurred in the village. Therefore, I do not see what the evidence of the previous fires in the village has got to do with the present case at all : and, that being so, it seems to me that it would not be safe to leave the case as it stands, because we are unable to say that the evidence, as to what the learned Judge calls " the previous chain of events " may not have had an important effect on his mind.

Further than that, there are one or two facts with regard to the other part of the case, namely, the question of identification and also the question of the evidence of the complainant and his servant. These

(1) L. R. [1894] A. C. 57.

(2) Criminal Appeal Reports 1913.

are the points that I mentioned in the course of Mr. Sanyal's argument, which struck me as important.

Now, the evidence of the complainant was that he did not ascertain that there was any fire at all until he was close to it. He says that he was at the south-east corner of his compound when he saw the fire. Now, to reach that point he had to walk a considerable distance from the entrance of his compound carrying a lighted lantern in his hand; and, it is almost impossible to believe that the two people who were alleged to have set fire to his *bari* at the south-east corner of the compound should have remained close to it and not have noticed the man walking down to the point with a lighted lantern in his hand and with nothing to interrupt their view of him and allowed him to come within a couple of yards without their attention being attracted to his presence.

Further than that, there is the fact that his servant was also carrying a lighted lantern and he had to come from the other side of the tank which was close to the spot, and, it is highly probable, that his lighted lantern at 2 o'clock on a dark morning would have thrown light on the atmosphere in such a way that anybody especially those who were about such a nefarious scheme as setting fire to a house, would have seen. This leads me to doubt whether the evidence of the complainant and his servant can be accepted in toto when the complainant says that he came right upon the two accused within a couple of yards before they discovered his presence.

Now, the other point, which has appealed to us, is the evidence of the servant, and that is this: According to his evidence, he said that he was at the north-western corner of the tank when he first heard the shout of his master, and his master must then have been at the south-eastern corner of the compound. The men who are supposed to have set fire to the *bari* were then running away in a southerly direction, yet the servant was able to run back and come up to meet one of these men almost face to face. We have some doubts whether that story, when looked at from a physical point of view, can be accepted in its entirety.

For these reasons I think that it would not be safe to allow this conviction to stand. We therefore allow this appeal, set aside the conviction and sentence and direct that the Appellant be set at liberty.

Walmsley, J.—I agree.

S. C. M. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

Rev. No. 86 of 1916.

Mookerjee, J.
Sheepshanks, J.
1916,
10, June.

Arfan Ali
v.
King-Emperor.

Indian Penal Code (Act XLV of 1860), sec. 379 —Theft—Elements necessary to constitute offence —Removal of property in assertion of bonâ fide *claim of right.*

To sustain a conviction under sec. 379 it is necessary to prove a dishonest intention to take property out of the possession of another person. Consequently when property is removed in the assertion of a bonâ fide *claim of right the removal does not constitute theft. The claim of right must be an honest one though it may be unfounded in law or in fact. If the claim is not made in good faith but is a mere colourable pretence to obtain or to keep possession, it is of no avail as a defence.*

This was a Reference under sec. 438, Cr. P. C., by H. C. Liddell, Esq., Sessions Judge, Sylhet, dated 30th May 1916, recommending that the order of Rai Sukmay Chaudhuri Bahadur, Honorary

ARFAN ALI *v.* KING-EMPEROR.

Magistrate, Sylhet, dated 15th April 1916, convicting accused under secs. 379 and 447, I. P. C., and sentencing him to pay a fine of Rs. 5 and Rs. 3 respectively, be set aside for the reasons set forth in the letter of Reference.

The reference was in the following terms :—

" The complainant charged the accused with theft of eight bamboos from the land of patta No. 12 and with filling in a ditch in the land of patta No. 15. The defence case was that the land of patta No. 12 was held by the accused and that the land of patta No. 15 was not held or owned by the complainant but by one Abdul Sobhan. The Magistrate found the accused guilty of offences under secs. 379 and 447, I. P. C., and sentenced him to a fine of Rs. 5 and Rs. 3 respectively, in default five days' rigorious imprisonment under each section.

" It is clearly admitted by the witnesses for the complainant that the accused is a *malik* of patta No. 12 : his title to the land is substantiated infinitely better than that of the complainant himself for we find that the complainant's name is not in either patta, he admits the absence of his name, he does not know the area of the land in patta No. 12, and he admits that the name of the accused has been entered recently in the survey. As to title and possession, therefore, the accused has a good case. Witnesses, as is admitted by the Magistrate, are largely partisan witnesses. The complainant's witnesses do not hesitate to allege against the documents that the complainant is a *malik* in plot No. 12 and they say that the complainant pays revenue through his cousin (which the complainant does not say) : some of them try to make out that there has been a sort of amicable partition between the co-sharers but of this the evidence is extremely unconvincing and no such partition will bring in a person who is not a *malik*, the complainant himself says nothing about any such amicable partition—P. W. 4, who is a co-sharer, never saw any such partition : P. W. 3, who also is a co-sharer, says nothing about any partition : there is absolutely no evidence of any such partition : except the statement of co-sharer P. W. 2 " our shares are all marked."

" As to the land of patta No. 15 the evidence is even worse : the title of the complainant is hinted at in defiance of the documents, but as to his possession there is no evidence whatever.

" The only witnesses in the case are (*i*) 3 co-sharers who come to try to establish complainant's title to the land of patta No. 12 and fail to show his possession, (*ii*) the complainant himself and (*iii*) his son, P. W. 5.

" There are thus flaws fatal to both charges. In the theft charge we have (*i*) no proof of title, (*ii*) no proof of possession by the complainant, (*iii*) title proved with the accused as co-sharer, (*iv*) no evidence to establish any sort of possession adverse to his, (*v*) complete want of any indication of dishonest intention.

" In the trespass charge we have (*i*) absolutely no evidence that the property in question was in the possession of the complainant. The weight of evidence is in fact against the claim of the complainant.

" I therefore refer the case to the Hon'ble High Court with the recommendation that both convictions be set aside.

The JUDGMENT OF THE COURT was as follows :—

The complainant Suraj Ali and the accused Arphan Ali are cousins. On the 17th March 1916, Suraj Ali lodged a com-

plaint against Arphan Ali that the latter, along with two others, had, on the 14th March, cut away eight bamboos from his Ilam land and had also filled in a pit made by his sons on another plot of land with a view to catch fish. Suraj Ali was placed on his trial before an Honorary Magistrate and was charged with offences under secs. 379 and 447, I. P. C., namely, first, that he had dishonestly cut and removed eight bamboos from land in patta No. 12 in the possession of Suraj Ali, and, secondly, that he had committed criminal trespass on complainant's land in patta No. 15 with intent to fill in a pit made by his sons. The defence in substance was that the land of patta No. 12 belonged to the accused and was in his possession and that he had lawfully taken his own bamboos. He further denied that he had filled in any pit and stated that the land in patta No. 15 was the property of his cousin Abdul Sobhan who was in possession thereof. The Honorary Magistrate has convicted the accused and has sentenced him to pay a fine of Rs. 5 and Rs. 3 under secs. 379 and 447 respectively, in default to suffer rigorous imprisonment for five days under each section. The Sessions Judge has recommended that the conviction and sentence be set aside, as the elements necessary for a conviction for theft and criminal trespass have not been established. We are of opinion that the view taken by the Sessions Judge is correct.

To sustain a conviction under sec. 379, it is necessary to prove a dishonest intention to take property out of the possession of another person. Consequently, where property is removed in the assertion of a *bonâ fide* claim of right, the removal does not constitute theft. The claim of right must be an honest one, though it may be unfounded in law or in fact. If the claim is not made in good faith, but is a mere colourable pretence to obtain or to keep possession, it avails not as a defence. In the present case, the accused admits that he did cut the bamboos, but he maintains that the bamboo clump is his property and is in his possession. Now, even the witnesses for the complainant admit that the accused is proprietor of the land in patta No. 12. The name of the accused is in the patta, while the name of the complainant is not to be found there. No reason is assigned for the absence of his name, should he really be a co-sharer. He admits that he does not know the area of the land included in patta No. 12. His witnesses seek to establish that he pays revenue through his cousin the accused, but he himself does not venture to assert this. Then, again, while some of the witnesses seek to make out an amicable partition between the co-sharers, the complainant does not make any such allegation. The evidence of exclusive possession by the complainant of the bamboo clump, is, as the Sessions Judge rightly observes, extremely unconvincing, while the proof of his alleged title is even more shadowy. Consequently, even if we do not hold that the accused has established his title and possession, there is no room for controversy that this is a case of *bonâ fide* dispute as to title and possession, and the accused cannot be held to have dishonestly cut and removed the bamboos. The principle applicable in circumstances like these is well settled and is stated in works of high authority. Sir Mathew Hale in his Pleas of the Crown (Vol. I, pp. 506, 509) observes in his quaint style, "it is the mind that makes the taking of another's goods to be a felony or a bare trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and though these

circumstances are various and may sometimes deceive, yet regularly and ordinarily these circumstances following direct in this case. If A, thinking he hath a title to the horse of B, seizeth it as his own, or supposing that B holds of him, distrains the horse of B, without cause, this regularly makes it no felony, but a trespass, because there is a pretence of title; but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it." To the same effect is Sir Edward Hyde East in his Pleas of the Crown (Vol. II, p. 659); "in any case, if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the Court will direct an acquittal; for it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy." Hawkins puts the matter in much the same way in his Pleas of the Crown (Vol. I, Book I, Ch. 19, sec. 12). See also *R.* v. *Hall* (1), *R.* v. *Wade* (2), *R.* v. *Jenner* (3), *R.* v. *Leppard* (4). The same principle has been recognised and applied in a long line of cases in Indian Courts [*Kheter Nath* v. *Indro Jelia* (5), *Hari* v. *Emperor* (6) and *Algara Swami* v. *Emperor* (7)], which show that a conviction for theft cannot be sustained if there is a *bonâ fide* assertion of a claim of right, but a mere assertion of a claim does not oust the jurisdiction of the Criminal Court; whether the claim is honest must be decided by the Court from all the circumstances of the case, and, as has been said, it should not convict unless it is in a position to say that the claim is a mere pretence [*Nassib Choudhry* v. *Nanoo Choudhry* (8), *Runno Singh* v. *Kali Churn* (9), *Huris* v. *Bolai* (10), *Re Madhab Hari* v. *Empress* (11), *Pandita* v. *Radhimullah* (12), *Empress of India* v. *Budh Singh* (13) and *Sabal Sang* v. *Emperor* (14)]. In the case before us, we agree with the Sessions Judge that there is a complete absence of any indication of dishonest intention and that, consequently, the conviction under sec. 379 cannot be supported.

As regards the conviction under sec. 447, there is really no evidence that the complainant is in possession of the lands of patta No. 15, while the evidence as to his title is still more illusory than in the case of patta No. 12. On the other hand, there is reliable evidence that Abdul Sobhan holds possession of the land of patta No. 15 and pays revenue for it. In these circumstances, it is impossible to hold that the accused entered into any land in the possession of the complainant with intent to commit an offence or to annoy the person in possession thereof [*Booth Singh* v. *Queen* (13) and *Re Shistidhar Purni* (15)]. The conviction under sec. 447 cannot accordingly be sustained.

We accept the recommendation of the Sessions Judge, set aside the conviction and sentence and direct that the fine, if paid, be refunded.

S. C. M. *Conviction set aside.*

(1) 3 C. & P. 409 (1828).
(2) 11 Cox C. C. 549.
(3) 7 L. J. (O. S.) M. C. 79.
(4) 4 F. & F. 51 (1864).
(5) 16 W. R. Cr. 78 (1871).
(6) 9 C. W. N. 974 (1905).
(7) I. L. R. 28 Mad. 304 (1904).
(8) 15 W. R. Cr. 47 (1871).
(9) 16 W. R. Cr. 18 (1871).
(10) 16 W. R. Cr. 65 (1871).
(11) I. L. R. 15 Cal. 390 (n) (1887).
(12) I. L. R. 27 Cal. 501 : s. c. 4 C. W. N. 480 (1900).
(13) I. L. R. 2 All. 101 (1879).
(14) 4 Bom. L. R. 936 (1902).
(15) 9 B. L. R. App. 19 (1872).

PATNA HIGH COURT.
[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE ORDER
No. 1468 of 1915.

CHAMIER, C. J.
SHARFUDDIN, J.
1916,
28, June.

SAHDEO LAL BHAGAT and ors., Plaintiffs, Appellants,
v.
KESHO MOHAN THAKUR and ors., Defendants, Respondents.

Plaintiff's title and previous possession, suit to establish, whether suit for mere declaration—Maintainability—Whether catching fish in a streamlet amounts to dispossession.

Where the Plaintiffs in a suit establish their title to a village and also that they have been in possession of it and of a streamlet which lies within it, but that the Plaintiffs' possession has been disturbed inasmuch as the Defendants' people have caught fish in it,

Held—*That under such circumstances the Plaintiffs' suit for a mere declaration is maintainable.*

Even if the Defendants are found to have granted the right to catch fish in the streamlet to other persons not parties to the suit, that act would not amount even to disturbance of possession still less to dispossession nor would the fact that some persons have at times caught fish in the streamlet shew that the Plaintiffs have been dispossessed. At most the catching of fish in the streamlet would be a disturbance of possession.

This was a second appeal against the decision of Maulvie Mirza Bedar Bukht, Additional Subordinate Judge of Bhagalpur, dated the 23rd March 1915, affirming the decision of Babu Kawla Prasad, Munsif of Banka, dated 20th August 1914.

The facts out of which this appeal arose were shortly as follows :—

Between two villages, named Pararia and Kasba flowed a small streamlet called the Kalia. The Plaintiffs were the proprietors of the village Pararia and the Defendants, 2nd party, the proprietors of Kasba. The object of the Plaintiffs' suit was to obtain a declaration that so much of the streamlet as lay on the eastern boundary of Pararia was within and formed part of that village. They further alleged that the Defendants were claiming that the streamlet lay within the boundaries of the village Kasba and that the streamlet had been erroneously shewn in the survey map as lying within the village Kasba. The Defendants alleged that the disputed portion of the streamlet lay entirely within the village Kasba and that the proprietors of Pararia had not been in possession of it within 12 years of the suit. The primary Court found that the portion of the streamlet in dispute lay within Pararia but that the possession of the Plaintiffs had been disturbed because some persons acting under or on behalf of the Defendants had taken fish from the streamlet. That Court dismissed the suit on the ground that the Plaintiffs were not entitled to mere declaration but that they should have claimed further relief. The lower Appellate Court on appeal dismissed the Plaintiffs' appeal. Thereupon the Plaintiffs preferred this second appeal.

Mr. Noresh Chandra Sinha for the Appellants.

Mr. Lal Mohan Ganguli for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHAMIER, C. J.—The Plaintiffs and Defendants, second party, are the proprietors of a village called Pararia. Defendants second party are the proprietors of a village called Kasba. Between these two villages there flows a small streamlet

which is called the Kalia. The object of this suit was to obtain a declaration that so much of the streamlet as lies on the eastern boundary of Pararia is within and forms part of that village. The Plaintiffs alleged that the lands of Pararia have always been irrigated with water obtained from the Kalia. They further alleged that in or about 1320 Fasil the Defendants first party wished to take water from the streamlet but the Appellants refused to allow them to do so. At that time Defendants first party alleged that the streamlet lay within the boundaries of the village Kasba and the Plaintiffs then discovered that the streamlet had been shown in the survey map as lying within the village of Kasba. Defendants first party denied all the material allegations of the Plaintiffs. They said that the portion of the streamlet in dispute lay entirely within the village Kasba and that the proprietors of Pararia had not been in possession of it within 12 years of the suit. They also denied that the water of that portion of the streamlet had ever been used for irrigating the lands of Pararia. The Munsif struck nine issues. On the 7th issue he found that the disputed portion of the streamlet lay within Pararia but he also found that the possession of the Plaintiffs had been disturbed because some persons acting under or on behalf of some of the Defendants had taken fish from the streamlet. He dismissed the suit on the ground that the Plaintiffs might and ought to have claimed further relief and were not entitled to a mere declaration. On appeal the Additional Subordinate Judge dismissed the suit on the ground that the Plaintiffs' possession had been disturbed in the manner above mentioned, therefore they could not sue for a declaration only. He did not even record a finding that the Plaintiffs had established their possession or their title. He apparently assumed these two points in their favour but dismissed the suit on the ground that a claim for mere declaration was not maintainable even if the Palintiffs had established title and previous possession. We must dispose of this case on the assumption that Plaintiffs have proved their title to Pararia and also that they were previously in possession of Pararia and of the streamlet. The question is whether the proved fact that some persons have taken fish from the streamlet shews that the Plaintiffs have been dispossessed and are therefore not entitled to sue for a mere declaration of title. All that the Additional Subordinate Judge says on the question of dispossession is "There can be no doubt that the Plaintiffs' possession has been disturbed, that is to say the Defendants' people have caught fish in the disputed portion of the river." The Munsif went into the matter somewhat more fully and it would appear from his judgment that the Defendants first party on two occasions granted the right to catch fish in the streamlet to other persons not parties to the suit. Defendants first party may have attempted to confer on other persons the right to catch fish in the streamlet. Such an act would not amount even to disturbance of possession still less to dispossession, nor in my opinion does the fact that some persons have at times caught fish in the streamlet shew that the Plaintiffs have been dispossessed. At most the catching of fish in the streamlet would be a disturbance of possession. From the findings it would appear that the disturbance was only temporary. In my opinion the Courts below were wrong in finding that a suit for declaration could not be maintained merely because some per-

sons not before the Court had caught fish in the streamlet. I would allow this appeal, set aside the decree of the lower Appellate Court and remand the case to that Court to be restored to the pending file and disposed of in accordance with law. The costs of this appeal will be costs in the cause.

SHARFUDDIN, J.—I concur.

A. K. R. *Appeal allowed.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 469 OF 1914.

ATKINSON, J.
JWALA PRASAD, J.
1916, 14, June.

MUKUNDA LAL CHAKRAVARTI, Plaintiff, Appellant,
v.
JOGESH CHANDRA CHAKRAVARTI and ors., Defendants, Respondents.

Partition suit—Omission by Plaintiff to put in some properties in the list of joint properties in the plaint—Dismissal of suit—Power of amendment of plaint by the first Court as also by the Appellate Court—Civil Procedure Code (Act V of 1908), sec. 153, Or. 6, r. 17.

Per JWALA PRASAD, J.—*In a suit for partition of joint family property by a Hindu all the properties must be included in the action, and the reason for this proposition is to save the parties from multiplicity of proceedings. If by inadvertence, mistake or fraud of any of the parties, some of the joint properties are not partitioned in the original suit, there will be no bar after the partition to have the properties, excluded at the first partition, divided when the mistake or fraud is discovered.*

JOGENDRA NATH MUKHERJI *v.* JUGOBUNDHU MUKHERJI (1) *and* JOGENDRA NATH *v.* BALADEO DAS (2) *referred to.*

Or. VI, r. 17, enables the Court to allow either party to alter or amend his pleadings at any stage on such terms as may be just. Sec. 153, C. P. C., empowers the Court to make itself all necessary amendments for the purpose of determining the real questions or issues raised in the action. This power is vested both in the original as well as in the appellate Court.

SRIMOHAN THAKUR *v.* MACGREGOR (3) *approved.*

Per ATKINSON, J.—*To avoid multiplicity of suits the law has endowed all Courts in all countries with just and most ample powers of amendment. The widest power of amendment is given not only to the primary Court but to the High Court, which enables the Court to try all matters properly in dispute between the parties.*

This was a first appeal against the decree of Babu Satish Chandra Mitra, Additional Subordinate Judge of Manbhum, dated the 27th July 1914.

The facts and arguments appear sufficiently from the judgment of the Hon'ble Mr. Justice Jwala Prasad.

Mr. Lal Mohan Ganguli for the Appellant.

Messrs. Naresh Chandra Sinha and *Gour Chandra Pal* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

JWALA PRASAD, J.—This appeal arises out of a suit for partition of movable and immovable property alleged to belong jointly to the Plaintiff and the Defendants. The Plaintiff is the uncle of the Defendants. The property sought to be partitioned consists of a number of mov-

(1) I. L. R. 14 Cal. 122 (1886).
(2) I. L. R. 35 Cal. 961 : s c. 12 C. W. N. 127 (1907).
(3) I. L. R. 28 Cal. 769 (1901).

THE

Calcutta Weekly Notes.

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Calcutta High Court.

(CIVIL REVISIONAL.)

Baburam Roy and ors. v. Saday Ghochat and ors. *Provincial Small Cause Courts Amending Act—Cl. (2), Art. 35 of the Second Schedule—Suit for recovery of money due as compensation for cutting and removal of crops, if cognizable by Provincial Small Cause Courts* ccxvi

REPORTS (*See* Index).

High Court Notice.

ORIGINAL SIDE.

The undermentioned principal officers will be on duty during the Long Vacation.

Such urgent Chamber applications as can be disposed of by the Registrar or Master will be heard by the Master on the following specified days in September, *viz.*:—Monday the 4th, Wednesday the 6th, Friday the 8th, Monday the 11th, Wednesday the 13th, and Friday the 15th, after which urgent Chamber applications will be taken by special appointment only,—

(*a*) by the Registrar between 16th September and 31st October, and

(*b*) by the Registrar in Insolvency between 1st November and 14th November.

The Hon'ble Mr. Justice Chaudhuri will hear applications of a specially urgent nature on Monday the 4th September at 11 o'clock, otherwise His Lordship will sit only by appointment, applications for which should be made in writing to the officer on duty. No other applications will be taken.

The officers on duty are as follows:—

From 4th September to 24th September.	MR. C. RYPER, 93, Park Street; him failing, Mr. S. N. Roy, 140, Cornwallis Street; him failing, Mr. N. C. Mukerjee, Bally P. O.
From 25th September to 30th September.	MR. S. C. MITTER, Hurrish Chunder Mukerjee Road; him failing, Mr. S. N. Roy; him failing, Mr. N. C. Mukerjee.
From 1st October to 4th November.	MR. S. N. ROY, him failing between 1st and 12th October, Mr. N. C. Mukerjee.
From 5th November to 14th November.	MR. C. C. DAS, 13, Duff Street.

HIGH COURT, O. S.,
The 28th August 1916.

(Sd.) MAURICE REMFRY,
for Registrar.

Admission of women to practise law.

The Calcutta High Court has decided the application of *Miss Regina Guha* to be admitted as a pleader in a mofussil (Alipur) Court in the same way as the Judges of the High Court and the Appeal Court in England did in the case of *Miss Marjorie Bebb*, who applied for admission into the profession of Solicitors in England (18 C. W. N. xliii). In the present instance it was contended as in the *Bebb* case that the term "person" included women and further that according to the General Clauses Act the terms "he" and "she" are interchangeable in the interpretation of statutes unless there was anything repugnant in the subject or context. In order to test the soundness of the argument, as the Court of Appeal in England said, "all that the Court had to consider was whether at the date of the Act women were under a disability" (18 C. W. N. xliv).

The learned Chief Justice (Sir Lancelot Sanderson) in delivering the judgment reviewed the earlier Regulations providing for the enrolment of pleaders and vakils and the scope of Act XX of 1865 by which they were finally repealed and came to the conclusion that the Legislature contemplated the admission of male persons only as pleaders. The Legal Practitioners Act was passed in 1879 and it repealed Act XX of 1865. But it did not purport to make any departure in this respect. The disability that existed before so far as women are concerned was continued. The other Judges constituting the Special Bench before which the matter was argued agreed with his Lordship the Chief Justice, Mookerjee and Chitty, JJ., delivering separate judgments. The Judges in England had said that if any such departure was intended, it should be done by express legislation.

Casement Trial—Right of third counsel to follow.

There were some questions of practice raised in the trial of Casement for treason before the

High Court of Justice in England which are of interest to the profession. Mr. Sergeant Sullivan, K. C., of the Irish Bar appeared as the leading counsel for the accused. Mr. Sullivan is also an English Barrister and no question arose as to his right to appear. We presume he appeared in his stuff gown and not in silk. Mr. Artimus Jones and Prof. J. H. Morgan also appeared with him as his juniors. Mr. W. F. Doyle, a member of the Bar in the United States, who came over to England to assist counsel for Casement, attended all through the trial but was given a seat at the solicitors' table. Mr. Sullivan in the course of his address which was as remarkable for its learning as for its eloquence and fearlessness broke down before he had finished it. The Judges congratulated him for having delivered an address which was according to the best traditions of the Bar and particularly for his independence in saying all that could possibly be said for his client. An interesting point of practice arose when Mr. Sullivan on the day following his break-down could not continue his address and asked the leave of the Court to allow Prof. Morgan to continue the legal argument. The Lord Chief Justice thereupon said that, as Mr. Morgan was third counsel, it seemed that he could only be heard as *amicus curiæ*. The Court, however, reserved the question whether he had the right to address them and for the time being allowed him to follow and heard him as *amicus curiæ*.

Civil Court Commissioners for survey.

We published some letters in these columns sometime ago on the proposal of the Local Government to replace the Pleader Commissioners for survey work in connection with civil suits in the mofussil by Sub-Deputy Collectors specially trained for the purpose. The scheme as proposed by Government is as given below. So far as we are aware nothing definite has been done yet, and before the scheme can be put into operation, it will have to be sanctioned by the High Court.

"The question of the improvement of the existing system of executing surveying commissions has recently engaged the attention of Government. The High Court, who have been consulted in the matter, recognise the inefficiency of the present agency of Pleader-Commissioners, and have recommended the creation of a service of men specially trained in surveying whose time should chiefly be devoted to the work in Civil Courts. The Governor in Council agrees in this view. It is accordingly proposed to draw up a scheme for the approval of the High Court, entrusting the work to a staff of Sub-Deputy Collectors who have received a training in surveying. One or more Sub-Deputy Collectors would be attached to each Judgeship or to a group of Judgeships, if the work in a single Judgeship was not sufficient. The Civil Courts would send survey commissions to the Collector for execution in the same way as they send enquiries regarding the prevailing rates of rent under sec: 31 of the Bengal Tenancy Act. The Collector would then make over the commission to the Sub-Deputy Collector, who would either carry out the survey himself, or have it carried out by a subordinate staff under his supervision. In either case, the Sub-Deputy Collector would be held responsible for the work. The Sub-Deputy Collectors, in their spare time, if any, would do ordinary revenue work.

"Before proceeding further with the scheme, it is necessary to have an estimate of the establishment that will be required. It has been calculated that a Sub-Deputy Collector could carry out in a year from 50 to 75 commissions involving considerable areas, and a larger number if the areas concerned were small; but this estimate is very rough and needs to be tested with reference to local conditions. For instance, there are considerable areas in this Presidency where no survey work can be done in the rains. I am now to request than an estimate of the number of Sub-Deputy Collectors with subordinate staff that would be necessary in your district for the working of the scheme may be prepared and submitted for the information of Government. If the work in your district would not be sufficient to occupy a Sub-Deputy Collector for a considerable part of the year, you should communicate with the Judges of neighbouring districts and consider whether a joint establishment for two or more Judgeships would be advisable."

CURRENT INDIAN CASES.

(CRIMINAL.)

Indian Penal Code, sec. 498—Criminal Procedure Code, complaint.

EMPEROR *v.* BHAWANI DAT, I. L. R. 38 All. 276.

In a case under sec. 366, I. P. C., the husband was not the complainant but appeared as a witness while the case was proceeding. In the interim he had asked that the proceed-

ing under sec. 366, should be dropped but when examined by the Magistrate he explained that his action was due to deception and that he wished to prosecute the accused.

Held—That the statement of the husband in the deposition was a complaint within the meaning of sec. 4 (*h*), Cr. P. C., and a conviction under sec. 498 on such statement was legal.

Indian Penal Code, sec. 228—Intentional insult to Court.

EMPEROR *v.* MURLI DHAR, I. L. R. 38 All. 284.

An accused in a case under sec. 107, Cr. P. C., filed a petition before a Magistrate applying for adjournment to enable him to get a transfer of the case on the ground that the persons who had caused the proceedings to be instituted was intimate with the Magistrate. For this he was convicted under sec. 228, I. P. C.

Held—That the conviction was not sustainable.

Criminal Procedure Code, sec. 239—Trial of thief and receiver.

EMPEROR *v.* BHIMA, I. L. R. 38 All. 311.

Unless the act of guilty receipt is clearly separated from the act of theft the receiver and the thief may be jointly tried.

(CIVIL.)

Civil Procedure Code.

NIHAL SINGH *v.* KHUSHEL SING, I. L. R. 38 All. 297.

Under Or. XLIII, r. 1, cl. (*d*), C. P. C., an appeal lies against an order rejecting an application for an order to set aside a decree passed *ex parte* in a case open to appeal.

Trust.

DWARKADAS DAMODAR *v.* DWARKADAS SHAWOJI, I. L. R. 40 Bom. 341.

Under sec. 83 of the Indian Trusts Act where a trust is incapable of being executed or where the trust is completely executed without exhausting the trust property the trustee in the absence of a direction to the contrary must hold the trust property or so much thereof as is unexhausted for the benefit of the author of the trust or his legal representative. In the case of the estate of a deceased intestate for which no administration has been granted the term "legal representative" in sec. 83 of the Trusts Act must in such a case include the person or persons beneficially entitled who represent the interests of the deceased by virtue of inheritance, *i.e.*, the heirs are the legal representatives and they represent the estate of the deceased for the purpose of interests established by way of a resulting trust just as would the executor or administrator.

The representative by inheritance is to be found according to law at the moment of the death of the deceased.

Hindu Law.

GANGABAI PURABHA *v.* BANDU, I. L. R. 40 Bom. 369.

Amongst Sudras as between an illegitimate son and a legitimate daughter, the son takes one-third of the father's estate and the daughter two-thirds.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM JUDICIAL COMMISSIONER OF OUDH]

THE LORD CHANCELLOR.
LORD HALDANE.
LORD SHAW.
LORD ATKINSON.
LORD PARMOOR.
1916,
25, July.

RANEE SUBHADRA KUAR
v.
SHAMBHU PRASAD and another.

Special leave, application for, in a case below appealable value—Affecting property not in suit—Question of principle.

This was an application for special leave to appeal from a decree dated 13th April, 1915, of the Court of the Judicial Commissioner of Oudh. In 1864, the predecessor in title of the Respondents sued the predecessor in title of the Appellant, and that litigation was decided by their Lordships of the Privy Council in 1873 (*vide* Supp. I. A., p. 220 and 4 I. A., p. 198). Their Lordships decreed to the under-proprietor against the taluqdar a one-third share of the profits in seven villages, including Sessendi; such share to be ascertained and paid when the annual accounts are made up and that the under-proprietor was further entitled to have a sub-settlement on the terms of paying the Government demand or revenue plus 10 per cent. In 1868, the Government made a permanent settlement with the said taluqdar by way of reward for his loyal services and the amount of permanent revenue was fixed at the settlement jama, less 10 per cent. At the settlement, the revenue of Sessendi had been

assessed at Rs. 2,300. During the currency of the first settlement the accounting which took place between the Appellant and the Respondent was made in this way, *viz.*, that out of the profits ascertained after deducting the permanent revenue from the gross rental, Rs. 230 were allowed to the Appellant taluqdar and the balance was divided in the proportion of one-third and two-thirds amongst them. At the recent settlement the revenue for Sessendi was assessed at Rs. 3,100. The Respondents claimed their share of the profits of Sessendi allowing to the taluqdar a deduction of Rs. 230 only as before. The Appellant on the other hand contended that she was entitled to deduct from the gross income a further sum of Rs. 800. The Assistant Collector, the District Judge, and the Court of the Judicial Commissioner all held against the Appellant. The Appellant then applied to the Judicial Commissioners for leave to appeal but that was refused on the ground that the value of the proposed appeal was considerably below Rs. 10,000, and that it did not satisfy the requirements of the law. Hence this petition.

Messrs. L. DeGruyther, K. C. and *Bhugwandin Dubé* for the Petitioner submitted that a substantial question of principle was raised on the appeal, and that the appeal affected a number of other villages of the taluqdar.. The appeal indirectly affected property of the value of more than Rs. 10,000 and raised a question of general public importance in the province of Oudh. The benefit of the permanent settlement was bestowed upon the taluqdar alone and the Respondents were not entitled to get a share in that reward which they did on the principles of accounting declared by the Courts below. Their Lordships rejected the petition.

Messrs. T. L. Wilson & Co., Solicitors, for the Petitioner.

B. D.

Leave refused.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important ones to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before FLETCHER and TEUNON, JJ. CIVIL RULE No. 398 OF 1916. BABURAM ROY AND ORS., Petitioners *v.* SADAY GHOCHAT AND ORS., Opposite Party. 14th July 1916.

Provincial Small Cause Courts Amending Act (VI of 1914)—Cl. (2), Art. 35 of the Second Schedule—Suit for recovery of money due as compensation for cutting and removal of crops, if cognizable by Provincial Small Cause Courts.

On the 6th December 1915, one Hridoy Maiti (a witness on behalf of the Plaintiffs, opposite party, in this Rule) brought a complaint against the first two of the petitioners before the learned Sub-divisional Officer of Ghatal for cutting away paddy from a plot of land and forcibly removing it on the 5th December 1915. The learned Sub-divisional Magistrate dismissed the complaint under sec. 203, Cr. P. C., holding that the paddy was not grown by the above complainant and further held "the circumstances go to shew that this so-called tenant was out of possession all the time." Subsequently on the 17th February 1916 the Plaintiffs Hridoy Ghochat and Saday Ghochat, two brothers and near relations and neighbours of the above-mentioned Complainant Hridoy Maity, brought a suit before the Munsif of Ghatal, exercising Small Cause Court powers, for recovery of Rs. 37-12 annas due as compensation for the paddy cut and taken away by the Defendants-Petitioners. The learned Small Cause Court Judge held that "the Defendants without any right cut and took away the disputed crops. The Defendants are liable to compensate the Plaintiff No. 1 for taking away the crops grown by Plaintiff No. 1" and the suit of Plaintiff No. 1 was decreed for Rs. 37-12 annas.

Against the decision of the learned Small Cause Court Judge the Defendants moved the High Court and obtained the present Rule on the ground "that suits of the nature as brought by the Plaintiffs had been excluded from the cognizance of the Court of Small Causes by the Amending Act (Act VI of 1914) and by Art. 35, cl. (*ii*), of the Second Schedule of the Provincial Small Cause Courts Act, and the Court below had no jurisdiction to try the suit."

Held, that the Small Cause Court Judge had no jurisdiction to try the suit as suits of this nature had been excluded from the cognizance of the Court of Small Causes.

Their Lordships made the Rule absolute and set aside the decree of the Small Cause Court Judge.

Babu Hit Lal Guha for the Petitioners.

Babu Amarendra Nath Bose for the Opposite Party.

H. C. S. *Rule made absolute.*

able and immovable properties, the details of which are set forth in the schedules attached to the plaint. The Defendants in their written statement took objection to the suit being maintained in the present form, inasmuch as all the joint properties of the family were not included in the schedule attached to the plaint. The Defendants at that stage did not disclose the names or the nature of the properties said to have been omitted by the Plaintiff. Apart from this objection the Defendants also claim that most of the properties included in the schedule to the plaint were the self-acquired properties of their father, and that the Plaintiff had no right to have the said properties partitioned. The learned Subordinate Judge in the Court below upon the pleadings of the parties framed the following issues for its determination :—

No. 1.—Is the suit maintainable in its present form?

No. 2.—Did the Plaintiff and the Defendants live in joint mess, and are the properties described in the plaint joint properties of the parties?

No. 3.—To what relief, if any, is the Plaintiff entitled?

After evidence was given by the parties, the Court, by its judgment dated the 27th July 1914, dismissed the suit, solely upon the ground that the Plaintiff had omitted five properties, two of which were immovable and three movable, from the list of joint properties attached to the plaint for partition. The learned Additional Subordinate Judge did not, however, try the other issues, Nos. 2 and 3. The Plaintiff has appealed and seeks to have the order of the Subordinate Judge reversed and also asks to be permitted to amend his plaint in such a manner as to include the properties that were omitted from the plaint originally, and which were found by the learned Subordinate Judge to be the joint property of the family, and to allow the original suit to proceed to final determination.

The learned Subordinate Judge was of opinion that the action brought by the Plaintiff was not maintainable by reason of the omission of the specified properties from the suit and that as a consequence the suit must necessarily be dismissed; and that the Plaintiff must institute a fresh suit including all the joint family property, if he desires to proceed and enforce a partition of the joint property. The learned Subordinate Judge relied upon the rulings quoted in the cases of *Jogendra Nath Mukherji* v. *Jugobundhu Mukherji* (1) and *Jogendra Nath* v. *Baladeo Das* (2), in support of his decision. It is true that in a suit for partition of joint family property by a Hindu, all the properties must be included in the action, and the reason for this proposition is, to save the parties from multiplicity of proceedings. On the other hand, if by inadvertence, mistake or fraud of any of the parties, some of the joint properties are not partitioned by the institution of the original suit, there will be no bar after the partition to have the properties, excluded at the first partition, divided when the mistake or fraud is discovered. All that is required in a suit for partition is that all the properties that are known to be joint family properties at the time the suit for partition is instituted, must be included in the action for partition. But the question here is, whether or not the suit should have been dismissed, or the Court should have allowed the amendment of the plaint, *suo motu* or at the

(1) I. L. R. 14 Cal. 122 (1886).
(2) I. L. R. 35 Cal. 961 : s. c. 12 C. W. N. 127 (1907).

instance of the parties, so that the partition might be effected in this action; and that the Plaintiff should not be forced unnecessarily to bring another action for the same relief, and thus to cause the same evidence, if not more, to be given at the second hearing, and delay the separate enjoyment of the properties by the parties according to their shares. In a case like the present one it was, I think, the obvious duty of the Court to have allowed the amendment of the plaint and as amended to allow the action to proceed, including all the properties that were found to be joint family properties. Such power of amendment is vested in the Court by the provisions of sec. 153 of the Code of Civil Procedure, coupled with Or. VI, r. 17. The latter rule enables the Court to allow either party to alter or amend his pleadings, at any stage, on such terms as may be just, whereas sec. 153 empowers the Court to make itself all necessary amendments for the purpose of determining the real questions or issues raised in the action. This power is vested both in the original as well as in the appellate Court. This view was taken in the case of *Srimohan Thakur* v. *MacGregor* (3). I entirely concur with the view taken in that case, and I think that the learned Subordinate Judge should have allowed the amendment and proceeded to try the other issues in the case. It is not denied by the learned Vakil for the Respondent that the Court had power to amend the plaint and that it would not have been improper to have done so in this case. His only objection to the amendment of the plaint is, that the Respondent will be very much prejudiced at this stage, when all the evidence has been given. Whereas, if the suit is dismissed and a fresh suit is brought, he would be in a better position, for then he would be able to adduce fresh or additional evidence. I do not think that there is any substance in the contention of the learned Vakil for the Respondent, or in the grievance that he complains of. The lower Court has only tried issue No. 1, and has dismissed the suit on the preliminary ground. The trial of the other issues on the case being remanded will proceed and the Defendants will certainly be able to make any submission as regards those issues that they consider proper. We think, therefore, that the decree of the Subordinate Judge, as it stands, must be set aside and the case remanded to the lower Court to try the issues that were left by it undetermined, and to commence the inquiry at the stage at which it terminated by the order of the 27th of July 1914 on the plaint as amended, by the inclusion of the five denominations of properties that have been found by the learned Court below to be joint family properties.

Now, it remains to consider the terms upon which this order of remand must be made. It was entirely the fault of the Plaintiff not having included all the properties in the suit for partition. The Defendant-Respondent was put to great expense and inconvenience in the lower Court in having to prove that the properties omitted from the plaint were joint properties, and, I think, that he is entitled to costs for all the trouble and expense he had to incur on account of his having to prove that the properties were joint. We assess these costs in the lower Court at a sum of Rs. 100. He is further entitled to the costs of this appeal, which again will be assessed at another Rs. 100. The order of the Subordinate Judge is set aside, and the case remanded, on condition that the Plaintiff-Appellant

(3) I. L. R. 28 Cal. 769 (1901).

pays to the Defendant-Respondent the sum of Rs. 200 as costs, both in the lower Court and of this appeal.

ATKINSON, J.—I agree in the main with the views expressed by my learned brother. I only want to say one word on the legal aspect of the case. The learned Judge decided this case on the basis, that if a Plaintiff in an action for partition of joint Hindu properties omits to include any item of the joint property in his list or in his schedule to his plaint, that then, *per se*, the action must be dismissed, and that no right of amendment exists, either in the primary Court or in this Court, which would enable the error to be corrected and the action proceeded with in the ordinary way, and he relies upon the case reported in *Jogendra Nath Mukherji* v. *Jugobundhu Mukherji* (1), in support of that view. In my opinion the widest power of amendment is given not only to the primary Court but to this Court, which enables the Court to try all matters properly in dispute between the parties. I think it would be a manifest injustice if the power of amendment did not exist in a case such as the present one. No doubt, the Plaintiff must make compensation for the error. To avoid multiplicity of suits the law has endowed all Courts in all countries with just and most ample powers of amendment, and in my opinion this case is one in which the power of amendment should have been exercised by the learned Judge. In this view we are fortified by the decisions which have been cited, and by the admission made by the learned Vakil for the Respondent on appeal, to the effect that he did not dispute that the right of amendment existed, not only in the lower Court, but also in this Court.

Accordingly we shall remit this case, subject to the amendment that the Plaintiff be allowed to include in his schedule to the plaint of the joint properties the five denominations of properties omitted therefrom, as found by the Judge. The case will be remanded and will proceed before the learned Judge as if he had proceeded with the trial on the 27th of July. I agree with my learned brother as to the question of costs.

Should any other property be discovered to be joint, the Court will be at liberty to include it in the plaint for partition.

A. K. R. *Appeal allowed.*

(1) I. L. R. 14 Cal. 122 (1886).

[PRIVY COUNCIL.]

[APPEAL FROM ALLAHABAD.]

THE LORD CHANCELLOR. LORD ATKINSON. SIR JOHN EDGE. 1916, 26, June.	MUSAMMAT RADHA KUNWAR, Appellant, *v.* THAKUR REOTI SINGH, Respondent.

Mortgage-suit—Joinder of party claiming adversely to mortgagor, irregular—Claim of person so joined, dismissed—Appeal by claimant to Privy Council—Subject-matter of appeal, if mortgage-debt or property claimed—Appealable value—Civil Procedure Code (Act V of 1908), sec. 110.

In a suit by a mortgagee to enforce his mortgage, it is irregular to join as parties persons who set up adverse claims to the mortgaged property.

Where in a mortgage suit a person who claimed a certain share in the mortgaged property as against the mortgagor under a title adverse to his, was made a party Defendant, and her claim was allowed in part by the trial Court, but wholly disallowed by the High Court, and she sought to appeal from that decree to His Majesty in Council:

Held—*That the subject-matter of the appeal was the property which she was*

claiming and its value was the value of that property and not the value of the mortgage debt.

This was an appeal from a judgment and decree, dated the 12th March 1912, of the High Court of Judicature for the North-Western Provinces (Griffin and Chamier, JJ.), Allahabad, which partly affirmed and partly reversed a judgment and decree, dated the 8th June 1910, of the Subordinate Judge of Aligarh.

The facts of the case shortly stated were as follows :—

On the 7th July 1884, one Musammat Mahtab Kunwar executed a mortgage in favour of the Plaintiff's mother, Musammat Sobha Kunwar, since deceased, hypothecating therein a ten-biswa and odd share in mauza Mubarakpur.

On the 20th November 1909, the present suit for sale of the mortgaged property was instituted in the Court of the Subordinate Judge of Aligarh. In his plaint the Plaintiff stated that the said Hukum Singh had executed a bond (31st January 1898) in favour of the present Appellant, hypothecating a portion of the mortgaged property to her without any right or title to that property.

The said mortgagor, Musammat Mahtab Kunwar, and the said Hukum Singh and the present Appellant, among other persons, were made Defendants to the suit, but the present Appellant and Hukum Singh alone contested the suit and filed separate written statements. The only plea, now material, raised in defence was that Hukum Singh and not the mortgagor was owner of a four-biswa share of the village.

The said Subordinate Judge delivered judgment on the 8th June 1910. He found that the said mortgagor, Musammat Mahtab Kunwar, executed the mortgage in suit for consideration and for legal necessity. He also held that the said mortgagor absolutely owned and possessed five biswas odd share in the said village, but he held that a moiety of the remaining mortgaged property, *viz.*, four-biswa odd share did not belong to the mortgagor or her husband, Bhim Singh. In his opinion it belonged to Durjan Singh, the father of Hukum Singh aforesaid.

The result was that the said Subordinate Judge allowed the Plaintiff's claim with costs, and made a decree directing the sale of the mortgaged property, excepting " one-half of four biswas and eighteen and odd biswansis."

Against the said decree both parties appealed to the High Court. Both appeals were heard together and the said High Court delivered one judgment on the 12th March 1912. The learned Judges of the High Court dismissed the Defendant's appeal and allowed that of the Plaintiff.

In the result the said High Court made a decree allowing the Plaintiff's claim, and directing that the *whole* of the mortgaged property should be sold in satisfaction thereof. The Appellant, who was a transferee from Hukum Singh, applied to the High Court for the usual certificate in order to appeal to His Majesty in Council, and that Court (Sir Henry Richards, C. J., and Banerji, J.), granted it by an order in terms following :—

" This is an application for leave to appeal to His Majesty in Council. The value of the subject-matter of the suit in the Court below exceeds Rs. 10,000. This Court reversed the decision of the lower Appellate Court; and therefore if the value of the subject-matter of the proposed appeal exceeds Rs. 10,000, the case is one which fulfils the requirements of sec. 110 of the Code of Civil Procedure. It is, however, urged that the value of the

subject-matter of the proposed appeal to His Majesty does not exceed Rs. 10,000, and this contention is based on the following facts. The suit was one to recover Rs. 38,000 and odd by enforcement of a mortgage. A part of the property comprised in the mortgage was exempted from liability under the mortgage by the Court below. An appeal was preferred to this Court, and it was held that the whole of the mortgaged property was liable to sale in enforcement of the mortgage. It is in respect of this part of the decree of this Court that the Applicant seeks to appeal to His Majesty in Council. It is alleged that the value of the property, which by the proposed appeal is sought to be exempted from liability under the mortgage and decree passed on it, is Rs. 2,000 odd, and this amount must be regarded as the value of the subject-matter of the appeal to His Majesty. We do not agree with this contention. The decree imposes on the property a liability for Rs. 38,000 and odd. Therefore the value of the subject-matter of the appeal to His Majesty is a sum exceeding Rs. 10,000, and the case fulfils the requirements of sec. 110. We so certify."

The Respondent took the preliminary objection that the appeal was not maintainable inasmuch as the value of the appeal was less than Rs. 10,000.

Sir William Garth for the Appellant submitted that the value of the subject-matter of the appeal was above Rs. 10,000. The High Court had granted the necessary certificate, notwithstanding Respondent's objections. The suit was to recover Rs. 38,000 and odd, and every bit of the mortgaged property was liable for that amount. There was no evidence upon the record of the value of the property disputed in this appeal, but that was not through any fault of the Appellant. The High Court did not enter into the question of value. The Respondent valued it at Rs. 2,000 odd, but there was nothing to show that that estimate was correct, or that the High Court had accepted it. The High Court's decision as embodied in the certificate, ought to be held final as to the value of the appeal. In any case, the Board ought to give to the Appellant an opportunity of proving that the value of the land in dispute was over Rs. 10,000.

Messrs. L. DeGruyther, K. C., and *Bhugwandin Dubé* for the Respondent, submitted that the value of the subject-matter of the appeal was Rs. 2,000 only. The amount of the mortgage had no relevance to the subject-matter of the appeal. The Appellant, under no conceivable circumstance, was liable to pay Rs. 38,000. The subject-matter of the appeal was simply the property which the Appellant claimed, that is, two biswas. It was apparently not disputed before the High Court, that the value of two biswas was Rs. 2,000, but the reason why the High Court granted the certificate, was that it held (it was submitted erroneously), that the decree imposed upon the property a liability for Rs. 38,000. A certificate which on the face of it, proceeds on a wrong principle, is not conclusive. It must comply with the requirements of the section. *Banarsi Pershad* v. *Kashi Krishna Narain* (1).

Sir William Garth replied:

Their LORDSHIPS' JUDGMENT was delivered by

THE LORD CHANCELLOR.—It is always to be regretted when an appeal is disposed of on a preliminary point, and the parties are compelled, after having incurred considerable expense, to leave this Board without a determination of the real merits

(1) L. R. 28 I. A. 11 (1900)

of their dispute. But in this case their Lordships feel that they have no choice in the matter, and that they are bound to advise His Majesty that the preliminary point raised must prevail.

The facts of this case are these : In 1884 a mortgage was executed of certain property for a sum of Rs. 2,000, with interest at 12 per cent. On the 30th November 1909, the persons who were entitled to the benefit of that mortgage took proceedings in order to have it enforced. They claimed that the amount due upon the mortgage was Rs. 38,494, and they asked for an order for payment of that sum against the Defendants, and a sale of the property. They made, as parties to that suit, not merely the people who claimed under the mortgagors, but also certain people who had set up adverse claims to the mortgaged property, among whom the Appellant was one. Their Lordships think that this joinder of these parties was irregular, and that it could only tend to confusion.

What followed was this : The present Appellant, who claimed through a person named Hukum Singh, said that she was entitled to four biswas of the property. That dispute was entirely independent of the mortgage transaction of 1884. Whatever the amount of that mortgage might be, in no circumstances could the Appellant have been made responsible for it. If it had been held that her claim was good, the mortgagor would have completely failed, so far as her share of the estate was concerned : if it had been held that her claim was bad, she could have had no right whatever to redeem the mortgage. The cause, however, proceeded without any objection being taken, and, in the end, on the 8th June 1909, a decree was made by the Subordinate Judge, in which he declared that the Appellant was entitled to one-half of the four biswas which had been set up as her original claim. From that decree an appeal was taken to the High Court, and on the 14th November 1910, the High Court decided that the Appellant had no title at all. The result was that as to one-half there were concurrent findings both of the Subordinate Judge and of the High Court that the Appellant had no claim, and as to one-half there were differing judgments. The Appellant accordingly sought to obtain leave to appeal to His Majesty in Council from the judgment of the High Court, and for that purpose it was essential that she should satisfy the condition of sec. 110 of the Civil Procedure Code of 1908. That section provides that an appeal can only be allowed in certain cases where the amount or value of the subject-matter of the suit in the Court of First Instance was Rs. 10,000, or upwards, " and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards."

Upon the Appellant's application for a certificate that the value of the subject-matter exceeded the Rs. 10,000 there appears to have been argument before the High Court, and a certificate has been given in her favour. But it is objected that that certificate, on the face of it, proceeds upon a wrong principle, and that this Board ought not to regard it as conclusive of the Appellant's right to appeal.

Their Lordships think that the Respondent's contention in this respect is correct. The certificate is prefaced by an order in which the High Court state what the reasons were that led them to the conclusion that the subject-matter was above the prescribed limit, and it is quite plain, on an examination of that order, that they were deciding as between two rival contentions. The one that was put forward

on behalf of the Respondent was that in point of fact the appeal related only to the value of the two biswas, while the Appellant asserted that it related to the whole subject-matter of the suit, which was Rs. 38,000. This latter argument was enforced by suggesting that if the Appellant's case failed, the mortgage would operate over the whole of the property, and there would be a right left in the mortgagee to sell and dispose of this piece of the estate for the total value of the mortgage debt; that as the mortgage debt affected equally every part of the property subject to the original mortgage, it affected the whole of those two biswas, and the subject-matter of the disputes therefore was Rs. 38,000. This contention prevailed before the High Court, and they state in terms that the decree, which was the subject of appeal, had imposed on the property a liability for Rs. 38,000, and that, in consequence, the value of the subject-matter of the appeal exceeded the necessary prescribed sum.

Their Lordships think that this was an entire mistake. As between the Respondent, who was seeking to enforce his mortgage, and the Appellant, the subject-matter of the suit was not Rs. 38,000. The subject-matter of the dispute was simply the value of the property which the Appellant claimed, and it was quite immaterial for that purpose what the value of the mortgage might be. As has already been pointed out, the Appellant could under no circumstances have been made responsible for the amount of the mortgage, nor could its extent in any way whatever have in the least degree varied her rights. In truth the confusion has arisen because the cause of action against the Appellant, that is to say, the right to obtain a declaration of title against her adverse claims, has been joined with another, which was quite distinct, the enforcement of rights under a mortgage.

Their Lordships think that the subject-matter of this appeal is nothing but the two biswas to which the Subordinate Judge found that the Appellant was entitled.

Then Sir William Garth urges that, in these circumstances, as this question of the value has never been determined by the High Court, the matter ought to go down for the purpose of seeing whether those two biswas would support the value of Rs. 10,000, and thus enable an appeal to be maintained. After considering all the arguments upon this point, their Lordships think that, out of consideration for the parties themselves, no such direction ought to be given. Had it been possible, when the original certificate was applied for, to have established that the value of those two biswas exceeded the Rs. 10,000 —a perfectly simple and straightforward thing to do—all this difficulty as between the value of the estate and the value of the mortgage would at once have vanished, but it seems impossible to read the judgment of the High Court without seeing that there were two contentions, and only two, before them. Upon the one contention the Appellant would have failed, and that was that the subject-matter of the suit related to the two biswas, and on the other contention she would have succeeded, and that was that the subject-matter of the suit was affected by the value of the mortgage debt. It was the latter contention which the High Court wrongly adopted.

Their Lordships will therefore humbly advise His Majesty that this objection must succeed, and that this appeal should be dismissed wih costs.

Solicitor: *Mr. Douglas Grant* for the Appellant.

MUSAMMAT RADHA KUNWAR *v.* THAKUR REOTI SINGH.

Solicitors : *Messrs. Barrow, Rogers* and *Nevill* for the Respondent.

B. D. *Appeal dismissed with costs.*

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 11 OF 1916.

MOOKERJEE, J.
CUMING, J.
1916,
Heard, 27, June.
Judgment, 4, July.

In the matter of RASIK LAL NAG, a Muktear.

Legal Practitioners Act (XVIII of 1879), secs. 13 and 14—Muktear abusing Court's officer, if liable to disciplinary action—Contempt—Object of punishment—Subordinate Court if may start enquiry under sec. 14 in cases other than under cls. (a) and (b) to sec. 13—High Court if may adopt a report made by subordinate Court in a proceeding wrongly initiated but properly conducted.

Sec. 14 of the Legal Practitioners Act invests a Subordinate Court with authority to inquire into any case of misconduct alleged against a pleader or muktear practising before it, covered by sec. 13 of the Act as amended by Act XI of 1896, and not merely cases covered by cls. (a) *and* (b) *of sec. 13.*

IN THE MATTER OF SOUTHEKAL KRISHNA RAO (2) *explained.*

IN RE PURNA CHANDRA PAL (1) *commented on.*

Whether an enquiry is made by or under the orders of the High Court under sec. 13 or is instituted by the Subordinate Court of its own motion the final order can be passed only by the High Court.

The law does not require an inquiry ordered under sec. 13 to be conducted directly by the High Court. Therefore, even if it were incompetent for a Subordinate Court to initiate an inquiry into certain kinds of charges of misconduct, if such an inquiry has been properly held after notice, there is nothing to prevent the High Court from adopting it as one which could be directed under sec. 13.

The Court, at least when in session, is present in every part of the place set apart for its own use and for the use of its officers, jurors and witnesses, and disorderly conduct anywhere in such place amounts to a contempt of Court.

The power of suspension or removal is distinct from the power to punish for contempt, but a contempt may be of such a character as to warrant the exercise of the disciplinary powers of the Court.

When the Court takes notice of a misconduct which consists in the obstruction of, or an interference with, one of its officers, the object of the discipline enforced is not so much to vindicate the dignity of the Court or the person of the officer, as to prevent undue interference with the administration of justice.

Where a mukhtar in the course of an altercation with the Court's accountant in the latter's office used abusive language which was heard by the Munsif from his Court :

Held—*That for such conduct the Court could take disciplinary action against the mukhtar.*

This was a reference under sec. 14 of the Legal Practitioners Act, dated 26th February 1916, by Babu Kumudnath Ray, Munsif, Kustea, through Mr. J. C. H. MacNair, District Judge, Nadia.

While forwarding the letter of the Munsif, the District Judge stated his opinion as follows :—

The Munsif has, I consider, gone into the question very carefully and his finding as to the facts is I think obviously correct. The sum of fifteen rupees four annas (Rs. 15 ans. 4)

(1) I. L. R. 27 Cal. 1023 : s. c. 4 C. W. N. 389 (1899).
(2) L. R. 14 I. A. 154 : s. c. I. L. R. 15 Cal. 152 (1887).

IN THE MATTER OF RASIK LAL NAG.

was lying in the Sub-Treasury at Kustea in this district for payment jointly to 3 persons, one of whom, Rasiklal Nag, happens to be a muktear. In December 1915 a pleader named Bhuban Bandhu Mazumdar (C. W. 7) on behalf of the 3 payees filed a payment Order form in the office of the Munsif, 1st Court, Kustea, and this was passed by the Saristadar on 18th December and by the accountant, whose name is Kishorilal Chatterjee, on 22nd December, and it was the duty of Babu Bhuban Bandhu Mazumdar to come to the office and receive it and present it at the Sub-Treasury for payment within 10 days of 22nd December. Bhuban Babu admits that between 18th December and 7th January he never came to the office to ask for delivery of the payment order to him. On 7th January Rasiklal Nag and his clerk Moti and Bhuban Babu pleader all came together to the office in connection with the cheque. There is therefore no reason to suppose that Bhuban Babu would try to blacken the case against Rasiklal Nag nor has that ever been suggested, and therefore Bhuban Babu's evidence is particularly reliable.

The Saristadar Babu Nilmoni Roy Chowdhuri (C. W. 2) bears an excellent reputation and his evidence is therefore valuable.

The evidence of these two gentlemen leaves no doubt as to the details of the commotion which occurred in the office of the Munsif, 1st Court, Kustea, on the afternoon of 7th January 1916. The particulars are as follows: Bhuban Babu on that day went and asked for the payment order and received it, endorsed it to Rasiklal Nag's clerk Moti and sent Moti with it to the Sub-Treasury. As it was then more than 10 days after 22nd December the Sub-Treasury refused to cash it and said it must first be renewed. In order to renew it Bhuban Babu ought to have filed an application bearing an 8 annas court-fee stamp in the office or Court room of the Munsif and had he done so it would have been renewed in the ordinary course without any difficulty and this was well known both to Bhuban Babu and to Rasik Babu. Instead of this, Bhuban Babu, Rasik Babu and Moti all went together to the Saristadar with the payment order, and asked him why the cheque had lapsed (C. W. 7, P. 31/74). Bhuban Babu does not say what further talk there was with the Saristadar, but the Saristadar says that Rasik Babu asked him who was going to pay for the 8 annas stamp for renewal, and that the Saristadar replied that the fault, if any, seemed to be with Rasik Babu himself or his pleader, as no attempt had been made to take delivery of the payment order on 23rd December or 3rd January after it was passed and before it lapsed (P. 26/57). Rasik Babu then wished to speak to the accountant Kishori Babu about it and was permitted to do so (P. 31/74, 26/51). Going up to where the accountant sat Rasik said something to the effect 'See this payment order. You have gone and caused it to lapse. Do you want me to lodge an application against you or swear an affidavit against you to that effect?' (P. 31/74, 26/51). The accountant replied 'You can do what you choose. Please do not lose your temper.' (P. 31/75, 26/51). Bhuban Babu says he did not notice what reply, if any, Rasik Babu made (P. 31/75) and the Saristadar says that Rasik Babu's reply was 'I am going to swear an affidavit saying that you asked me to pay you a bribe for passing my cheque and that because I did not comply you intentionally made my cheque lapse' (P. 26/52). The accountant next said to Rasik Babu 'Keep a civil tongue in your head (Mukh Samle Kotha Boliben)' (P. 31/75, 26/52), and Rasik Babu replied 'Haramjada, I am not Jagabandhu Sarkar to be ordered about by you' (P. 31/75, 26/52). This refers to the fact, admitted by the accountant, that he once upon a time (whether for good reason or not) gave a blow to a pleader's clerk named Jagabandhu Sarkar. Rasik Babu repeated the word Haramjada more than once (P. 31/76) while standing close to the accountant, whom he also called 'Paji' and other names (P. 26/53), Saristadar then asked Rasik Babu to leave the room and told the office peon to put him out (P. 26/53) and Rasik Babu marched out of his own accord (P. 31/76) and stood in the verandah and there shouted out the word Haramjada many times (P. 31/76), and threatened the accountant with a shoe-beating (P. 226/54), and even the Munsif

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sitting on the Bench heard the word Haramjada being shouted though he was not then aware who the shouter was (Order-sheet, P. 1/1).

As soon as Rasik Babu had gone away the accountant sat down and wrote out what is a perfectly true and fair account of the incident (P. 2/2) in the form of a report to the Munsif ending with the prayer.

'I most earnestly seek the protection of your Honour and pray that your Honour would be kind enough to hold an enquiry into the matter and to institute a legal proceeding against Rasik Babu or to do the needful under the circumstances which your Honour thinks best.' I do not see what other course the accountant could possibly have taken with greater propriety than this course.

The Munsif proceeded to appoint a date under sec. 14, Legal Practitioners Act, and to serve a copy of the accountant's report upon Rasik Babu. I do not see what other course the Munsif could with greater propriety have taken.

Rasik Babu contested the case tooth and nail from first to last. He admitted nothing. He prayed for, and obtained, several adjournments on various grounds. He objected that the accountant was not at the time busy and therefore was not interrupted. He objected that the copy of the accountant's report served on him was not a full copy. Both these objections were entirely frivolous and obstructive. He next objected that he himself at the time was not acting as a muktear and that therefore the Munsif had no jurisdiction to hold the enquiry. This objection was accepted by the Munsif, who thereupon discontinued the enquiry but at the same time in his letter No. 140, dated 26th February 1916, requested me to move the High Court to deal with Rasik Babu under sec. 13 of the Legal Practitioners Act. As muktears, pleaders, and pleader's clerks are in the habit of approaching accountants and other clerks on business, and are authorised to do so, whereas persons not belonging to those classes rarely if ever approach office clerks in person, it seemed to me that it was relying on the fact that he is a muktear that Rasik Babu went and addressed the accountant on the occasion, and that accordingly sec. 14 gives the Munsif jurisdiction to enquire into the matter. I therefore directed the Munsif to complete the enquiry on that assumption, adding that there seemed ample ground for bringing the matter to the notice of the High Court and that it would be open to me on completion of the enquiry, if I then thought fit, to invite the High Court to deal with the matter either under sec. 13 (*b*) of the Legal Practitioners Act or if deemed more proper then under sec. 13 (*f*). The enquiry has accordingly been completed. After the enquiry was completed I pointed out to the Munsif that at Sadar nobody who is not a muktear, pleader or pleader's clerk, thinks of approaching the clerks in person but always does so through a muktear, pleader or pleader's clerk, and asked whether anyone other than muktears, pleaders and pleader's clerks was in the habit of entering the enclosed space where Rasik stood when creating the disturbance. From the Munsif's reply it appears that in some cases other persons used to enter the enclosed space to make enquiries direct from the clerks. I am not convinced that Rasik Babu would on this occasion have entered that space except for the fact that he knew that as a muktear he was entitled to do so, but be that as it may, it seems to me that as pointed out by the Munsif in his judgment (P. 40/115, 40/116) the High Court has jurisdiction to deal with Rasik Babu and I feel very strongly convinced that this is a case which calls for action against Rasik Babu on the part of the High Court. I entirely concur with the last paragraph but one of Munsif's judgment. "If officers . . . . dignity entirely gone" (P. 40/116).

It is of course for the High Court alone to decide in what way if any it should deal with Rasik Babu's conduct. The Munsif has recommended that he should be 'suspended from practice for a short period or simply warned as may seem proper to the High Court.' I would respectfully submit that a mere apology would not be sufficient amends for all the trouble he has caused, and that if he expresses penitence now he ought rather to have done so on the 8th of January and not after the Munsif has been compelled owing mainly to the obstruc-

tion persistently indulged in by Rasik Babu to swell the bulk of these proceedings into a record of 116 pages mostly in his own handwriting, to the detriment of his other work. At the commencement of the proceedings the accountant asked that he might be legally assisted by the Government, and the District Magistrate was pleased to sanction the engagement of a pleader on Rs. 8 per diem at the expense of Government. I have calculated that this gentleman's bill to Government owing to the frivolous and obstructive objections indulged in by Rasik Babu, is likely to amount to about Rs. 75, and in addition to this the matter has occupied considerable time of the Munsif and myself which could have been otherwise employed and thereby indirectly has caused loss to Government. I would therefore respectfully suggest that punishment of an exemplary character would be very salutary and very well deserved.

As regards the attempt of Rasik Babu to introduce evidence that the accountant asked him for a bribe, I entirely agree with the Munsif's remarks in his judgment. I have never heard that the accountant makes demands of that sort, and I think it quite clear that he had not made any such demand from Rasik Babu and that Rasik Babu would have stated it prominently in his written statement if such a demand had been made.

It may be that in this case the acts of Rasik Babu amounted to the criminal offence of defamation or of insult likely to lead to a breach of the peace. But the impropriety of his conduct does not turn on the question whether he went the length of infringing the criminal law or whether he stopped short of that, it lies in the fact that he went up to a clerk who was sitting at his work and addressed him in an outrageously noisy, rude and unseemly way, and it seems to me that it would be very prejudicial to the prestige and dignity of the Courts if in the circumstances the clerk were merely told to have recourse to the criminal Courts where Rasik would be immune, however outrageous and unseemly his conduct might be proved to have been, provided that that conduct had just fallen short of amounting to a criminal offence. The Legal Practitioners Act seems to me to invest the High Court with jurisdiction to deal with outrageous and unseemly conduct. As such it seems to me that it is to that Act and not to the Indian Penal Code that a clerk in the position of Babu Kisorilal Chatterjee is entitled to look for protection.

Babu Debendra Nath Bagchi (with him *Babus Baranashibasi Mukerji* and *Mohini Mohon Chatterji*) for the Muktear.—This reference should be discharged on two grounds, (1) because it is incompetent, and (2) because it is not a fit case on the merits to come under the purview of sec. 13 (*f*) of the Legal Practitioners Act.

First, the reference is incompetent under the authority of a decision of this Hon'ble Court *In the matter of Purna Chandra Pal, Mukhtear* (1), which was followed in another decision of this Hon'ble Court in *In re Radha Charan Chakravertty* (7). The question was raised again in *In the matter of Kali Prasanna Chaudhury* (4), but was not gone into as unnecessary for the purposes of that case. The decision of Mr. Justice Hill in *Purna Chandra Pal's* case (1), was based upon a decision of the Privy Council in *In the matter of Southekal Krishna Rao* (2), and this has all through been followed *In the matter of Wajid Hossain* (3). Upon the authorities and having regard to the language of secs. 13 and 14 of the Legal Practitioners Act, the lower Courts were not competent to hold the enquiry or make the reference. It was only this Hon'ble Court that could take action and hold the enquiry under sec. 13 of the Legal Practitioners Act. The reference is, therefore, without jurisdiction

(1) I. L. R. 27 Cal. 1023 : s. c. 4 C. W. N. 389 (1899).
(2) L. R. 14 I. A. 154 : s. c I. L. R. 15 Cal 152 (1887).
(3) I. L. R. 29 Cal. 890 : s. c. 6 C. W. N. 556 (1902).
(4) 11 C. L. J. 164 (1910).
(7) 4 C. L. J. 229 (1907).

and should be discharged on this preliminary point.

[MOOKERJEE, J.—What do you say with regard to the decision of Mr. Justice Knox in *In re Muhammad Abdul Hai* (6), as noticed in *In the matter of Kali Prasanna Chaudhury* (4)? What about the changes introduced by Act XI of 1896 into the Legal Practitioners Act XVIII of 1879?]

That judgment is no authority against those decisions of this Hon'ble Court. The changes introduced by Act XI of 1896 did not affect cl. (*f*) of the section at all. The original section in Act XVIII of 1879 was grouped under clauses in Act XI of 1896 with the introduction of cls. (*c*), (*d*) and (*e*) only as new. "Any other reasonable cause" was there all the same and was only grouped as cl. (*f*). So there was no change by the Amending Act of 1896, so far as cl. (*f*) was concerned, under which only the present case comes. Mr. Justice Knox failed to notice this and erred in his decision in holding that sec. 14 would be applicable to all the clauses including cl. (*f*) of sec. 13. The Privy Council decision, upon which the decision of Mr. Justice Hill was based, held that "any such misconduct" in sec. 14 referred only to "misconduct in the discharge of professional duties," which led Mr. Justice Hill to hold, that sec. 14 referred only to cls. (*a*) and (*b*) of sec. (13). Because of the changes, as pointed out by Mr. Justice Knox, it may be conceded that sec. 14 is applicable even to cls. (*c*), (*d*) and (*e*), although that is also not free from difficulty, but surely not to cl. (*f*), which was there all the time and was excluded from the operation of sec. 14 according to the said decision of the Privy Council. Having regard to one of the well-known principles of interpretation of statutes, it is to be noticed that the Legislature, while amending the Legal Practitioners Act in 1896, did not in any way alter the language of sec. 14, although the above decision of the Privy Council was there, and it must, therefore, be taken that the Legislature did not intend to include cl. (*f*) of sec. 13, at any rate, within the purview of sec. 14 of the Act.

[MOOKERJEE, J.—It would be very inconvenient if we are to hold the enquiry ourselves in every such case.]

The members of the Bar should not lose this privilege if they can help it.

[MOOKERJEE, J.—But the ultimate decision rests with us.]

Yes.

But the enquiry itself may be sufficiently compromising to a Legal Practitioner though held to be without sufficient cause. The lower Courts are not likely to be free from prejudice, and why should a Legal Practitioner be subject to the ignominy of an enquiry at the caprice of a lower Court, where on a simple statement of the case the High Court may not be disposed to hold an enquiry.

The evidence shows that the accountant himself was the aggressor—whereupon he was abused by the muktear. The young accountant was in the habit of striking people—he struck people twice before, and when he rose up from his chair, closed up his sleeves, and was about to strike the old muktear he was abused. The incident was unfortunate and to be regretted; it was, however, not a deliberate act, but if anybody was to blame, it was the accountant and not the muktear. The act did not in any case

(4) 11 C. L. J. 164 (1911)
(6) I. L. R. 28 All. 61 (1906).

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reflect on his character. Refers to *In the matter of Wajid Hossain* (3).

Babu Ram Charan Mitter, Senior Government Pleader for the Crown.—As regards the first point I agree that sec. 14 is not applicable, at any rate, to cl. (*f*) of sec. 13, and that the lower Courts were not competent to hold the enquiry and make the reference. But this Court can hold the enquiry and can treat the evidence taken as evidence in the case, and decide accordingly.

On the merits, I should say that the matter ought not to have come up before your Lordships at all—the lower Courts ought to have put an end to it with an admonition or simple warning to both parties and your Lordships also can do that now.

Babu Debendra Nath Bagchi in reply.—The warning should more appropriately be given to the accountant.

[MOOKERJEE, J.—We have no jurisdiction in so far as the accountant is concerned.]

The JUDGMENT OF THE COURT was as follows :—

This is a report, made under sec. 14 of the Legal Practitioners Act, by the Munsif of Kustea, through the District Judge of Nadia. The Munsif has recommended disciplinary action against Rasiklal Nag, a Muktear, practising in his Court, and, the District Judge has in his opinion endorsed the views of the Munsif. The circumstances which led the Munsif to take action under sec. 14 may be briefly stated.

On the 7th January 1916, Kisori Lal Chatterjee, Accountant, in the office of the Munsif of Kustea, reported that while he was busy with his work in his office room, the Muktear, Rasiklal Nag, interrupted him, seriously threatened him, and, when asked to keep quiet, vilely abused him. The Munsif, who held his court in an adjoining room, had himself heard the altercation. He, accordingly, issued a notice on the Muktear under sec. 14, which set out the substance of the charge and called upon him to show cause why disciplinary action should not be taken against him for grossly improper conduct towards an officer of the Court. The Muktear entered appearance and contested the allegations of the Accountant. The result was an elaborate enquiry by the Munsif, which led him to the conclusion that the conduct of the Muktear had been highly improper and merited severe condemnation. It appears that the Muktear, along with two other persons, was a litigant in a case in that very Court. A sum of Rs. 15-4-0 deposited in the Sub-Treasury at Kustea was jointly payable to them. The payment-order form was passed by the Accountant on the 22nd December 1915, and under the Rules of Court, was to remain in force for a period of 10 days. The pleader employed by the parties did not, however, withdraw the money within the prescribed time. The result was that when, on the 7th January 1916, the Muktear, accompanied by his pleader and clerk, went to receive payment, they were informed that the payment order had lapsed, and that it would be necessary to apply for its renewal. This appears to have annoyed the Muktear, and an altercation ensued between him and the Accountant. The evidence recorded in these proceedings shows that the Muktear abused the Accountant, and the latter, not unnaturally, retaliated. It is extremely difficult, if not practically impossible, to allocate the blame precisely between the two con-

(3) I. L. R. 29 Cal. 890 : s. c. 6 C. W. N. 556 (1902).

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testants; but the Munsif, whose opinion is accepted by the District Judge, holds that the Muktear was the aggressor. It is plain, however, that the Accountant had not much of a reputation for civility of manners, and, on one occasion, had struck a blow to the clerk of a pleader, which incident had not been forgotten. His attitude towards the Muktear, so far as one can gather from the evidence, was, in view of his antecedents, not very reassuring. The parties on this occasion did not however actually come to blows; there was abundance of mutual abuse and recrimination, and when the Sharistadar threatened to call in the office peon to put the Muktear out, the latter, in the words of the Munsif, "marched out of his own accord." In these circumstances, the Munsif, as also the District Judge, recommend that "punishment of an exemplary character would be very salutary and very well deserved."

On behalf of the Muktear, a preliminary objection has been taken to the validity of the reference on the ground that the Munsif was not competent to take action under sec. 14, as the latter section is limited in its application to cases covered by sec. 13, cls. (*a*) and (*b*). In support of this view, reference has been made to the dictum of Hill, J., in *In the matter of Purna Chandra Pal* (1). In that case, Hill, J., relied upon the judgment of Lord Hannen in *In the matter of Southekal Krishna Rao* (2), where sec. 14 was read by the Judicial Committee along with sec. 13, and it was ruled that the expression "charged with any such misconduct" in sec. 14 referred back to the preceding section and was consequently limited to "misconduct in the discharge of professional duty." Hill, J., however, overlooked that sec. 13 had been amended after the decision of the Judicial Committee and, that, whereas in 1883 (the date of the order under review by the Judicial Committee), sec. 13 comprised a paragraph which corresponds to what is now included in cls. (*a*) and (*b*), before 1899 (the date of the order under review by Hill, J.) that is by sec. 2 of Act XI of 1896, a new and extended sec. 13, which comprises cls. (*c*), (*d*) and (*e*) not included in the original sec. 13, had been introduced by the Legislature into the Legal Practitioners Act, in supersession of the section in its primary form. Consequently, the question now before us, namely, whether the expression "such misconduct as aforesaid" in sec. 14 is restricted to "fraudulent or grossly improper conduct in the discharge of his professional duty," or is comprehensive enough to cover all cases of misconduct whether they be included in cl. (*b*) or in one or more of the other cls. (*c*), (*d*), (*e*) and (*f*), never arose before the Judicial Committee. On the other hand, the judgment of the Full Bench in *In the matter of Wajid Hossain* (3), shows that conduct comprised in the clauses other than cls. (*a*) and (*b*) may also be properly described as misconduct; indeed it was suggested by Rampini and Gupta, JJ., in the order of reference that the expression "any other reasonable cause" in sec. 13 (*f*) may be paraphrased as "any kind of misconduct other than the professional misconduct specified in the preceding clauses." We are of opinion that the question cannot be treated as concluded either by the observation of Lord Hannen in *In the matter of Southekal Krishna Rao* (2) or by the

(1) I. L. R. 27 Cal. 1023 : s. c. 4 C. W. N. 389 (1899).

(2) L. R. 14 I. A. 154 : s. c. I. L. R. 15 Cal. 152 (1887).

(2) L. R. 14 I. A. 154 : s. c. I. L. R. 15 Cal. 152 (1887).

(3) I. L. R. 29 Cal. 890 : s. c. 6 C. W. N. 556 (1902).

dictum of Hill, J., *In the matter of Purna Chandra Pal* (1). We also find that the dictum of Hill, J., has been doubted in *In the matter of Kali Prasanna Chaudhury* (4) and *In the matter of two Second Grade Pleaders* (5). We further find that Sir George Knox, J., dissented from the view of Hill, J., in the case of *In re Muhammad Abdul Hai* (6) and held that the words " any such misconduct as aforesaid " as used in sec. 14, relate to all the cases set out in sec. 13, in other words, a Subordinate Court is competent to enquire into a matter falling within the purview of any of the clauses of sec. 13, when the Pleader or Muktear whose conduct is called in question practises in such Court. This view is not opposed to the decision in *In re Radha Charan Chakravertty* (7), where although the dictum of Hill, J., was quoted, the only question for determination was the competency of one Subordinate Court to investigate a charge of misconduct committed in another Subordinate Court, specially during the pendency of proceedings under sec. 11 in the latter Court; a careful scrutiny of the judgment shows that it does not deal with the question in controversy before us. Nor can the decision in *In the matter of Golap Khan* (8), which turned upon the construction of secs. 15 and 16 of Act XX of 1865, be treated as binding authority on the question of the true scope of secs. 13 and 14 of Act XVIII of 1879 as amended by Act XI of 1896. That question was recently considered by a Full Bench of the Madras High Court in the case of *District Judge of Kistna* v. *Hanumanulu* (9), and the construction was adopted that sec. 14 covers all the clauses of sec. 13, so that a Subordinate Court is competent to take proceedings against a legal practitioner for misconduct alleged to come within cl. (*f*) of sec. 13. We agree with Sir John Wallis, C. J., that there is no good reason why charges under clauses other than cls. (*a*) and (*b*) of sec. 13, should not be investigated in the first instance by the Subordinate Court, and it would be very inconvenient if they could not. The introduction of cls. (*c*), (*d*) and (*e*) into sec. 13, without any amendment of sec. 14, goes rather to show, as observed by Ghose, J., in *In the matter of Purna Chandra Pal* (1), that sec. 14, as it stood, was deemed wide enough to cover them. The Court would be slow to presume that the Legislature had overlooked the point and had through oversight left a lacuna which must lead to serious practical inconvenience. If the narrow construction indicated by Hill, J., be adopted, the result follows that while in cases of misconduct comprised in cls. (*a*) and (*b*) of sec. 13, the Subordinate Court may forthwith institute an enquiry under sec. 14, and may, if necessary, exercise the power of suspension at the appropriate stage [*In the matter of Bajrangi Sahay* (10)], the Subordinate Court may be helpless in cases of a much graver character, for instance, where a practitioner is guilty of extremely contumacious conduct in Court. Secs. 13 and 14 were intended, in our opinion, to cover the same ground, in so far as the character of the misconduct is concerned. If the misconduct is brought or comes to the notice of the High Court without the

(1) I. L. R. 27 Cal. 1023 : s. c. 4 C. W. N. 389 (1899).
(4) 11 C. L. J. 164 (1910).
(5) I. L. R. 34 Mad. 29 : 34) (1910.
(6) I. L. R. 29 All. 61 1906).
(7) 4 C. L. J. 229 (1906).
(8) 7 B. L. R. 179 (1871).

(1) I. L. R. 27 Cal 1023 : s c 4 C. W. N. 389 (18 9).
(9, 18 Mad L. T. 549 (1915 ; [1915] Mad. W. N. 1050
(10) 15 C. W. N. 269 (1911).

intervention of the Subordinate Court, the High Court is competent to take direct action under sec. 13 : if sec. 14 had stood by itself, the result would have been that the High Court would be powerless to take disciplinary action, where the Subordinate Court had, by reason of weakness, ignorance, or like cause, failed to take notice of the misconduct and to report the matter to the High Court under sec. 14. A good illustration is afforded by the decision of the Full Bench in *In the matter of an Advocate, a Vakil, a Pleader and a Muktear* (11), where the misconduct committed in the Court below and ignored by that Court, was noticed by this Court in the course of the hearing of an Appeal from Original Order. Sec. 14, on the other hand, invests the Subordinate Court with authority to institute an enquiry, if, in its opinion, such misconduct has been committed as deserves investigation by that Court. From this point of view, the two sections supplement each other, but the cardinal fact remains that whether the enquiry is made by or under the orders of the High Court under sec. 13 or is instituted by the Subordinate Court of its own motion, the final order can be passed only by the High Court. In fact, secs. 12 to 15 show that the final determination in all these cases rests with the High Court and the High Court alone. We hold accordingly that the decisions in the case of *In re Muhammad Abdul Hai* (6) and *District Judge of Kistna* v. *Hanumanulu* (9), take a correct view of the intention of the Legislature and that sec. 14 covers cases of misconduct under all the clauses of sec. 13. In this view, the objection that the Munsif had no jurisdiction to take proceedings against the practitioner in respect of misconduct alleged to come within cl. (*f*) of sec. 13 must be overruled. We desire to add, however, that even if we had felt constrained to adopt the restricted view taken by Hill, J., the Muktear would not have been benefited in the least degree. It cannot be disputed that this Court is competent to take action under sec. 13, cl. (*f*), after such enquiry as it thinks fit. The section does not require that the enquiry should be conducted directly by the High Court; the enquiry may well be made by a Subordinate Court under the direction of the High Court. The only essential is, as pointed out by the Full Bench in *In the matter of Ganapati Sastri* (12), that notice must be given to the legal practitioner concerned to show cause against suspension or dismissal, and the notice must formulate the charges, with great particularity and precision, so as to enable the practitioner to know the charges he is called upon to meet. That condition has been amply fulfilled in this case. There is, thus, no reason why the enquiry by the Munsif, though not conducted under the orders of this Court, should not be adopted for the purpose of a proceeding under sec. 13, if we took the view that this Court could proceed only under sec. 13 and not on a report by the Subordinate Court under sec. 14. We must consequently examine the case on the merits.

The misconduct imputed to the Muktear technically amounted to a contempt of Court. It is well settled that misconduct in the presence of the Court which shows disrespect of its authority or which obstructs or has a tendency to interfere with the due administration of justice, is contempt. On this ground, disorderly

6 I. L. R. 29 All. 61 (1906).

(9) 18 Mad. L. T. 549 (1915); [1915] Mad. W. N. 1050.

(11) 4 C. L. J. 262 (1901).

(12) 19 Mad. L. J. 504 (1909).

conduct in the Court room is treated as contempt of Court. This principle is not limited to misconduct in the actual presence of the Judge; the Court is deemed present in every part of the place set apart for its use and for the use of its officers, jurors and witnesses, and, therefore, misbehaviour in such places is misconduct in the presence of the Court. Sir William MacMahon, M. R., in *French* v. *French* (13), observed that as a Tribunal administering laws, without authority to protect its proceedings from outrage or disturbance, presents to the mind the idea of an institution which must be impotent, dependent and frequently useless, the Court will exercise its jurisdiction for outrages committed or insults offered in the face of the Court; he then added that the same jurisdiction will be extended to all the departments and offices of the Court, a proposition which results directly from the cases mentioned [*King* v. *Carroll* (14), *Roach* v. *Hall* (15), *Anon* (16), *Ex Burrows* (17) and *Ex Jones* (18)]. The same principle was recognised in the decision in *Re Johnson* (19), *Ex Wilton* (20), *Kirby* v. *Webb* (21) and *Charlton's* Case (22). A similar doctrine has been adopted and repeatedly applied in cases of high authority in the Courts of the United States [*Fisher* v. *Mac. Daniel* (23), *U. S.* v. *Carter* (24), *U. S.* v. *Emerson* (25) and *State* v. *Woodfin* (26)].

(13) [1824] 1 Hogan 138.
(14) 1 Wilson 75 (1744).
(15) 2 Atk. 469; 2 Dick 794 (1742).
(16) 2 Ves. 520 (1795).
(17) 8 Ves. 535 (1803).
(18) 13 Ves. 237 (1806).
(19) 20 Q. B. D. 68 (1887).
(20) 1 Dowling. N. S. 805 (1842).
(21) 3 T. L R. 763 (1857).
(22) 2 My. & Cr. 316 (1837).
(23) 9 Wyo. 457: 87 Am. St. Rep. 971.
(24) 3 Cranch. C. C. 428; 25 Fed. Cas. 313.
(25) 4 Cranch. C. C. 188; 25 Fed. Cas. 1012.
(26) 5 Ired. (N C.) 199; 42 Am. Dec. 161.

No useful purpose would be served by a minute comparison of the facts of the different cases; what we are concerned with is the ascertainment of the general principle, and that principle is accurately formulated in the language used by Harlan, J., in delivering the unanimous opinion of the Supreme Court in *Ex parte Savin* (27). "The Court, at least when in session, is present in every part of the place set apart for its own use and for the use of its officers, jurors and witnesses, and misbehaviour anywhere in such place is misbehaviour in the presence of the Court." In the case before us, there is no room for doubt that the practitioner misbehaved in the presence of the Court within the meaning of this rule; in fact, the abusive language used by him was heard by the presiding Judge himself, who was holding his Court in the room adjoining the office where the incident took place. In these circumstances, it is incontrovertible that this Court may take disciplinary action against the Muktear. No doubt the power of suspension or removal is distinct from the power to punish for contempt [*Ex parte Robinson* (28)]; but a contempt may be of such a character as to warrant the exercise of the disciplinary powers of the Court. At the same time, we must not overlook that, as pointed out by Bowen, L. J., in *Helmore* v. *Smith*. (29), when the Court takes notice of a misconduct which consists in the obstruction of or an interference with one of its officers, the object of the discipline enforced is not so much to vindicate the dignity of the Court or the person of the officer, as to prevent undue interference with the administration of justice; from this point of view, the pre-

(27) 131 U. S. 267.
(28) 19 Wallace 505.
(29) 35 Ch. D. 449 (455) [1886].

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sent case is not of much gravity; there was obviously no intentional disrespect towards the Court; the Muktear was rather moved by a sudden impulse. In view of these extenuating circumstances, and also of his long-standing and position in the profession, we are of opinion that it will be sufficient to warn him as a mark of our disapproval of his conduct. We direct accordingly that he be warned.

N. G. *Muktear warned.*

[CRIMINAL REVISIONAL JURISDICTION.]
REV. No. 515 OF 1916.

SANDERSON, C. J.	MAHOMED KAZI and ors., Accused, Petitioners,
WALMSLEY, J.	
1916,	
Heard, 30, June.	*v.*
Judgment, 25, July.	THE KING-EMPEROR, Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 224—Escape from custody after arrest on charge subsequently not proved if offence—Opium Act (I of 1878), secs. 9, 15.

The first petitioner was arrested under sec. 15 of the Opium Act for being in illicit possession of opium and while in such custody he was rescued by the other petitioners. The first petitioner was convicted under sec. 224, I. P. C., and the others under sec. 225, I. P. C. The first petitioner was also separately prosecuted and convicted under sec. 9 of the Opium Act, but the High Court in revision set aside that conviction on the ground that the substance seized from him was not opium within the meaning of the Act.

Held—*That under sec. 224, I. P. C., it would be an offence for a person to escape from custody after he had been lawfully arrested on a charge of having committed an offence although he may not be convicted of such latter offence.*

That the arrest of the first petitioner under sec. 15 of the Opium Act was legal and at the time of the rescue he was in lawful custody.

This was a Rule granted on the 15th May 1916 against an order of Mr. L. Barrows, Sub-divisional Magistrate of Cox's Bazar, dated the 27th March 1916, convicting petitioner No. 1 under sec. 224, I. P. C., and sentencing him to rigorous imprisonment for one year and convicting the remaining petitioners under secs. 147 and 225, I. P. C., and sentencing them each under sec. 147, I. P. C., only to undergo rigorous imprisonment for one year; an appeal from which order was dismissed by J. C. Twidell, Esq., Sessions Judge of Chittagong, on the 15th April 1916.

The material facts will appear from the judgment.

Mr. S. R. Das and *Babu Chandra Sekhar Sen* for the Petitioners.

Mr. Camell (Deputy Legal Remembrancer) for the Crown.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case the first accused Mohammed Kazi was charged with an offence under sec. 224 of the Indian Penal Code, that is to say, with intentionally offering resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or escaping from any custody in which he is lawfully detained for any such offence; and the other accused were charged with an offence under sec. 225, that is to say, with intentionally offering resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescuing any other person from any custody in which that person is lawfully detained for an offence. All of them were also charged under

sec. 147 of the Indian Penal Code, the common object alleged being to rescue Mohammed Kazi from lawful custody.

Now, the facts of the case may shortly be recapitulated as follows :—The accused Mohammed Kazi was suspected of being in possession of opium contrary to the Opium Act; and certain persons were put forward by the Excise Officer as apparent purchasers of opium from the accused No. 1, Mohammed Kazi, and in pursuance of such apparent purchase, certain balls of black substance changed hands. Thereupon, the first accused, Mohammed Kazi, was arrested by the Excise Officer. On the way to the place where the *Sapman* was moored, the Excise Officer and the others who were with him were attacked by a body of men who were carrying lathis : and that body of men included the accused other than Mohammed Kazi. The result was that the accused No. 1 was rescued by force.

A case was then made against the first accused Mohammed Kazi under sec. 9 of the Opium Act alleging that he was unlawfully in possession of opium. He was convicted. On revision by this Court, that conviction was set aside* on the ground that the substance which Mohammed Kazi purported to sell to those persons who were put forward by the Excise Officer was not in fact opium; the black substance which was sold did contain a very small percentage of opium; but we came to the conclusion that what he had sold, and had been in possession of, was not in fact opium within the meaning of the Act; and consequently the conviction against Mohammed Kazi under sec. 9 of the Act was set aside.

What he had really been doing, as far as I can understand the facts, was that he was attempting to pass off this black substance as opium purporting to sell it to the persons who were put forward by the Excise Officer as the apparent purchasers.

Then the present charge came to be investigated. The charge against the first accused was under sec. 224 and against the other accused under sec. 225, and against all of them under sec. 147.

A point was then taken that Mohammed Kazi not having committed any offence under sec. 9 of the Opium Act was not in lawful custody at the time of his rescue.

Now, the Excise Officer was acting under sec. 15 of the Opium Act. That section provides first of all that any officer of the said department " may seize, in any open place or in transit, any opium or other thing which he has reason to believe to be liable to confiscation under sec. 11 or any other law for the time being in force, relating to opium," and, " detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and, if such person has opium in his possession, arrest him and any other persons in his company." It was the latter portion of the section under which the Excise Officer acted, namely, " if such person has opium in his possession arrest him and any other persons in his company." Mohammed Kazi had purported to sell what he alleged was opium : and, consequently, the Excise Officer arrested him acting under sec. 15 of the Opium Act. If the substance had in fact been opium, Mohammed Kazi would have been guilty of an offence under sec. 9 of the Act; and there could be no doubt whatsoever about the legality of the Excise Officer's act in arresting him. How then can Mohammed Kazi being himself respon-

* [Judgment reported : 20 C. W. N. 1206.]

sible for his arrest by alleging that the substance which he was selling was opium, turn round and say that his arrest was illegal, alleging that what he was selling was not opium although at the time he made the sale he passed it off as opium. To give effect to such an argument would lead to a conclusion which is ridiculous. Consequently we are of opinion that the arrest was legal and that Mohammed Kazi was in lawful custody at the time of the rescue.

In support of this conclusion I may refer to the case of *Deo Sahay Lal* v. *Queen-Empress* (1), where Mr. Justice Pratt and Mr. Justice Brett, said, "having regard to the context" (they were dealing with sec. 224), "we think that the words 'for any such offence' must mean 'for any offence with which he is charged or of which he has been convicted,' so that it would be an offence for a man to escape from custody after he had been lawfully arrested on a charge of having committed an offence, although he may not be convicted of such latter offence."

For these reasons I am of opinion that the first accused was in lawful custody, he was lawfully detained and when he effected his escape he committed an offence under sec. 224.

It follows from this that the other accused who rescued the first accused from the above-mentioned lawful custody were guilty of an offence under sec. 225. The learned Judge in concluding his judgment said this: "The evidence shows that Mohammed Kazi, after escaping from the hold of two excise peons, joined in beating the excise men. The other Appellants were members of an unlawful assembly with the common object of rescuing Mohammed Kazi from lawful custody and joined in inflicting injuries on members of the excise party in order to effect and to safeguard his escape. The convictions are therefore within the scope of secs. 224, 225 and 147 of the Indian Penal Code. The attack was of a dangerous nature and shows that the perpetrators have little regard for law and order. The sentences are not too severe." I entirely agree with this summary of the learned Judge.

For these reasons I think that this Rule should be discharged.

WALMSLEY, J.—I agree.

S. C. M. *Rule discharged.*

(1) I. L. R. 28 Cal. 253 at p. 255: s. c. 5 C. W. N. 289 (1900).

[CRIMINAL REVISIONAL JURISDICTION]

REV. NO. 559 OF 1916.

SANDERSON, C. J. WALMSLEY, J. 1916, 14, July.	ARINDRA RAJBUNSHI and ors., Petitioners, *v.* THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 367, 424—Appellate judgment, what should be.

The Petitioners were convicted all under secs. 147 and 342, I. P. C., and some also under sec. 354 and some under sec. 458, I. P. C.; the convictions were affirmed in appeal by the Sessions Judge:

Held—*That there ought to be sufficient materials in the appellate judgment itself to enable the High Court to form a conclusion as to the propriety of the conviction of each of the accused having regard to the various offences with which he was charged, and to enable it to come to a conclusion as to the correctness of the sentence which has been passed upon each of the accused having regard to the nature of the offence with which each of the accused was charged.*

The High Court directed a rehearing of the appeal by the same Sessions Judge.

ARINDRA RAJBUNSHI *v.* THE KING-EMPEROR.

This was a Rule granted on the 19th May 1916 against an order of J. J. Graham, Esq., Sessions Judge of the Assam Valley Districts, dated the 1st April 1916, passed on appeal from an order of Babu C. G. Chatterjee, Sub-divisional Magistrate of Goalpara, dated the 6th March 1916, convicting Petitioners under secs. 147, 342 and 353, I. P. C., and sentencing them to various terms of imprisonment.

The judgment of the Sessions Judge was as follows :—

"There are 24 appellants in this case and they have been convicted, all of them, under sec. 147, Indian Penal Code and some of them also under secs. 342, 353 and 458, Indian Penal Code, in connection with a riot which is said to have taken place on the 7th November last at Abhoyapuri in the Goalpara district. The common object as stated in the charge was to assault the Police, who, it appears, were making a gambling raid, it being the day after the *Dewali*.

The facts of the case have been stated in detail in the full and careful judgment of the lower Court, and it is not necessary to recapitulate them. The points which arise for determination are :—

1. Did the riot take place substantially in the manner and circumstances alleged by the prosecution, and with the common object alleged?

2. If so, did the appellants take part in it? Has their identification been satisfactorily established?

Now with regard to the first point it has not been seriously argued that something of the kind did not take place, but it has been contended that the incident has been much exaggerated. In any case, however, the evidence is overwhelming, and goes to show that it was no ordinary disturbance but a riot of very serious proportions. Apart from the prosecution evidence as to the factum of the riot, we have the evidence of two defence witnesses, Nos. 6 and 7, on the point. These two men were deputed by the Superintendent of the Bijni Raj (P. W. 11) in answer to a written report received from the Sub-Inspector of Police for assistance. D. W. 6 says he heard a great row in the bazar, and, instead of carrying out the orders which he had received, he admits he turned back from a certain bridge without going to the bazar, because he was afraid to go there on account of the *golmal* which, to use his own words, " was being evidently done by a large number of people."

D. W. 7 says he came with the last-named witness as far as the bridge but no farther, as there was much *hulla* and he saw about 200 or 300 men near Suren Thakur's shop and on the road. He heard shouts of 'Daroga maro,' ' Bund Karde.'

These witnesses, therefore, fully bear out the case for the prosecution, and there is also in this connection the evidence of the Superintendent of the Bijni estate, Jnanendra Mohan Das (P. W. 11), who appears to have considered discretion the better part of valour and to have been content to send two Raj orderlies to the help of the Police rather than go himself to try and put an end to the disturbance. The chit (Exhibit 1) sent to the Superintendent by the Police Sub-Inspector was in these terms :—

" Please come at once in the bazar with guns and your men to release me from confinement." The action taken on receipt of this urgent application for help was somewhat curious. The Superintendent admits he received it about 2-30 to 2-45 A.M. and he took it into his bedroom and read it. He then sent an orderly to call the Assistant Superintendent, but the

orderly returned and reported that the Assistant Superintendent was fast asleep and could not be roused. How he could be asleep in spite of all the noise that was going on is a mystery. It would appear that he was lying 'daggo' to use a slang expression. However that may be, the next inspiration which came to the Superintendent was to send for the Dewan Mukhtar Babu though the work in hand would appear to have been somewhat outside the province of that officer. Beyond this the Superintendent appears to have done nothing. He says he did not come out or attempt to speak to the bearer of the letter. In fact he went back to bed as if it were an everyday affair. He got no further information during the rest of the night, but he makes the damaging admission that he "had received information about 11-30 P.M., about a rioting in the bazar." It is clear no sort of action was taken by him, at that time. Indeed he makes even more damaging admission, for he says he had been told that there had been rioting in the bazar and that a Sub-Inspector and other Policemen of North Salmara had been attacked by a mob of 300 or 400 persons and assaulted, and that the Sub-Inspector had taken refuge in the shop of Surendra Bhattacharjya. In spite of all this, not only did he take no action at 11-30, when he first heard of the affair, but at 2-30 A.M., *i.e.*, three hours later, when he received the Sub-Inspector's urgent application for help, instead of personally taking any steps to quell the riot, he was content to send a man to rouse the Assistant Superintendent and when that failed, sent another man to inform the Raj mukhtar.

From all the above facts it is abundantly clear that a riot did take place on the night in question in the Abhaypur bazar and what is more that it was a very serious affair in which a large number of persons were concerned, the common object of the mob being plainly to assault the Police. If the shop-keeper Surendra Bhattacharjya (P. W. 13) had not given shelter to the Police, the results would, in all probability, have been even more serious. As it was, violence was caused in prosecution of the common object, both the Sub-Inspector and Head Constable Ram Chandra Chaudhury having sustained injuries. The Sub-Inspector had no less than eleven. It is true all of these are described as slight, but the seriousness of an affair of this kind lies not so much in the grave nature of the injuries inflicted as in the deliberate resistance offered to the Police as representing law and order. It has been urged before me that some of the moneys belonging to certain persons engaged in gambling were seized by the police-officers but they had a perfect right to do so, and indeed it is usual in such cases to seize not only the instruments of gambling but the stakes as well. These form part of the evidence in such cases. In any event it is clear that the gamblers had no right whatever to resent the conduct of the Police and to take the law into their own hands.

I now come to the second point and this is the main point in the case, *viz.*, whether it has been proved beyond reasonable doubt that each and every one of the Appellants took part in the riot. The learned Magistrate, as I have said above, has written a most careful judgment and has dealt separately with the case of each accused. Where the evidence has given rise to any doubt, he has given the benefit of that doubt to the accused. The learned pleader for the appellants has urged that in the case of some of the accused the evidence amounts to nothing more than this that they were

present among the crowd, and he has argued that this is consistent with their having been mere spectators in the large crowd which collected. If it were the case that any of the appellants had been convicted upon such evidence, I should certainly have held that it was not sufficient, but the learned pleader for the appellants has not been able to show me that a single accused has been convicted upon such evidence. In every instance evidence has been given of specific acts plainly shewing that the appellants were not mere spectators, but that they took an active part in the riot. I do not think it necessary to restate the case against each accused, as this has been done by the learned Magistrate in his judgment, and I do not think I can improve upon what he said. Where any doubt has arisen effect has been given to it, and four of the accused have been acquitted on this ground. In the case of only one of the appellants I am inclined to differ from the lower Court and to hold that the benefit of the doubt might be extended to him as it was to others. I refer to the Appellant No. 11, Budharu Rajbongshi, in his case the evidence is somewhat meagre and may be said to suggest a doubt. The Sub-Inspector (P. W. 1) says he was one of the men who attacked him outside the shop, but it is a sweeping statement, comprising a number of persons and he might have been mistaken. The only other evidence against this particular accused is given by the two constables who say they saw him in the mob at Suren Thakur's shop. Thus the evidence against Budharu is not particularly strong and I think he may be given the benefit of the doubt. The remaining Appellants have, however, in my opinion been rightly convicted, and acts have been clearly proved which warrant their conviction under the various sections specified at the commencement of my judgment.

In the result the appeal is dismissed in respect of all the Appellants, save and except the Appellant No. 11, Budharu, and the convictions and sentences, so far as they are concerned, are affirmed. The appeal of Budharu is allowed and he is acquitted.

Babu Monmatha Nath Mukerjee for the Petitioners.

Mr. Camell for the Crown.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case we are of opinion that the Rule should be made absolute and that the appeal should be re-heard, and we think it should be re-heard by the same learned Judge.

Speaking for myself I should like to make it clear that I make no suggestion that the learned Judge has not heard this appeal in a proper manner; on the contrary, I am convinced that he gave the hearing of the appeal his full consideration : and, I think, as far as I can see from his judgment, that he must have taken very considerable care with regard to the case made against each of the accused. His judgment, however, is one that is subject to review by this Court, and we do not think he has given us sufficient materials to enable us to come to a decision upon the points which arise in the case.

Therefore, the case must be sent back to him for the purpose of the appeal being re-heard and his giving further judgment on it.

I do not suggest for a moment that he should repeat the evidence or the conclusions as regards the evidence at which the Court of first instance has arrived : still less that he should restate in different words the judgment at which the Court of

first instance has arrived. But, this is a case where there were no less than 13 Appellants, all of whom have been convicted under sec. 147 and sec. 342—which deals with wrongful confinement—and some of whom have been convicted under sec. 352, which is a section dealing with assault on a public servant, and six of whom have been convicted under sec. 458 which deals with house-breaking by night; and, we ought to have sufficient materials in the appellate judgment itself to enable us to form a conclusion as to the propriety of the conviction of each of the accused, having regard to the various offences with which he is charged: and, we ought also to have sufficient materials in the appellate judgment itself to enable us to come to a conclusion as to the correctness of the sentence which has been passed upon each of the accused, having regard to the nature of the offence with which each of the accused is charged.

The Appellate Court's judgment is therefore set aside and the appeal is directed to be re-heard as soon as possible.

Walmsley, J.—I agree.

S. C. M.

[CRIMINAL REFERENCE.]

Refs. Nos. 61 and 62 of 1916.

Mookerjee, J
Sheepshanks, J.
1916,
12, May.

Bejoy Gopal Ghosh, Complainant,
v.
Kamal Mandal and another, Accused.

Criminal Procedure Code (Act V of 1898), sec. 35 (1)—Sentences when may be ordered to run concurrently.

Sec. 35 (1), Criminal Procedure Code, authorises a Court to direct that several punishments passed on an accused for two or more distinct offences do run concurrently only when such sentences have been passed on him at one trial. It is not competent to a Court to give such a direction when the sentences have been passed in different trials.

These were References under sec 438 (*1*), Cr. P. C., by R. C. Hamilton, Esq., District Magistrate of Jessore, dated the 15th April 1916, recommending that the order of Babu S. N. Mukerjee, Sub-Deputy Magistrate of Narail, dated the 3rd January 1916, be modified or fresh trial ordered for the reasons set forth in the Reference.

The Reference was in the following terms:—

"On the night of 10th October last a burglary with theft was committed in the house of Bijoy Lal Ghosh of Raigram and several articles were stolen. The local police investigated into the case but failed to discover any of the property stolen and submitted a final report stating the case to be true.

"On the night of 12th December last, *i.e.*, about two months after, another burglary was committed into the house of Bijoy Gopal Rai of the same village and several articles were stolen.

"While investigating into the 2nd case, the police not only discovered the articles of Bijoy Gopal Rai but those of Bijoy Lal Ghosh also from the huts and from underneath the heap of straw in the courtyard of the accused Kamal Mandal and his son the accused Purna Mandal. Thus there were two separate cases.

"The accused persons were tried, convicted and sentenced by the Sub-Deputy Magistrate of Narail, Babu S. N. Mukherji, with second class powers in two separate cases and with two separate judgments, to undergo rigorous imprisonment for six months each. But he ordered that the sentences in the two cases would run concurrently.

"Under r. 526 (explanation I) of the

BEJOY GOPAL GHOSH *v.* KAMAL MANDAL.

Jail Code, the two sentences are to run consecutively, the order of the Sub-Deputy Magistrate was therefore illegal and cannot stand. The Sub-Deputy Magistrate's intention was, as I have now elicited, that each accused should in all undergo six months' rigorous imprisonment (taking together the sentences of both the cases). He directed the sentences to run 'concurrently' by inadvertence. I would recommend that the sentence in each case be reduced to three months' rigorous imprisonment and ordered to run consecutively, or a fresh trial may be ordered."

No one appeared on this Reference.

The JUDGMENT OF THE COURT was as follows :—

These are references under sec. 438 (*1*), Criminal Procedure Code, made by the District Magistrate of Jessore. The facts are not in dispute and may be briefly stated. On the night of the 10th October 1915, a burglary with theft was committed in the house of one Bijay Lal Ghosh of Raigram. On the 12th December 1915, another burglary with theft was committed in the house of one Bijay Gopal Rai of the same village. In the course of the investigation in the second case, the Police discovered the stolen articles of Bijay Lal Ghosh as also those of Bijay Gopal Rai, from the huts and from underneath a heap of straw in the courtyard of the two accused, Kamal Mandal and his son Purna Mandal. Two separate cases were thereupon instituted against both the accused, one in respect of each incident. The trials were separately held and separate judgments were delivered. The Sub-Deputy Magistrate sentenced each accused to undergo rigorous imprisonment for six months in each case, and he ordered that the sentences in the two cases should run concurrently. Appeals were preferred to the District Magistrate as the trials had been held by a Sub-Deputy Magistrate of the second class. The appeals were summarily rejected. It was subsequently brought to the notice of the District Magistrate that the order that the sentences in the two cases should run concurrently was irregular under Jail Code, r. 526, Exp. I. An explanation was called for from the Sub-Deputy Magistrate, who stated that his intention was that each accused should in all undergo rigorous imprisonment for six months, taking together the sentences in both the cases. The District Magistrate has now referred the case to this Court with the recommendation that the sentence in each case be reduced to rigorous imprisonment for three months and the two sentences be ordered to run consecutively, or that a fresh trial be directed.

It is obvious that the order of the Sub-Deputy Magistrate that the sentences in the two cases do run concurrently is illegal. Sec. 35 (*1*), Criminal Procedure Code, authorises a Court to direct that several punishments passed on an accused for two or more distinct offences do run concurrently, only when such sentences have been passed on him at one trial. It is not competent to a Court to give such a direction when the sentences have been passed in different trials. (Sec. 397, Cr. P. C.) [*Empress* v. *Bhagabandas* (1), *Emperor* v. *Tuka Ram* (2) and *Girdharilal* v. *Emperor* (3)]. It may be pointed out that under sec. 46 of Act XXV of 1861 such a direction could have been given when the accused was convicted of more than one offence at one time; in sec. 314 of Act X of 1872 the phrase "at one *trial*" was substituted for "at one *time*".

(1) 2 Bom. L. R. 111 (900).
(2) 4 Bom. L. R. 876 (1902).
(3) 12 Cr. L. J. R. 217 (1911).

and any possible ambiguity in the section due to the use of the latter phrase was thus removed [*Queen* v. *Puban* (4)]. We accordingly accept the recommendation of the District Magistrate, reduce the sentence upon each accused in each case to rigorous imprisonment for three months, and direct that the sentences in the two cases do run consecutively.

S. C. M.

[CRIMINAL REFERENCE.]

Ref. No. 102 of 1916.

Sanderson, C. J. Walmsley, J. 1916, 14, July.		Radha Kanta Guin, Complainant, *v.* Kartik Guin, Accused.

Order regarding possession of immoveable property following acquittal in case under secs. 447 and 426 of the Penal Code (Act XLV of 1860), propriety of.

The accused were tried for offences under secs. 447 and 426, I. P. C., for having cut and removed some bamboos from a bamboo clump alleged by the complainant to be his. The trying Magistrate acquitted the accused but directed that the complainant was to retain possession of the bamboo clump until ousted by the Civil Court.

The High Court set aside the order so far as it contained the direction about the bamboo clump.

This was a Reference under sec. 438, Cr. P. C., by Mr. M. Yusuf, Sessions Judge of Murshidabad, dated the 24th January 1916, recommending that the order of Mr. R. W. Von Morde, Deputy Magistrate of Berhampur, dated 9th May 1916, directing complainant to retain possession of a bamboo clump in dispute until ousted by the Civil Court may be set aside.

The judgment of the trying Magistrate so far as is material for the report, is set out below :—

" The complainant's story is that he cut 16 bamboos from his bamboo clump, the accused took them away. . . . The complainant admits that there was a dispute *re* this bamboo clump and later a criminal case, in which he was ordered to seek redress in the Civil Court. He, however, states the clump in question is his and he pays rent for the land on which it stands.

" The parties were ordered to seek redress in the Civil Court but instead of doing so the complainant took the law into his own hands and cut bamboos from the clump in question.

* * * * *

" As there is a dispute which may result in a mistake of fact and the intention of the accused does not appear criminal or mischievous, I acquit under sec. 245, Cr. P. C. The complainant will, however, retain possession of the bamboo clump in question until ousted by the Civil Court."

The trying Magistrate in his explanation to the Sessions Judge submitted that it was desirable to pass the order in view of the existence of a dispute beween the parties with respect to the ownership of the bamboo clump which might lead to a breach of the peace. The Sessions Judge in his letter of reference to the High Court submitted that the order contained in the direction about the bamboo clump was not supported by any provision of law and recommended that it should be set aside.

Babus Hemendra Nath Sen and *Dhirendra Nath Sen* for the Complainant.

Babus Santosh Kumar Bose and *Bimal Chandra Sarkar* for the Accused.

The Judgment of the Court was as follows :—

We accept this reference and we think

(4) 7 W. R. Cr. 1 (1867).

that the order should be set aside in so far as it directed that complainant was to retain possession of the clump until ousted by the Civil Court.

S. C. M.

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 48 OF 1916.

CHAMIER, C. J.
SHARFUDDIN, J.
1916,
7, July.

DEBI CHARAN LAL and ors., Appellants,
v.
SHEIK MEHDI HUSSAIN and anr., Respondents.

Limitation—Sec. 5, Limitation Act (IX of 1908)—Sufficient cause—Interference by High Court in second appeal—Sec 12, Limitation Act—The time requisite for obtaining a copy of the decree, what is—Letters Patent, cl. 10—Point not argued be ore single Judge if may be urged in appeal.

It is now settled by a long string of authorities that where a Court after considering all the circumstances of the case has come to the conclusion that sufficient cause has or has not been established within the meaning of sec. 5 of the Limitation Act for not filing an appeal within time, the High Court will not interfere in second appeal.

Where a judgment was passed on 27th September 1913 and the decree was prepared and signed on the same day and the annual vacation began on the following day and the Court reopened on 1st November and the Appellants applied for a copy of the judgment on 3rd November and for a copy of the decree on 13th November and both copies were ready and were delivered on 21st November and the appeal was filed on 28th November in the lower Appellate Court:

Held—*That the whole of the time which elapsed from the delivery of the judgment to the reopening of the Court on November 1st, 1913, was part of the time requisite for obtaining copies of the judgment and decree, and that this must be so whether the Appellant applied for copies on the day on which the Court reopened or on some later date.*

The words of sec. 12, Limitation Act, do not appear to lay down any rule that the time requisite for obtaining a copy must be continuous.

The conduct of a case before a single Judge of High Court must not be regarded as a preliminary canter in which the parties and their legal advisers are not called upon to exert themselves. Ordinarily a point which had not been taken before a single Judge would not be allowed to be taken in appeal under cl. 10 of the Letters Patent.

SAMINATHA AYYAR *v.* VENKATASUBA AYYAR (1) *and* KHUB CHAND *v.* HARMUKH RAI (5) *referred to.*

THE TANJORE PALACE ESTATE *v.* ANDI RANNIAH (2) *dissented from.*

BANI MADHAB *v.* MATUNGINI (3) *and* BECHI *v.* AHSANULLAH KHAN (4) *referred to.*

That was a Letters Patent Appeal against the decision of the Hon'ble Mr. Justice Mullick sitting singly in Second Appeal No. 2667 of 1914, dated the 4th May 1916.

The facts out of which the appeal arises are briefly as follows :—

Sheik Mehdi Hussain and another got a decree in their favour in the Court of the Munsif on 27th September 1913 against Debi Charan Lal and others. On that very day, the decree of the Court was prepared and signed by the Munsif. The

(1) I. L. R. 27 Mad. 21 (1903).
(2) 11 I C. 339 (1911).
(3) I. L. R. 13 Cal. 104 (1886).
(4) I. L. R. 12 All. 461 (1890).
(5) I. L. R. 34 All. 41 (1911).

DEBI CHARAN LAL *v.* SHEIK MEHDI HUSSAIN.

Courts closed for the annual Dusserah Vacation on the next day and reopened on 1st November. Debi Charan Lal then applied for a copy of the judgment on 3rd November and on 13th November he also applied for a copy of the decree. Both the copies of the judgment and the decree were ready on 21st November 1913, and they were delivered on the same day. Debi Charan Lal and others thereupon filed the appeal before the District Judge on 28th November 1913. The appeal was transferred to the Subordinate Judge for disposal and he dismissed it on the ground that it was filed beyond time and that the Appellants had failed to shew sufficient cause within the meaning of sec. 5 of the Limitation Act for not filing the appeal within time. Thereupon Debi Charan preferred a second appeal to the High Court. The appeal came on for hearing before the Hon'ble Mr. Justice Mullick who by his judgment held that as the Subordinate Judge had considered all the circumstances of the case and had in the exercise of his discretion come to the conclusion that the Appellants had not established sufficient cause within the meaning of sec. 5 of the Limitation Act, the High Court could not interfere in second appeal. Thereupon the Appellants preferred this appeal under cl. 10 of the Letters Patent.

Mr. S. Sinha (with *Mr. Abanibhusan Mukerjee*) for the Appellants.

Messrs. Mahomed Mustafa Khan and *Rai Guru Saran Prasad* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHAMIER, C. J.—The question for decision in this appeal is whether the Appellants' appeal to the lower Appellate Court was within limitation. On September 27th, 1913, the Respondents obtained a decree in the Court of a Munsif. Strangely enough, the decree of the Court was prepared and signed on the same day. The annual vacation began on the following morning and the Court reopened on November 1st. The Appellants applied for a copy of the judgment on November 3rd and for a copy of the decree on November 13th. Both copies were ready and were delivered on November 21st. An appeal was filed by the Appellants on November 28th. The Subordinate Judge to whom the appeal was transferred for disposal dismissed it on the ground that it had been filed beyond time, and that the Appellants had failed to shew sufficient cause within the meaning of sec. 5 of the Limitation Act for not preferring the appeal within time. The Appellants filed a second appeal in this Court. A learned Judge of this Court dismissed the appeal holding that as the Subordinate Judge had considered all the circumstances of the case and had in the exercise of his discretion come to the conclusion that the Appellants had not established sufficient cause within the meaning of sec. 5 of the Limitation Act, this Court could not interfere. It is now settled by a long string of authorities that where a Court after considering all the circumstances of the case has come to the conclusion that sufficient cause has or has not been established for not filing an appeal within time, the High Court in second appeal will not interfere. In my opinion the learned Judge was right in following those authorities.

But it is contended before us that the time during which the Court was closed should be treated as part of "the time requisite for obtaining a copy of the decree" within the meaning of sec. 12 of the Limitation Act. This point was not taken either before the Subordinate

Judge or before the learned Judge of this Court but I think that we ought to consider it. The Appellants rely upon the decision of the Madras High Court in *Saminatha Ayyar* v. *Venkatasuba Ayyar* (1). In that case the facts were practically the same as in the present case except that the Appellant applied for a copy of the decree on the day on which the Court reopened after the vacation. It was held that the time during which the Court was closed was part of the time requisite for obtaining a copy of the judgment. The Respondents rely upon the case of *The Tanjore Palace Estate* v. *Andi Ranniah* (2), in which two other Judges of the same Court declined to hold that the vacation was part of the time requisite for obtaining a copy of the judgment delivered five days after the Court closed for the vacation, as the Appellant had not applied for a copy till 17 days after the reopening of the Court. They referred to the case of *Saminatha Ayyar* v. *Venkatasuba Ayyar* (1), with approval as I read the judgment, but distinguished it from the case before them on the ground that the Appellant had not applied for the copy till 17 days after the reopening of the Court. They concluded their judgment with the observation that they could see no reason for excluding the period during which the Court was closed except upon grounds which would entitle an Appellant to demand the exclusion of every holiday which occurred during the period allowed for the presentation of his appeal.

Different High Courts have laid down different general rules for determining the amount of time requisite for obtaining copies. For example, a Full Bench of the Calcutta High Court held in *Bani Madhab* v. *Matungini* (3), that the time which elapses between the delivery of the judgment and the signing of the decree is part of the time requisite for obtaining a copy of the decree whether or not the Appellant applies for the copy before the decree is signed, while a Full Bench of the Allahabad High Court held in *Bechi* v. *Ahsanullah Khan* (4) that the time requisite for obtaining a copy does not begin till an application for the copy is made.

These and a few other decisions of general application have settled the practice on important points for the provinces subject to those Courts and they suffice for the great majority of cases. But so far as I am aware no High Court has attempted to lay down any hard and fast rule which shall determine exactly for all classes of cases the amount of time requisite for obtaining a copy.

Subject to any general rules which may have been laid down, it appears to me that the question in each case is what was in fact the time requisite for obtaining the copy? The decision in *Saminatha Ayyar* v. *Venkatasuba Ayyar* (1), rests avowedly on the special circumstances of the case. So also does that in *Khub Chand* v. *Harmukh Rai* (5). I therefore ask myself the question what was the time requisite for obtaining the copy of the decree in this case? The day on which the judgment was pronounced and the decree signed in this case must admittedly be excluded. So far as I know it is the universal practice to exclude the day on which the case was decided for all purposes connected with the calculation of limitation for an appeal. It is common ground that from September 28th to October 31st (both

(1) I. L. R. 27 Mad. 21 (1903).
(2) 11 I. C. 389 (1911).

(1) I. L. R. 27 Mad. 21 (1903).
(3) I. L. R. 13 Cal. 104 (1886).
(4) I. L. R. 12 All. 461 (1890).
(5) I. L. R. 34 All. 41 (1911).

days included) the Appellants could not have even applied for a copy either of the judgment or of the decree. That being so, it appears to me to follow that the whole of the time which elapsed from the delivery of the judgment and the reopening of the Court on November 1st, 1913, was part of the time requisite for obtaining copies of the judgment and decree, and that this must be so whether the Appellant applied for copies on the day on which the Court reopened or on some later date. In fact it appears to me that the date on which the application for copies was made has in this case no bearing on the question whether or not the period of the vacation should be deducted. In this respect I am unable to accept the decision in *The Tanjore Palace Estate* v. *Andi Rannah* (2). It was suggested that the time requisite for obtaining a copy must be continuous. But the words of the section do not appear to lay down any such rule. In the United Provinces it is the practice to disallow the days which the applicant has wrongly allowed to elapse between the notification of the number of stamped sheets required and the deposit of those sheets. The effect of this is to allow two different periods as time requisite for obtaining the copy.

On the facts of this case I am of opinion that the period of the vacation was part of the time requisite for obtaining the necessary copies. I would therefore allow this appeal and set aside the judgment of the learned Judge of this Court and that of the Subordinate Judge I would remand this case to the Court of the Subordinate Judge to be disposed of according to law.

I agree with the learned Judge of this Court in thinking that the decision of the Subordinate Judge with reference to sec. 5 of the Limitation Act was clearly wrong.

As observed above, the point on which this appeal has been allowed was not taken before the single Judge of this Court. In this connection I take this opportunity of pointing out that the conduct of a case before a single Judge of this Court must not be regarded as a preliminary canter in which the parties and their legal advisers are not called upon to exert themselves. Ordinarily I would not allow a point to be taken in appeal under cl. 10 of the Letters Patent which had not been taken before the single Judge. In the present case I felt bound to allow a new point to be taken in order to remedy what appeared to me to be a serious failure of justice.

I would make the costs of the hearing before the single Judge costs in the cause but would leave the parties to pay their own costs of this appeal.

Sharfuddin, J.—I agree.

A. K. R. *Appeal allowed.*

(2) 11 I. C. 839 (1911).

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

Appeal from Original Decree No. 470 of 1913.

Chamier, C. J. Sharfuddin, J. 1916, 17, July.	Lalit Kishore Mitra, Plaintiff, Appellant, *v.* Thakur Girdhari Singh and ors., Defendants, Respondents.

Partition, suit for, is maintainable by a lessee of mining rights for a term against lessor's co-owners—Partition of underground mines and minerals, if possible—Sec. 2, Partition Act (IV of 1893).

According to the English authorities, it is clear that a lessee for a term of years may maintain a claim for partition. There is no reason for holding that a different rule prevails in India.

LALIT KISHORE MITRA *v.* THAKUR GIRDHARI SINGH.

The authority of MUKUNDA LAL PAL CHAUDHURI *v.* LEHURAUX (1) *has been much shaken by the decision of the Full Bench in* HEMADRI NATH KHAN *v.* RAMANI KANTA ROY (2).

HEATON *v.* DEARDEN (3), BHAGWAT SAHAI *v.* BIPIN BEHARI MITTER (5) *and* BARING *v.* NASH (4) *referred to.*

There may be no special difficulty in effecting a partition of the underground mines and minerals, but in case any such difficulty arises, the power to order a sale under sec. 2 of the Partition Act of 1893 may be exercised.

This was a first appeal against the decision of Babu Atul Chandra Ghosh, Rai Bahadur, Subordinate Judge of Manbhum, dated the 14th July 1913.

The Plaintiff's allegations were as follows :—

" That Mauzah Shimatand is situate in Pergunnah Nawagarh and appertains to the revenue-paying estate of the principal Defendant No. 1, Thakur Girdhari Singh and the *pro formâ* Defendants Rajkumar Thakur, Ranjit Narayan Singh and Srimati Paban Kumari, widow of late Thakur Bhola Prosad Singh, and that they are entitled to the same in equal shares. That the *pro formâ* Defendant No. 3, Keshu Mahato, has been in possession of the surface right of some of the cultivated lands in the village under the *pro formâ* Defendants Nos. 4 and 5 by virtue of a lease dated 23rd September 1879. That by a registered lease dated the 21st January 1908, the Plaintiff obtained from the said *pro formâ* Defendants Nos. 4 and 5, a settlement of the underground coal mining rights of half of the said *mauzah* appertaining to the share of the said *pro formâ* Defendants and has since been in possession of the same. The Plaintiff further states that Defendant No. 2 (The Bengal Coal Company, Ld.) claims to be entitled to the underground coal mining rights in relation to the other half share of the *mauzah* owned by Defendant No. 1, whom the Plaintiff believes to be the real owner of the said rights. He asks for a partition of the underground coal mining rights of the *mauzah* as without a partition it would be inconvenient to carry on mining operations or enjoy possession of the rights. There is an alternative prayer that in the event of a partition being found to be inconvenient, a decree may be passed for the sale of the coal mining rights and division of the proceeds between the parties in proportion to their respective shares."

Defendant No. 1 in his written statement alleged that he was the owner of one-half of the Mauzah Shimatand which formed part of his zemindari; that Defendant No. 3 was a tenant under him only of the surface lands of his said half share, the subsoil rights being in his own *khas* possession; that Defendants Nos. 2 and 3 had no right to the subsoil of the *mauzah* which belonged in equal shares to himself and the *pro formâ* Defendants Nos. 4 and 5; and that he had no objection to a partition of the subsoil, but a sale of the subsoil would cause much inconvenience.

Defendants Nos. 4 and 5 in their written statement supported the Plaintiff's case, denying the title of Defendant No. 2. Defendant No. 3 did not enter appearance.

Defendant No. 2 (Bengal Coal Co., Ld.), who really contested the suit, alleged that Defendant No. 3 acquired both the surface and the underground rights in a moiety of the *mauzah* by virtue of a lease dated 23rd

(1) I. L. R. 20 Cal. 879 (1892).
(2) I. L. R. 24 Cal. 575 at p. 581 : s. c. 1 C. W. N. 406 (1897).
(3) 16 Beav. 147 (1852).
(4) 1 V. & B. 551 (1813).
(5) I. L. R. 37 Cal. 918 : s. c. 14 C. W. N. 962 (1910).

LALIT KISHORE MITRA *v.* THAKUR GIRDHARI SINGH.

September 1879 granted by the *pro formâ* Defendants (Nos. 4 and 5) and subsequently leased out the underground rights which had become vested in Defendant No. 2 and the latter was in possession; that the other moiety of the *mauzah* belonged to Defendant No. 1 and was transferred by him under a *mokurari pattah*, dated the 11th Assin 1285 (B. S.) to one Raghunath Mahato, who remained in exclusive possession, and that the underground rights in the said moiety had by several leases and assignments now become vested in Defendant No. 2, who was in possession of the same. Defendant No. 2 denied Plaintiff's title to the underground rights and to possession of the same and his right to ask for partition. It was also contended that the prayer for sale of the underground rights was not maintainable.

The lower Court found that the Plaintiff had obtained a coal mining lease in respect of one-half of the *mauzah* for a term of 999 years. He therefore held that as the lease was not a perpetual lease, the Plaintiff was not the present owner of all the coal in one-half of the *mauzah* and so he dismissed the suit on that ground alone without deciding the other issues raised in the case. The Plaintiff thereupon preferred this first appeal.

Messrs. Pugh, Jayaswal, Naresh Ch. Sinha and *Sishir Kumar Mitra* for the Appellants.

Messrs. P. R. Das and *Sailendra Nath Palit* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

CHAMIER, C. J.—This was a suit for partition of underground mines and minerals in a village of which an eight annas share belongs to the first Defendant and the remaining eight annas share is the property of Defendants Nos. 4 and 5. The only dealings with the property which need be noticed are; (*a*) a *makurari* of an eight annas share granted on September 26th, 1878, by the predecessor-in-title of the first Defendant to one Raghunath; (*b*) a lease of four muris of land and other rights granted by the predecessor-in-title of the fourth and fifth Defendants on September 23rd, 1879, to Keshu, the son of Raghunath; and (*c*) a lease for 999 years of the underground mines and minerals in half the village granted on January 21st, 1908, to the Plaintiffs by the fourth and fifth Defendants. The rights of Raghunath and Keshu under leases (*a*) and (*b*) have, by reason of various assignments, vested in the second Defendant, the Bengal Coal Co., Ld.

In view of certain well-known decisions of their Lordships of the Privy Council it is probable that lease (*a*) did not affect the lessor's right to the underground mines and minerals in his share of the village but the question need not be decided in this case. It is clear, and indeed it is conceded by Counsel for the Bengal Coal Company, that lease (*b*) did not confer on the lessee any right to underground mines and minerals. The Plaintiff is therefore entitled to the rights which lease (*c*) purports to confer upon him. The question for decision is whether that lease entitles him to maintain a suit for partition. The fourth and fifth Defendants support his claim to partition. The first Defendant also is willing to have the underground mines and minerals partitioned. His case is that the second and third Defendants have no rights whatever to the minerals in his share of the village.

The Subordinate Judge dismissed the suit on the ground that the Plaintiff as a lessee for a term only was not joint owner of the minerals with any other person,

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REPORTS (*see* Index).

Prisoner, if may address Court after verdict.

In the treason trial of Casement another point of practice and procedure worthy of note is that the prisoner was asked to make a statement after the evidence had been closed and before his counsel addressed the jury. Casement thereupon made a statement which somewhat corresponds to the written statements which are usually put in on behalf of the defence in this country. Then, again, after the addresses of counsel on behalf of the defence and the Crown and after the jury had returned a verdict of guilty, the Lord Chief Justice asked Casement whether he had anything to say. Casement thereupon made a speech which he expressly said was addressed not merely to the Judges but to the public at large. The trial Judges did not interfere but allowed him to deliver the speech which he had written in the course of his trial. This has given rise to a controversy in England as to the propriety of the course. Sir Harry Poland, K. C., is of opinion that the indulgence given to the prisoner is contrary to practice in treason trials. He maintains that after the return of verdict, the Judges may, no doubt, ask the prisoner why judgment should not be passed on him according to law, but the prisoner is only entitled to move on some point of law in arrest of judgment. In a treason trial a prisoner is usually asked after the address of his counsel whether he has anything to add.

This was the course adopted in *Frost's* case (4 St. Tr. N. S., 86) and in *Smith O'Brien's* case (7 St. Tr. N. S., 276). Sir Harry Poland maintains that since Casement was allowed to make a statement and addressed the jury before his counsel addressed them, he was not entitled to a second address after verdict. He says that this is open to objection on the ground that since the counsel for the Crown cannot reply to this address by the prisoner after verdict, it is objectionable and places the prosecution at a disadvantage. It may be said, however, that as the address after verdict is meant for the judge, it is not likely to prejudice the prosecution. Sir Homewood Crawford referring to Sir Harry Poland's views refers to *Wainwright's* trial before Sir Alexander Cockburn in 1875 where after verdict the prisoner was asked why the Court should not proceed to pronounce sentence of death and Wainwright who was an eloquent speaker commenced his address, but the Lord Chief Justice interfered and said, "I cannot allow you to make a speech. The only question put to you is whether you have anything to say why sentence should not be passed on you." Mr. Swift Macneill, K. C., says that the course followed in Casement's trial cannot be regarded as a new departure. He refers to *Mrs. Maybrick's* trial where the prisoner was allowed, just as in Casement's trial, to put in a long written statement after the evidence was closed and was further allowed by Sir James Fitzames Stephen to make a further statement after verdict as to why sentence should not be passed on her.

Journal of the Society of Comparative Legislation—July 1916.

As we were going to press we received the July number of the Journal of the Society of Comparative Legislation for the current year which contains a number of very interesting notes and articles. Amongst these an article on the "Zamora" judgment (on which we have already commented in these columns), The Public Trustee in India, England and some of the Colonies, contributed amongst others by Sir John Trevelyan, The Case Method of Teaching Law, The Constitution of India and Canada, will specially interest the Indian readers, but

there are many others which are of exceptional interest to all who take interest in the scientific study of law. Owing to shortness of space and pressure of time we are unable to review this particularly interesting issue of the Journal but hope to do so after the Long Vacation.

DELEGATION OF POWERS AND THE WAR ORDINANCES.

The power to promulgate Ordinances was conferred on the Governor-General by the Indian Councils Act, 1861, sec. 23; The Government of India Act, 1915 (sec. 72) which repeals the Act of 1861 confers on the Governor-General the same power. Such Ordinances are to be passed in cases of emergency, for the peace and good government of British India or any part thereof and any Ordinance so made shall, for the space of not more than six months from its promulgation, have the like force as an Act passed by the Governor-General in Legislative Council; but the power of making Ordinances is subject to the like restrictions as the power of the Governor-General in Legislative Council to make laws. The restrictions to the legislative power of the Governor-General in Legislative Council are contained in sec. 65 of the Government of India Act, 1915.

This extraordinary legislative power possessed by the Governor-General is to be used with great caution and only in cases of extreme emergency. That this power has been used very rarely is evidenced by the fact that since 1861 there have been only a few Ordinances. The exigencies of the present war have rendered it necessary to exercise this power and as many as nine Ordinances were passed within a very short period about the close of 1914.

The life of an Ordinance cannot be extended beyond six months by the Governor-General, neither can the Governor-General promulgate a fresh Ordinance embodying the terms of an old Ordinance, for that will have the effect of extending the old Ordinance beyond six months. In the recent case of *In the matter of Jewa Nathoo and others* (reported in 20 C. W. N. 1327) it was contended that an Ordinance could not be extended even if it was incorporated in an Act of the Governor-General in Legislative Council. Sec. 72 of the Government of India Act, 1915 (which is practically the same as sec. 23 of the Indian Councils Act, 1861), says, that an Ordinance may be controlled or superseded by any such Act (*i.e.*, Act of the Governor-General in Legislative Council). Speaking about the old section the learned Judge said in that case " The power of the Governor-General in Council to pass an Act embodying the provisions of an Ordinance is in no matter controlled or taken away by that section. It is clear that the Governor-General in Council has power to pass such an Act embodying the provisions of the Ordinance in question. It is not an Ordinance extended but an Act."

A point which was not taken in the above case but which it seems may be urged is as to the question of delegation. By sec. 3 of Ordinance III of 1914 the Governor-General in Council may by order do certain things. By sec. 8, the Governor-General in Council may delegate, subject to such conditions and restrictions as he may think fit, all or any of his powers under this Ordinance to any civil or military authority in British India either by name or in virtue of his office. By Government of India, Home Department Notification No. 1374, dated 12th September 1914 (published in the Gazette of India Extraordinary of the same date) the Governor-General in Council delegated to the Governor of Bengal in Council certain powers specified in the said Notification. By Notification No. 11312P of the Government of Bengal the Governor of Bengal in Council in the exercise of powers delegated to him by the Governor-General in Council by the abovementioned Notification conferred on certain officers, described as Supervising Officers, certain very wide powers. On a perusal of the powers so conferred it would seem that the Governor of Bengal in Council has in fact delegated again all his powers under the Ordinance to these Supervising Officers. But it is a well-known principle of law that a delegated authority cannot be further delegated. If the same principle applies to this case then the appointment of Supervising Officers with such wide powers may be *ultra vires*. It may be also stated that the Governor of Bengal in Council retains the power to make the final order on the report made by the Supervising Officers. But that does not seem to validate the intervening acts of those officers if their appointment *ab initio* was *ultra vires*.

M. N. Kanjilal,
Bar.-at-Law.

Reviews.

INDIAN CASE-LAW ON EJECTMENT. Containing the laws and rulings, relating to suits for recovery of immoveable property. *By Lal Mohon Mukhopadhyaya, B.L. Vol. II. Second Edition. Butterworth & Co. Ld. (India) 1916. Price Rs. 6.*

We noticed in detail the first volume of this work, and the industry and care which marked every page of the first volume are equally apparent in the present. The subjects dealt with in this volume, are : (1) Forfeiture (which title is made to include cases of re-entry by the landlord upon abandonment and surrender as also re-entry under the provisions of the various rent laws upon annulment of encumbrances), (2) the several local statutory provisions relating to Ejectment of agricultural tenants, (3) Ejectment of tenants holding other than agricultural lands, (4) Ejectment under sec. 9 of the Specific Relief Act, (5) Illegal Ouster, (6) Compensation for improvement made by tenants, (7) Burden of proof and presumptions arising in suits for recovery of land, and (8) Proof of possession with chapters thrown in on : (1) Landlord's private land, (2) Customs and Usages, and (3) Documentary evidence relating to suits for recovery of land. One may reasonably entertain doubts as to whether all these matters and those dealt with in the first volume could really be squeezed into a book professing to deal with the Indian Case-law on Ejectment. At one time, indeed, it occurred to us to ask the author to rename it the Law of Landlord and Tenant in India. But some of the titles mentioned above obviously overflow the limits implied by even such a comprehensive title. But what need there is to quarrel over the title? The book brings together the principles of English Law, the statutory provisions enacted for different provinces of India, and the case-law bearing on those provisions and others now repealed, under a variety of titles which are related to each other in at least one particular, *viz.*, that they may all come up for consideration in suits for recovery of land. The book will provide legal practitioners with a digest and a book of reference—perhaps the only one dealing with its particular subject-matter—up-to-date and thoroughly reliable.

SANJIVA ROW'S DIGEST OF PRIVY COUNCIL RULINGS. 3rd Edition. Vols. I and II. *By C. S. Somanatha Sastri, B.A., B.L. Published by the Law Printing House, Madras. 1916.*

The above Digest which in its previous editions had been very well received by the legal profession, has in the present edition been made more comprehensive, comprising as it does, all law reports, official and non-official, from the earliest times down to the present date, such reports as Knapp's Privy Council cases, Acton's Reports, Saraswati's Privy Council Judgments, etc., which had been omitted in previous editions being also included in the present. The classification and arrangement of the subject-matter are excellent and the cases digested have for facility of reference been arranged both chronologically and in the order of the Provinces to which they belong. Additional notes have been given clearly indicating how a particular decision of the Privy Council has been dealt with in subsequent decisions of the same tribunal. An elaborate subject-Index and two Tables of Cases, one by the volume and page of the reports and the other in alphabetical order of the names of the cases digested are other features of the compilation. The get-up of the volumes does credit to the publishers. We have no doubt that the work will prove of the greatest use to legal practitioners throughout India.

THE PROVINCIAL INSOLVENCY ACT (III of 1907) with Commentaries. *By Ramnikrai Jadavrai Thakor, B.A., LL.B., Pleader, Ahmedabad. Butterworth & Co. (India), Ld., Calcutta. 1916.*

The object of this little book of 200 pages is chiefly to interpret to the commercial public the provisions of the Provincial Insolvency Act who, we agree with the author, by reason of their want of familiarity with its provisions allow themselves to be tricked out of the rights conferred upon them by the statute by slippery debtors. The Insolvency Statutes are mainly intended to enable creditors to participate equitably in the assets of a debtor who is unable to pay his debts fully and incidentally to afford protection to honest debtors. But the prevailing idea in the mofussil, no doubt, is that these statutes exist solely for the purpose of affording dishonest debtors an opportunity under forms of law to do their creditors out of their dues. The present commentaries ought to dispel these ideas, and if they do not, it will be through no fault of the author, for the commentaries are

not mere digests of cases. They are explanatory, and quotations from the proceedings in Council and from leading decisions, English and Indian, figure in them largely. Courts and legal practitioners in the mofussil, whose acquaintance with the Insolvency Law may not be very intimate, will also profit by these commentaries. The rules framed by the Bombay, Calcutta and Madras High Courts are also appended to the commentaries and together they form a handy manual on the Insolvency Law applicable to India outside the presidency-towns.

The Consolidated Digest of all Indian Decisions, 1909-1915. Vol. I, A to H. *By K. Bhashyam Iyangar and R. Narayanaswami Iyer, assisted by S. D. Chaudhuri. 1916. The Commercial Press, Triplicane, Madras, S.-E.*

This digest of the decisions of the Indian High Courts, Chief Courts and Judicial Commissioners' Courts reported between 1909 and 1915, is prepared on the lines of the Compilers' Annual Digests. It overlaps to some extent the Decennial Digest of Indian Cases, 1901-1910, published by the late S. Srinivasa Aiyar. It will, as all such publications usually do, economise labour.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[Appeal from Bengal.]

The Lord Chancellor
Lord Haldane.
Lord Atkinson.
Lord Shaw.
Lord Parmoor.
1916,
28, July.

Maharaja Ram Narayan Singh
v.
Adhindranath Mukerji and others.

Privy Council—Rehearing of appeal, application for—Party prevented from appearing by fraud of agent—Restoration on terms.

This was an application, praying for a restoration and re-hearing of the appeal, which was heard *ex parte* on the 7th April 1916, and which was allowed with costs by a judgment (see 20 C. W. N. 989) delivered on the 12th May 1916. The Petitioners (Respondents) stated in their petition that they had instructed one Basil C. Wilson, who represented himself as the Calcutta agent of Messrs. T. L. Wilson & Co., Solicitors, of 5, Victoria Street, London, S. W., and paid him some money to defend the Privy Council Appeal on their behalf. But the Petitioners subsequently discovered that Basil C. Wilson was not at the time the agent of the London firm, and that instead of doing anything to prosecute the appeal, the money had been embezzled and the Appeal was heard in the absence of the Petitioners. It was submitted on behalf of the Petitioners, that but for the fraud practised upon them, they would have defended the appeal, and that if they had had an opportunity of arguing their case, their Lordships would have come to a different conclusion.

Their Lordships granted the petition—the Petitioners to pay to the Appellant the costs of the hearing of the petition and the costs of the previous hearing that were thrown away.

Sir R. Finlay, K. C., and *Mr. J. M. Parikh* for the Petitioners.

Messrs. L. DeGruyther, K. C., and *B. Dubé* for the Appellant.

Solicitor: *Mr. Edward Dalgado* for the Petitioners.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for the Appellant.

B. D.

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but was only entitled on certain conditions to carry on mining operations in half the village, that his rights under the lease of January 1908 did not entitle him to claim partition of the minerals, and that a partition was impossible.

Counsel for the Bengal Coal Co. relied upon the decision in *Mukunda Lal* v. *Lchuraux* (1) but the authority of that case is much shaken by the decision of the Full Bench in *Hemadri Nath* v. *Ramani Kanta* (2), in which Banerjee, J., delivering the judgment of the Court said "In support of the first ground it is urged that the Plaintiff's predecessor-in-title having granted a *putni* of an undivided share of six annas in the entire zemindari, to allow the Plaintiff to enforce partition and limit the *putni* to a specific portion of the zemindari proportionate to the six annas share would be to allow him to alter the terms of the *putni* lease against the will of the lessees. A contention somewhat similar to this was raised in *Heaton* v. *Dearden* (3) on behalf of the Defendant, whose predecessor-in-title had agreed to grant a lease of an undivided moiety of certain mines, in a suit for specific performance of the agreement to lease and for partition, and the contention was disallowed. And there is no reason why a different principle should be followed in this case," and "I am unable to assent to the view that as a general proposition of law there can be no partition as between parties, the interest of one of whom is subordinate to that of the others. I think the Court must in each case determine whether, having regard to the nature of the interest owned by the parties and to all other circumstances necessary to be taken into consideration, the balance of convenience is in favour of allowing partition, and if it determines that question in the affirmative, the mere fact of the parties owning interests which are not co-ordinate in degree, ought not to be a bar to partition. This view is in accordance not only with the English cases cited in the argument, namely, *Baring* v. *Nash* (4) and *Heaton* v. *Dearden* (3) which may be referred to so far as they deal with general principles, but also with rules of justice, equity and good conscience, which our Courts are directed to follow in cases not provided for by any definite rule of law (see Act XII of 1887, sec. 37)." Counsel for the Bengal Coal Co. relied also upon the decision of the Privy Council in *Bhagwat Sahai* v. *Bipin Bchari Mitter* (5). In the course of their judgment their Lordships said, "In the judgment appealed against it was held, in accordance with an earlier decision of a Full Bench of the same Court, that the fact of the party on one side of the dispute being in a lower grade of title than those on the other side was not necessarily a bar to partition. Their Lordships agree with the opinion of the Full Bench, in the case referred to, that the right of partition exists when two parties are in joint possession of land under permanent titles, although those titles may not be identical. It is unnecessary for their Lordships to consider whether a right to partition exists in any other case, and they are desirous to avoid indicating any view upon any such subject."

This case clearly cannot be relied upon as authority for the proposition that only a person having a permanent title can claim partition.

(1) I. L. R. 20 Cal. 879 (1892).
(2) I. L. R. 24 Cal. 575 at p 581 : s. c. 1 C. W. N. 406 (1897).
(3) 16 Beav. 147 (1852).
(4) 1 V. & B. 551 (1813).
(5) I. L. R. 37 Cal. 918 : s. c. 14 C. W. N. 982 (1910).

LALIT KISHORE MITRA *v.* THAKUR GIRDHARI SINGH.

In *Baring* v. *Nash* (4) the Vice-Chancellor overruled a demurrer to a Bill for partition by a lessee for a term of 500 years of which 73 had expired, and held that it was clear law that a person having a limited interest of that kind might claim partition. In *Heaton* v. *Dearden* (3) one of two tenants in common of an estate had agreed to grant a lease for 21 years of the mines under it. The Master of the Rolls held that the lessee was entitled to a decree for specific performance and for partition of the estate. In view of the suggestion made by Counsel that an owner of land having given a lease of the surface cannot grant a lease of the minerals, I quote the following passage from the judgment of the Master of the Rolls: "It was argued that the mineral being unbroken, and there being no agreement to demise the surface of the ground, you could neither have the specific performance nor a partition of the property. But so far as the partition is concerned, the point is decided by the case of *Baring* v. *Nash* (4) because a limited interest in a portion of the estate would not differ in effect from a limited interest with respect to the whole of the estate. With respect to specific performance, I am also of opinion that it is decided by the ordinary principles, that a man may, if he pleases, sell his interest in the surface of an estate reserving the minerals, or he may sell his interest in the minerals reserving the surface—that he may demise and contract to demise the minerals alone, in the same manner as he may enter into a contract to sell them—without the surface, and that having demised the minerals, he has also given the right to get at them."

According to the English authorities, it is clear that a lessee for years may maintain a claim for partition.

I see no reason for holding that a different rule prevails in India. Moreover, the objections that have been taken at times to allowing a suit for partition by a person holding a limited interest do not apply to the present case. The Plaintiff holds a lease for no less than 999 years, and the fourth and fifth Defendants, who are entitled to the reversion, desire that the claim for partition should be allowed.

There remains the question whether a partition of the underground mines and minerals is impossible. In his plaint the Plaintiff claimed a sale as an alternative to partition and the Bengal Coal Co. at once denied that the underground rights could not be conveniently partitioned or that a division could not reasonably or conveniently be made (Written statement, para. 7). Their counsel in this Court seemed inclined to dissent from this. At present I see no reason to anticipate any special difficulty in effecting a partition but in case any such difficulty is found hereafter, we may reserve to the Court below the right to order a sale under sec. 2 of the Partition Act, 1893.

I would allow this appeal and pass a preliminary decree for partition of the underground mines and minerals of the village provided that, if hereafter it is found impracticable to partition the same, a sale may be ordered. The Bengal Coal Co. must pay the Appellant's costs in this Court. All other parties will pay their own costs in this Court. Costs in the Court below will be costs in the cause.

SHARFUDDIN, J.—I agree.

A. K. R. *Appeal allowed.*

(3) 16 Beav. 147 (1852).
(4) 1 V. & B. 551 (1813).

[PRIVY COUNCIL.]

[APPEAL FROM MADRAS.]

LORD SHAW. LORD SUMNER. LORD PARMOOR. SIR JOHN EDGE. MR. AMEER ALI. SIR LAWRENCE JENKINS.	}	THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Appellant, *v.* SRI RAJAH CHELIKANI RAMA RAO and others, Respondents.
1916, Heard, 12, January. Judgment, 7, July.		

Limitation Act (IX of 1908), Sch. I, Arts. 149, 144—Island arising in the sea within territorial limits—Title in Crown—Crown opposed by squatters—Crown if must prove that squatters had not acquired title by adverse possession—Onus—Madras Forest Act (V Mad. of 1882)—Afforestation, notification of, objection to—Trial before Forest Officer—Appeal to District Court—Decision of District Court, if final—Limitation of ordinary incidents of litigation to be express.

The territory of the Crown does not cease at low water mark and its right over what extends seawards beyond that is not merely of the nature of jurisdiction or the like. The law in this respect is the same in India as in the United Kingdom. The Crown is the owner, and owner in property, of islands arising in the sea within the territorial limits of the Indian Empire.

Where Government seeking to constitute into a reserved forest certain islands which had formed in the bed of the sea near the mouth of the river Godaveri within much under three miles of the mainland, was opposed by certain persons who preferred claims before the Forest Officer under the Madras Forest Act, and the Forest Officer having rejected them, they appealed to the District Court as provided by the Statute:

Held—*That the decision of the District Court in such cases was not final.*

When proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees, the ordinary rules of the Civil Procedure Code apply; and when an ordinary Court of the country is seised of a dispute relating to a legal right to possession of, and property in, land, it would require a specific limitation to exclude the ordinary incidents of litigation.

RANGOON BOTATOUNG COMPANY *v.* THE COLLECTOR, RANGOON (2) *distinguished and its* ratio *examined.* KAMARAJU *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (1) *approved.*

Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession; and it would be contrary to all legal principles to permit a squatter to put the owner to a negative proof that the possession of the squatter was not long enough to fulfil all legal conditions.

The position of the objectors to afforestation in this case was in law the same as that of persons bringing a suit in an ordinary Court of Justice for a declaration of right by adverse possession, with this difference only that the period of 12 years provided by Art. 144 is extended by Art. 149 to sixty years.

RADHA GOBIND ROY SAHEB *v.* INGLIS (11) *and* THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* VIRA RAYAN (8) *referred to.*

The statement of law by the High Court that "it rested upon the Crown to prove that it had a subsisting title by showing that the claimant's possession commenced or became adverse within sixty years" was erroneous on the above view of the onus

(1) I. L. R. 11 Mad. 209 (1888).
(2) L. R. 39 I. A. 197 : 16 C. W. N. 961 (1912)
(8) I. L. R. 9 Mad. 175 (1885).
(11) 7 C. L. R. 364 (1880).

and also because the fact that islands formed in the sea belonged to the Crown was fundamental, and until adverse possession against the Crown was complete that fact formed "subsisting title" and it was not incumbent on the Crown to fortify that fundamental position by any enquiry into possession or the acceptance of any onus on the subject.

These were two consolidated appeals from two decrees, dated the 30th September 1909, of the High Court of Judicature at Madras (Benson and Munro, JJ.), made in second appeal from the Appellate judgments and decrees of the District Court of Godaveri, dated the 27th July 1904. The judgment of the High Court is reported in I. L. R. 33 Mad. at p. 1.

The main question for determination on the present appeal was whether the Appellant was entitled to constitute the lands in dispute into a reserved forest under the provisions of secs. 3 and 4 of the Madras Forest Act, No. V of 1882.

Purporting to act under the provisions of the said sections, the Governor of Madras in Council published two notifications, dated the 16th November and 2nd December 1901, proposing to constitute the lands in dispute which are situated at the mouth of the Godaveri into a reserved forest and appointing Mr. E. A. Smith, Forest Settlement Officer, to enquire and determine the nature and extent of any rights that may be claimed in respect of the said lands.

The Respondents, who were the proprietors of the Mallavaram and Nadavapalli estates respectively, put in their claims before the said Forest Settlement Officer on the 14th and 23rd February 1902, in respect of several plots of land therein specified. They asserted that the lands in question had been in the possession and enjoyment of their predecessors-in-title and themselves from time immemorial; that the lands belonged to them and that the Crown had no right or title whatever to take possession thereof from the Respondents, and constitute them into a reserved forest.

The Crown denied the Respondents' claim and filed a written statement. The said Forest Settlement Officer after examining evidence, oral and documentary, produced by the parties, delivered separate judgments on the 19th October 1903. He held that the lands in question were formations in the sea, and that, therefore they were originally the property of the Crown. He further held that the burden of proving their title lay upon the Respondents, and that as the Respondents had, in his opinion, failed to prove adverse possession against the Crown for the full period of 60 years, the Crown was entitled to constitute them into a reserved forest. He accordingly made two decrees dismissing the Respondents' claims in either suit with costs except in regard to a plot of land about which there is now no dispute.

Against the said Decrees, the Respondents appealed to the District Court of Godaveri, and the said appeals were heard together by the District Judge, who delivered one judgment on the 27th July 1904. The learned District Judge agreed with the said Forest Settlement Officer in his view that the onus of proof lay upon the Respondents. He therefore dismissed the said appeals with costs and made decrees accordingly.

Against the said decrees of the said District Judge the Respondents appealed to the High Court. Both appeals were heard together and the learned Judges of the High Court delivered one Judgment* on the 27th March 1908. They held that

* Reported in I. L. R. 33 Mad. 1.

the Forest Settlement Officer as well as the District Judge had erred in law. They observed as follows :—

"The District Judge then holds that as the title was originally in the Crown the Claimants must prove adverse possession for 60 years. Here the District Judge is clearly wrong. Though the title was originally in the Crown, still, as the possession of the Claimants for 20 years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by shewing that the possession of the Claimants commenced or became adverse within the period of limitation, *i.e.*, within 60 years before the notification. *The Secretary of State* v. *Vira Rayan* (8), *The Secretary of State for India* v. *Bavotti Haji* (9) and *The Secretary of State for India* v. *Kota Bapanamma Garu* (10). As the several islands were formed gradually and probably appeared and became capable of occupation at different times, it may be that there is proof that some, if not all, of them came into existence as land capable of occupation within 60 years prior to the notification. In the case of such land the title of the Crown must be subsisting title. In the case of lands which came into existence as land capable of occupation more than 60 years prior to the notification, the Crown must shew by evidence that it had a subsisting title at sometime within that period.

"We must therefore ask the District Judge to return a finding as to whether the Crown has subsisting title to the whole or any portions of the claim land lying between Hope Island on the north and Neelarva on the south.

"Further evidence on both sides on this question may be adduced before the District Judge as the true point in issue was not correctly understood by the parties at the trial. The finding should be returned within five months from date of the receipt of this Order and ten days will be allowed for filing objections."

The High Court accordingly remitted the following issue for trial to the District Judge of Godaveri :—"Whether the Crown has a subsisting title to the whole or any portions of the claim land lying between Hope Island on the north and Neelarva on the south."

Both parties adduced further evidence before the District Judge of Godaveri, and after hearing and examining that evidence, he recorded his finding on the 3rd September 1908. The learned District Judge found that the Crown had no subsisting title to the whole or any portion of the lands in dispute. In the course of his judgment he observed as follows :—

"It is conceded before me that there is no proof that these islands or any portion of them were formed within 60 years and it is rightly admitted, that, in fact, there is no evidence that can be relied on to support the Crown on the point. It is also admitted that never, before the notification, dated the 2nd December 1901, was the Crown in occupation of the lands in question. What is sought to be established for the Crown is that the islands, though they might have been formed before the 60 years, yet became capable of occupation within the 60 years and that though they might have become capable of occupation before the 60 years, yet they had not been in the exclusive possession of either of the two Claimants Nos. 1 and 2, for a period of 60 years, so as to extinguish the title of the Crown.

"Reading the entire record of the oral

(8) I. L. R. 9 Mad. 175 (1885).
(9) I. L. R. 15 Mad. 315 (1892).
(10) I. L. R. 19 Mad. 165 (1895).

evidence on behalf of the Defendant, including that adduced at the trial of this suit, before my predecessor, I am not prepared to find that the Defendant has proved that the land first became capable of enjoyment within the 60 years prior to the notification nor is there any tangible documentary evidence to prove the Defendant's contention on the point. It is argued that in Exhibit IX and Exhibit V the charts of the Coringa Bay, dated 1846 and 1857, dry sand and grassy sand are shown about the spot where the plaint islands now exist. The maps are not intended to show these forests and it is possible that only the edges are shown in the charts. On the other hand, Exhibit DD (S. A. 1434), Mr. Pascall's map, prepared in 1844, shows the existence of these forests. Thus I find that the Defendant has failed to prove that the islands in question became capable of occupation for the first time within 60 years before the notification.

"For these reasons, I am of opinion that the Defendant has failed to prove that the Claimants were not in exclusive possession of the respective lands they now claim, within the period of 60 years prior to the notification of 1901."

On receipt of the said finding of the District Judge, the appeals of the Respondents were again heard by the learned Judges of the High Court. The present Appellant filed his objections to the said finding of the District Judge, but the High Court overruled those objections and affirmed that finding. The result was that the claims of the Respondents in so far as they related to the lands covered by the said finding of the District Judge were allowed by the High Court, and decrees giving effect to that finding were accordingly made.

Hence these appeals.

Sir Erle Richards, *K. C.*, and *Mr. Kenworthy Brown* for the Appellant.—There was no right of appeal to the High Court against the decisions of the District Court, which were final under sec. 10, cl. 2, of the Madras Forest Act, 1882. The Act did not provide for a second appeal (*vide* sec. 16). The decision of the District Court was not a "decree" within sec. 2 of the Code of Civil Procedure, 1882—consequently there was no appeal given by sec. 584 of that Code. *Rangoon Botatoung Company* v. *The Collector, Rangoon* (2), *Meenakshi* v. *Subramaniya* (12) and *Ravi Veera Raghavulu* v. *Narasimha Naidu* (13).

The case of *Kamaraju* v. *The Secretary of State for India in Council* (1) was wrongly decided and the subsequent decisions of the Madras High Court were based on that Full Bench decision. Next, the High Court had wrongly decided that the onus was on the Crown to prove that the possession of the Respondents commenced or became adverse within 60 years of the institution of the suit. It was not disputed that the title to the lands was originally in the Crown, and having regard to the origin and nature of the lands that could not be disputed. The onus was therefore upon the Respondents to prove that they had a title against the Crown. Under the Madras Forest Act, the Respondents were the claimants and they had to establish their title to the lands. They could only do so by proving 60 years' adverse possesison against the Crown. And even if the Crown were suing for possession of the lands, as Plaintiff, the onus was still upon the Respondents. The

(1) I. L. R. 11 Mad. 309 (1888).
(2) L. R 39 I. A. 197 : s. c. 16 C. W. N. 961 (1912).
(12) L. R. 14 I. A. 160 (1887).
(13) L. R. 41 I. A. 258 : s. c. 19 C. W. N. 97 (1914).

Crown was never in possession of the lands and consequently Art. 142 of the Limitation Act, 1877, did not apply. Art. 144 applied, and that article read with Art 149 made it clear that it was for the Respondents to prove that their possession became adverse more than 60 years before the date of the notification. The distinction between cases in which the Plaintiff alleges dispossession and cases under Art. 144 appears from the following: *Nitrasur Singh* v. *Nund Loll* (14) and *Karan Singh* v. *Bakar Ali* (15).

The former was a case of dispossession, and the latter a case within Art. 145 of the Limitation Act of 1871. The Appellant's view is supported by *Radha Gobind* v. *Inglis* (11).

That decision has been followed in the following: *Faki Abdulla* v. *Babaj Gangaji* (16), *Hammanta* v. *Mahadev* (17), *Tarubai* v. *Venkatrao* (18) and *Alimaa* v. *Kutti* (19).

In *The Secretary of State for India in Council* v. *Vira Rayan* (8) the title of the Crown was not proved and it was *obiter dictum*. In *Secretary of State for India* v. *Bavotti Haji* (9), the Defendant had proved 60 years' possession, further, more Courts had held that the Respondents had no possession of the lands before 1882. Each claimant was bound to prove his exclusive possession for the statutory period. One trespasser cannot take advantage of the possession of another trespasser. The High Court had erroneously held that it was for the Crown to prove that it had a subsisting title. The title being originally in the Crown, that title subsisted unless and until the Crown lost it by full 60 years' adverse possession.

Sir R. Finlay, K. C., and *Mr. Dubé* for the Respondents.—As to the preliminary objection, the Full Bench decision in *Kamaraju* v. *The Secretary of State for India in Council* (1) has been acted upon in several cases since 1888. Even the Crown had filed second appeals. The right of appeal was given by the Code of Civil Procedure from all decrees of the District Court and was not affected by the Forest Act. The decisions here were in terms and in substance decrees within the meaning of sec. 2 of the Code of Civil Procedure. (Their Lordships intimated that they did not wish to hear further argument upon the preliminary point). By proceeding under the Madras Forest Act the Crown cannot place itself in a better position than in a suit for possession by the Crown. In every suit for possession, the Plaintiff must prove that he has a title which is not barred by statute. In an action in ejectment the Plaintiff must prove both title and possessory title—Darby and Bosanquet (2nd Ed., pp. 299, 544); that general principle was applicable to England as well as to India. *Nitrasur Singh* v. *Nund Loll* (14). The above decision applies to suits whether they are within Art. 142 or Art. 144. *Radha Gobind* v. *Inglis* (11) was explained in *Mano Mohun* v. *Mothura Mohun* (20). The onus was upon the Crown to show either possession within 60 years or that the possession of the Respondents became adverse within that period. Under sec. 4 of the Madras Forest Act, only land at the disposal of Government could be constituted into a

(8) I. L. R. 9 Mad. 175 (1885).
(9) I. L. R. 15 Mad. 315 (1892).
(11) 7 C. L. R. 364 (1880).
(14) 8 M. I. A. 199, 220 (1860).
(15) L. R. 9 I. A. 99, 102 (1882).
(16) I. L. R. 14 Bom. 458 (1890).
(17) I. L. R. 18 Bom. 513 (1893).
(18) I. L. R. 27 Bom. 43, 66 (1902).
(19) I. L. R. 14 Mad. 96 (1890).

(1) I. L. R. 11 Mad. 309 (1888).
(11) 7 C. L. R. 364 (1880).
(14) 8 M. I. A. 199, 220 (1860).
(20) I. L. R. 7 Cal. 225, 230 (1881).

reserved forest. All Courts had concurred in finding that the Respondents have been in possession for at least 20 years. There was reliable documentary evidence which carried Respondents' possession further back nearly 40 years. It was admitted that the Crown was never in possession, the Crown must therefore establish that it had a possessory title unbarred by limitation, at the commencement of the present proceedings. Reference was made to the following authorities: *The Secretary of State for India in Council* v. *Vira Rayan* (8), *Mohima Chander* v. *Mohesh Chander* (21), *Anangamanjari* v. *Tripura Sundari* (22), *Pandurang* v. *Balakrishna* (23), *Krishna Aiyer* v. *Secretary of State for India* (24), *The Secretary of State for India* v. *Kota Bapanamma* (10), *Karan Singh* v. *Bakar Ali* (15), *Inayet Husain* v. *Ali Husain* (25) and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (26). Cole on Ejectment (1st Ed., p. 6).

Sir Erle Richards in reply.—In an action for ejectment in England, the Plaintiff had to allege and prove a dispossession. The principle with regard to limitation under the English Statute does not apply to India which had a Limitation Act of her own. The knowledge of ouster by adverse possession can only be in the Defendant. If the onus were put on the Plaintiff it would impose an impossible burden on him. The nature of the jungle lands was such that the Crown was not in a position to say when the possession of squatters commenced. *Raja Kishan Dat* v. *Narender Bahadur* (27). The Forest Act puts the onus on the claimants who desire to prove their ownership. They can only do so by proving 60 years' adverse possession.

(8) I. L. R. 9 Mad 175 (1885).
(10) I. L. R. 19 Mad. 165 (1895).
(15) L. R. 9 I. A. 99, 102 (1882).
(21) L. R. 16 I. A. 23 (1888).
(22) L. R. 14 I. A. 101, 110 (1887).
(23) 6 Bom. H. C. R. 125, 127, 128 (1869).
(24) I. L. R. 33 Mad. 178 (1909).
(25) I. L. R. 20 All. 182 (1897).
(26) L. R. [1914] A. C. 153, 174.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—These are consolidated appeals from two decrees of date the 30th September 1909, pronounced by the High Court of Judicature at Madras. The appeals relate to certain parcels of land claimed by two zemindars. These zemindars' claims were, on the 19th October 1903, in certain proceedings under the Madras Forest Act (V of 1882), dismissed by the Forest Settlement Officer of Godaveri. His judgments were affirmed by two decisions of the District Court of Godaveri, dated the 27th July 1904. These decisions of the District Court were, however, reversed and varied by the High Court by the decrees now under appeal to the Board. The Appellant is His Majesty's Secretary of State for India.

The question for determination is whether the Appellant is entitled to constitute or incorporate the lands into a reserved forest under the Forest Act. The Respondents are objectors and claimants under the Statute.

The physical facts are not in dispute; they have been found by the Courts below. They are quite simple. The lands are islands which have been formed in the bed of the sea near the mouth or delta of the river Godaveri. The Godaveri is a tidal and navigable river. The islands are within a short distance, much under three miles, of the mainland. The lands are now mostly jungle lands.

The Crown desires to constitute them into a reserved forest. The Respondents

(27) L. R. 3 I. A. 85 (1875).

object, and claim the lands. Their assertion is that these lands have been possessed by them and their predecessors-in-title from time immemorial, and that the lands are theirs. This assertion of property the Crown denies.

By the Statute already named, it is provided (sec. 3) that the Governor in Council may constitute any land at the disposal of the Government a reserved forest; that he shall publish a notification (sec. 4) containing this declaration, specifying "as nearly as possible the situation and limits of such land," and appointing a Forest Settlement Officer "to enquire into and determine the existence, nature, and extent of any rights claimed by or alleged to exist in favour of any person in or over" such land. Provision is made (sec. 6) for requiring, within a period of three months from the proclamation, every person claiming right "either to present to such officer within such period a written notice specifying, or to appear before him within such period and state, the nature of such right, and in either case to produce all documents in support thereof." Thereafter the Forest Settlement Officer is to enquire and to record evidence (sec. 8). And (sec. 10) the Forest Settlement Officer "shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part. If the claim be admitted, there are stipulated proceedings for the surrender, exclusion or acquisition of the right. But (sec. 10, ii) "if such claim be rejected wholly or in part, the claimant may, within thirty days of the date of the order, prefer an appeal to the District Court in respect of such rejection only."

What happened in the present case was that the claim was rejected. An appeal by the Respondents was thereupon made to the District Court, and a decision was pronounced. It was contended on behalf of the Appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the Statute just quoted. In their Lordships' opinion this objection is not well-founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench, *Kamaraju* v. *The Secretary of State for India in Council* (1), a decision which was given in 1888 and has been acted on in Madras ever since.

It was urged that the case of *Rangoon Botatoung Company* v. *The Collector, Rangoon* (2), enounced a principle, which formed a precedent for excluding all appeals from the decision of the district Court in such cases as the present. Their Lordships do not think that that is so. In the Rangoon case a certain award had been made by the Collector under the Land Acquisition Act. This award was affirmed by the Court, which under the Act meant "a principal Civil Court of Original Jurisdiction." Two Judges sat as "the Court" and also as the High Court to which the appeal is given from the award of "the Court." The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried, and the provisions of the particular statute, it was held that there was no right "to carry an award made in an arbitration as to the value of land" fur-

(1) I. L. R. 11 Mad. 309 (1888).
(2) L. R. 39 I. A. 197 : s. c. 16 C. W. N. 961 (1912).

ther than to the Courts specifically set up by the statute for the determination of that value.

The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation. The objection taken is accordingly repelled.

Upon the undisputed facts as to the formation of these islands in the sea and in the situation described, the case would appear to be the ordinary one described by Hale, "De Jure Maris." He describes how "the king hath a title to *maritima incrementa* or increase of land by the sea; and this is of three kinds, *viz.* :—

"1. Increase *per projectionem vel alluvionem.*

"2. Increase *per relictionem vel desertionem.*

"3. *Per insulæ productionem.*"

The lands in dispute fall under the third category, which is thus dealt with by Hale :—

"3. The third sort of maritime increase are islands arising *de novo* in the king's seas, or the king's arms thereof. These upon the same account and reason *primâ facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land environed with water."

The date of formation of these islands is not certain. Plans have been produced showing that from the forties to the sixties of last century they or the larger part of them appeared above the surface of the water. At what date soever they appeared, they were in the high seas at a point thereof not far from the shore of the mainland, and in these circumstances, in the opinion of the Board, they were Crown property.

The case is not complicated by any point as to geographical situation; the question of whether a limit from the shore seawards should be beyond three miles, should be the extreme range of cannon fire, or should be even more if the *locus* be claimed to be *intra fauces terræ*—no such questions arise here. The point is geographically within even three miles of British territory; at that point islands have risen from the sea. Are those islands no man's land? The answer is, they are not; they belong in property to the British Crown.

The doubt raised upon this proposition was substantially rested on certain dicta pronounced in the case of *Reg.* v. *Keyn* (3). The Crown, admitted to be owners of the foreshore, is, so the suggestion is, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it is said, extend further seaward. It should not be forgotten that the *Franconia* case had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore.

When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported nor has the

(3) L. R. 2 Ex D. 63 (1876).

suggestion appeared to be helpful or sound. Their Lordships do not refer to the settlement of the rights of the Crown as against the Duchy of Cornwall in the Cornwall case—but to much more recent examples of contested rights in or over land *ex adverso* of the foreshore.

In the case of *Lord Fitzhardinge* v. *Purcell* (4), Lord Parker, then Parker, J., expressed himself thus :—

". . . . Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are *primâ facie* vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership. The bed of the sea, so far as it is vested in the Crown, and *à fortiori* the beds of tidal navigable rivers, can be granted by the Crown to the subject. There are many several fisheries which extend below low-water mark or exist in the beds of navigable rivers. The whole doctrine of *incrementa maris* seems to depend on the beneficial ownership of the Crown in the bed of the sea, which in the older authorities is sometimes referred to as the King's royal waste. It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public. It is also true that no such grant can, since Magna Charta, operate to the detriment of the public right of fishing. But, subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership capable of being granted to a subject in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted."

It is true that the case cited dealt merely with the right of fowling; but it was necessary in the determination as to that right to settle the true nature of the right in the land itself.

In Scotland the law is firmly settled, and in a similar sense. The question raised in *Lord Advocate* v. *Clyde Navigation Trustees* (5), was whether the latter body could dispose of dredgings taken from the river by depositing them in the bed of Loch Long, a sea-water loch. The Crown resisted the claim, maintaining its ownership in the bed of the loch and in the bed of the sea for a distance of three miles from the coast. In the Outer House the entire question was fully dealt with by that very learned Judge, Lord Kyllachy, who expressed himself thus: ". . . . with respect to the nature of the Crown's right in what is now acknowledged to be part of the territory of the kingdom, *viz.*, the strip or area of sea within cannon-shot or three miles of the shore. Is the Crown's right in that strip of sea proprietary, like the Crown right in the foreshore and in the land? or is it only a protectorate for certain purposes, and particularly navigation and fishing? I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is, therefore, to a large extent *extra commercium*; but none the less is it in my opinion a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property." In the Inner House this view of the law was not dissented from, and Lord Young expressly agreed with it.

(4) L. R. [1908] 2 Ch. Div 139 at p. 166.

(5) [1891] 19 Rittie 174.

Last of all may be mentioned the case of *The Lord Advocate* v. *Wemyss* (6). The action had reference to the ownership of minerals in the bed of the sea and below low-water mark. This, of course, was entirely a question—not as to rights on or over that portion of the bed of the sea, but as to the actual ownership of the corpus or thing itself—of which corpus the minerals formed a part. Upon this question the statement of Lord Watson was expressed as follows: "I see no reason to doubt that by the law of Scotland the solum underneath the waters of the ocean, whether within the narrow seas or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown."

In the opinion of the Board, this is also the law of India. The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire.

It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in prinicple. There is nothing to recommend a local jurisdiction over a space of water lying above a *res nullius*. As to practical results: the confusion that might be produced by leaving islands, emergent within the three-mile limit, to be seized by the first comer is clear beyond controversy. He might be a foreign citizen: he would of course hoist the flag of his own nation, and that nation might proceed to fortify the emergent lands; in short, it is not difficult to figure the anomalies and difficulties which the abandonment of the plain ground taken by Lord Watson would involve to this and to other nations.

The law in the sense now affirmed has not been denied effect in the Courts of this country, even when its enforcement has operated to the advantage or supposed advantage of Foreign States. Lord Stowell dealt with such a position of affairs in "*The Anna*" (7). The case had reference to the capture of a vessel while on a voyage from the Spanish Main to New Orleans. The place of capture was two miles off certain islands. Those islands, at the mouth of the Mississippi, were, much as in the present case, formed by the silting up of sand and slob, but yet surrounded by navigable channels and in the open sea. The case sought to be made was that such islands were no part of American territory, and formed no datum for measuring the seaward mileage therefrom. This argument was rejected. Lord Stowell observed:—

"Consider what the consequence would be if lands of this description were not considered as appendent to the main land, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other Power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil."

Their Lordships do not doubt that the general law, as already stated, is supported by the preponderating considerations

(6) L. R. [1900] A. C. 48.

(7) 5 C. Rob. 373.

of practical convenience, and that, upon the particular case in hand, the ownership of the islands formed in the sea in the estuary or mouth of the Godaveri River is in the British Crown.

In these circumstances the question before the Board would appear to be extremely simple. Under the Indian Limitation Act no adverse possession can be effectively pleaded against the Crown for a period of less than 60 years. The question simply is: Do the claimants establish such adverse possession? If they do not, the basis of their claim fails. This was the way in which the matter was looked at, first by the Forest Settlement Officer, and then by the District Court. In their Lordships' opinion the attitude of both these tribunals was correct in law.

Before the reversal of their decisions by the High Court is remarked upon, the following facts may be noted :—

It appeared that certain squatting had taken place, and that two zemindars, whose successors are Respondents in this appeal, were rivals in seeking to set up some kind of right in the islands. They did not arrive at any settlement of their disputes until in or about the year 1882. The Forest Settlement Officer in the course of a careful examination into the circumstances and rights, held that there was no evidence of adverse and exclusive possession and enjoyment prior to 1883, and that accordingly such possession and enjoyment so proved had not lasted long enough to establish a right against the Government.

In the District Court the same result was reached and the same finding on fact was made. The matter is accordingly concluded so far as possession goes; the Board accepts, as it must accept, the finding. Confirmation of the District Court's judgment would have followed that finding as a matter of course but for the view taken by the High Court on a point of law. It is thus expressed :—

"The District Judge then holds that as the title was originally in the Crown the claimants must prove adverse possession for sixty years. Here the District Judge is clearly wrong. Though the title was originally in the Crown, still, as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, *i.e.*, within sixty years before the notification, *The Secretary of State for India in Council* v. *Vira Rayan* (8), *The Secretary of State for India* v. *Bavalti Haji* (9) and *The Secretary of State for India* v. *Kota Bapanamma Garu* (10). As the several islands were formed gradually and probably appeared and became capable of occupation at different times, it may be that there is proof that some, if not all, of them came into existence as land capable of occupation within sixty years prior to the notification. In the case of such land the title of the Crown must be subsisting title. In the case of lands which came into existence as land capable of occupation more than sixty years prior to the notification, the Crown must show by evidence that it had a subsisting title at some time within that period.

"We must, therefore, ask the District Judge to return a finding as to whether the Crown has subsisting title to the whole or any portions of the claim land lying between Hope Island on the north and Neelarva on the south.

Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to sug-

(8) I. L. R. 9 Mad. 175 (1885).
(9) I. L. R. 15 Mad. 315 (1892).
(10) I. L. R. 19 Mad. 165 (1895).

gest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, "I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions." Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Government officers, would disappear because there would be no evidence available to establish the state of possession for 60 years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

The application of this elementary doctrine is singularly clear, for there is a double finding of fact, a finding not disputed even in the High Court, that no adverse or exclusive possession was proved before the year 1882. The case of the Respondents must accordingly fail.

This conclusion is in no way varied by reason of the shape of the present proceedings. In November and December 1901, in pursuance of the Act, the Governor of Madras in Council published a notification proposing to constitute the lands into a reserved forest. The Respondents put in their claims before the Forest Settlement Officer on the 14th and 23rd February 1902. It apparently did not occur to them at that stage to view the law otherwise than has been stated above, because in the one petition the claim was that—

"for over seventy years your petitioners' estate has been in the exclusive and absolute enjoyment of the land and forest now said to be reserved as Government forest,"

and in the other petition the claim was—

"that by the long and peaceful enjoyment of the same by the petitioners and their predecessors in title the petitioners have acquired a title by prescription to the said lands and forests, and the rights, if any, of others to the same are excluded by lapse of time.'

In their Lordships' opinion objectors to afforestation thus preferring claims are in law in the same position as persons bringing a suit in an ordinary Court of Justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think that Art. 114 of the Limitation Act XV of 1877 (Sch. II) applies, the period of 12 years thereunder being, however, extended to a period of 60 years by Art. 149. In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the Plaintiff. In their Lordships' opinion the situation of a claimant under afforestation proceedings is the same upon this point. Reference may be made to *Radha Gobind Roy Saheb* v. *Inglis* (11) decided by this Board. Reference was made to various cases decided in lower Courts and stress was especially laid upon the decision in the Malabar case, *The Secretary of State for India in Council* v. *Vira Rayan* (8). The facts therein were essentially different from the present. After a historical survey of the peculiar position of the lands there in question the learned Judges found "That the land appertains to the district of Malabar, and we agree with the Judge that there is no presumption in that district and in the tracts administered as a part of it, that forest lands are

(8) I. L. R. 9 Mad. 175 (1885).
(11) 7 C. L. R. 864 (1880).

the property of the Crown." The ratio of the decision was found in this historical circumstance peculiar to Malabar. None of the cases cited have affected the authority of the case of *Radha Gobind Roy*.

Finally, their Lordships have some difficulty in understanding the view of the High Court to the following effect :—

"Though the title was originally in the Crown, still as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, that is, within sixty years before the notification."

In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for 60 years, their Lordships' opinion is, as stated, that this is erroneous. But (2) with reference to the "subsisting title," it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of 60 years, that fundamental fact remains, and that fact forms "subsisting title." And (3) it is no part of the obligation of the Crown to fortify their own fundamental right by any enquiry into possession or the acceptance of any onus on that subject.

Their Lordships will humbly advise His Majesty that these appeals should be allowed, and that the judgments of the District Court of date the 27th July 1904 should be restored. The Respondents will pay the costs of this appeal and in the Courts below.

Solicitor: *The Solicitor, India Office*, for the Appellant.

Solicitor: *Mr. Douglas Grant* for the Respondents.

B. D. *Appeal allowed with costs.*

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD SHAW.
LORD PARMOOR.
MR. AMEER ALI.
1916,
Heard, 22, June.
Judgment, 10, July.

JANAKI AMMAL, Appellant,
v.
NARAYANASAMI AIYER, Respondent.

Hindu Law—Widow's estate—Suit by presumptive reversioner to restrain waste by widow, really suit for proper administration brought in a representative capacity—Failure to substantiate allegations of waste and mismanagement—Decree declaring Plaintiff's right as next reversionery heir if can be made—"Further relief," prayer for.

When a Hindu dies leaving female heirs, the question as to who is the nearest reversionary heir or what is the class of reversionary heirs falls to be settled at the date of the expiry of the ownership for life or lives, and until then it is impossible to predicate who is to be reversionary heir.

No decree can therefore be passed during the lifetime of such female heirs declaring the Plaintiff's individual right as reversionary heir.

Courts of law have recognised the right of a reversionary heir having such contingent interests only (which are differentiated little, if at all, from a spes successionis) a right to demand that the estate be kept from waste and free from danger during its enjoyment by the widow or other owner for life. But a reversionary heir thus appealing to the Court for the conservation and just administration of the property does so in a representative capacity so that the corpus of the estate may pass unimpaired to those entitled to the reversion.

But where such a suit to restrain waste by the widow fails by reason of the Plain-

JANAKI AMMAL *v.* NARAYANASAMI AIYER.

tiff's failure to prove his allegations of waste and mismanagement, the Court cannot properly grant him a decree declaring him to be "the next reversionary heir" under cover of a prayer for "further relief" contained in the plaint.

This was an appeal from a decree of the Madras High Court (Miller and Abdur Rahim, JJ.), dated the 23rd August 1912, modifying a decree of the Subordinate Judge of Mayavaram. The Appellant was a Hindu widow in possession of her husband's estate. The Plaintiff sued her alleging acts of waste and misconduct against her. The relief claimed by the Plaintiff was "that the Court be pleased to pass a decree for the protection of his interests inasmuch as he is the reversionary heir to the properties specified in the plaint after the death of Defendants Nos. 1 and 2; (1) by appointing a Receiver, (2) by obtaining security and issuing an injunction restraining the Defendants from doing any act injurious to the Plaintiff's interests, and (3) granting such further relief as to the Court might seem fit and proper. The Defendant-Appellant denied the allegations of misconduct made against her in the plaint and also pleaded that the Plaintiff-Respondent was not the nearest of the male relatives of her husband. The Court fixed the following issues among others: (1) Whether the Plaintiff was the next reversioner of the deceased Ramaswami Aiyer, (2) Whether the Defendant had been guilty of any act of waste as alleged in the plaint, and (3) What relief, if any, was the Plaintiff entitled to. The Subordinate Judge found on the evidence that the Plaintiff was the next reversionary heir, but he found that the Defendant was not guilty of any waste, etc. He concluded his judgment as follows: "As Plaintiff's relationship has been disputed, I find on the seventh issue that the Plaintiff is entitled to a declaration that he is the next reversionary heir of the deceased Ramaiyah after the lifetime of Defendants Nos. 1 and 2 and to a declaration that the arrangement referred to in the fourth issue is not binding on him. The rest of the claim is dismissed." Both parties appealed to the High Court which dismissed the Plaintiff's appeal, and slightly modified the decree of the Court below. The High Court delivered the following judgment in the Defendant's appeal:—

"The appeal attacks two declarations made in the decree of the Subordinate Judge:—

"(1) a declaration that the Plaintiff is 'the next reversionary heir of the deceased Ramaiyah' and

"(2) a declaration that 'the arrangement to pay Rs. 10,000 to the 2nd Defendant by the 1st Defendant is not binding on the Plaintiff.' As to the first, we think it may remain in the decree. The question whether the Plaintiff was entitled to sue as next reversionary heir of Ramaiyah was fought out in the suit and much evidence taken. The Subordinate Judge decided it on the evidence and though the declaration asked for in the plaint was not essential and he might have dismissed the suit, yet the peculiar circumstances of this class of suits seem to make it not undesirable that it should remain to prevent further litigation on the question between the Plaintiff and the 1st Defendant, should the former find it necessary to attack again the latter's management of the estate. The 2nd declaration was not asked for and appears to be of no practical value: it may be struck out."

Hence this appeal.

Mr. Kenworthy Brown for the Appellant submitted that on the facts found concurrently by the Courts below no declaratory decree ought to have been made. A

reversionary heir under the Hindu Law may sue to protect the estate, and that he does in a representative capacity in order to secure that the estate should pass unimpaired to those entitled to the reversion. *Venkatanarayana Pillai* v. *Subbammal* (2).

But no suit was maintainable for a mere declaration that the Plaintiff was a reversionary heir. In fact, the Plaintiff's suit was based on allegations of misconduct against the Defendant and the declaratory relief granted to him was not claimed. Reference was made to the following :- Mayne's Hindu Law, 8th Ed., paras. 605, 624, 647. *Strimathoo Moothoo Natchiar* v. *Dorasinga Tever* (3) and *Davis* v. *Angel* (4).

Mr. E. B. Raikes for the Respondents submitted that a grant of declaratory relief was a matter of discretion of the Court. The Defendant in her pleadings had denied the Plaintiff's relationship and title. The trial Judge framed an issue and recorded a mass of evidence and it was found by both Courts that the Plaintiff was the next reversionary heir. Under the circumstances two Courts had exercised their discretion in favour of the Plaintiff and the Board ought to be slow to interfere with it. *Jaipal Kunwar* v. *Indar Bahadur Singh* (1).

Under the general prayer for relief in the plaint, the Courts below had power to grant declaratory relief. Reference was made to sec. 42 of the Indian Specific Relief Act.

Mr. Kenworthy Brown replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—This is an appeal from a decree of the High Court of Judicature at Madras of the 23rd August 1912, modifying the decree of the Subordinate Judge of Mayavaram, dated the 28th October 1907.

The suit was brought with reference to the estate of one Ramasami Iyer, of Konerirajapuram, who died intestate on the 24th June 1906. It is not disputed that the widow holds the property under the Hindu Law as "a widow's estate." The mother of the late owner is the person entitled to succeed should she survive this widow. On the expiry of these lives the estate will descend to the next reversionary heir of the deceased.

The rule of the Hindu law with regard to the nature of the widow's estate may have been subject to various forms of expression, but in substance it is not doubtful. Her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but, to use the familiar language of Mayne's "Hindu Law," paragraph 625, p. 870, "so long as she is alive no one has any vested interest in the succession." These propositions were not disputed.

The law as to the situation of the reversionary heirs is also in substance quite clear; there is, as stated, no vesting as at the date of the husband's death, and it follows that the questions of who is the nearest reversionary heir or what is the class of reversionary heirs fall to be settled at the date of the expiry of the ownership for life or lives; that is to say, in the present case, at the death of the survivor of the Appellant and her late husband's mother. Even where the Courts have proceeded, prior to the opening of the succession, to give any declaration, this has been done for special reasons only, as in the case of *Jaipul Kunwar* v. *Indar*

(1) L. R. 31 I. A. 67 : s c. 8 C. W. N. 465 (1904).
(2) L. R. 42 I. A. 129 : s c 19 C. W. N. 641 (1915).
(3) I. R. 2 I. A. 169, 172 (1875).
(4) 4 DeG. F. & J. 529 (1862).

Bahadur Singh (1), and—to use the language of Sir Arthur Wilson, (p. 70) —it is made clear that "whenever the succession opens by the death of the widow the present decision will have settled nothing as to who should succeed."

It follows from this state of the law that it is impossible to predicate at this moment who is the reversionary heir of the deceased proprietor. If a Court of Law proceeded to make any declaration of right upon that subject such a declaration would be subject to being rendered valueless by the development of events. It would not, after events had developed, be even of authority in regulating or declaring the rights of the present Respondents as against any other claimant to the character of reversionary heir. *A priori*, accordingly, a declaration of right granted at the present stage would appear to be stamped with something in the nature of futility.

It is also true that a reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis*, is recognised by Courts of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.

But a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion. The law on this subject was recently expounded in the judgment of this Board delivered by Mr. Ameer Ali in *Venkatanarayana Pillai* v. *Subbammal* (2).

This representation is in law founded upon a different set of considerations from those which would seek to stamp the character of reversionary heir upon one individual. The latter operation attempted during the enjoyment of the life estates would necessarily be premature, and might, as stated, be futile. The former is justified by the considerations of keeping the estate intact for the persons to whom as reversioners it shall ultimately and at the proper time be determined that the estate shall go.

The suit in the present case was brought by the Plaintiff against the Defendant and Appellant, making charges of a serious character against the conduct and management of the estate by the deceased's widow. Collusion, concealment, maladministration, malice, and fraud were charged, and the statement was made that heavy loss would be incurred if the properties were left in her possession—subject to waste by her. The appointment of a Receiver upon the estate was prayed for, and an injunction was asked restraining the widow from doing any act injurious to the Plaintiff's reversionary interest. The third prayer of the plaint was for "granting such further relief as to the Court may seem fit and proper."

It may be at once said that, of the serious charges made, none were held to be well founded in fact: and no reason was found by the Courts below either for the appointment of a Receiver or the granting of an injunction. By the decree of the Subordinate Judge, however, of date the 28th October 1907, the following order was made, namely, "that Plaintiff is declared to be the next reversionary heir of the deceased Ramaiyar after the lifetime of Defendants Nos. 1 and 2" (his widow and mother). This was done under the third prayer just referred to. For the reasons above set forth it is plain

(1) L. R. 31 I. A. 67: s. c. 6 C. W. N. 465 (1904).

(2) L. R. 42 I. A. 129: s. c. 19 C. W. N. 641 (1915).

that such a declaration is unavailing as well as premature. It appears to have arisen on account of a dispute as to whether the Plaintiff's relationship to the deceased had been made out, and the Courts below may have been misled by the circumstance of that dispute into permitting the question of a declaration to enter the decree. The form of the declaration was that the Plaintiff was "the next reversionary heir."

In their Lordships' opinion the Plaintiff-Respondent was not entitled to such a declaration. Had waste of, or danger to, the estate been established, the title of the Plaintiff to bring those matters before the Court in his representative capacity as a possible reversionary heir would have been allowed, and a decree following upon the finding of fact of such waste or danger would have followed. But the whole of that part of the case has failed. And in their Lordships' opinion the case must accordingly be treated as if the suit had been directed *simpliciter* to a declaration of the Plaintiff's individual right. In the view of the Board it is not legitimate to give a Plaintiff, under cover of a request for "further relief," after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the suit should be dismissed, and that the Respondent do pay the costs before the Board and in the Courts below.

Solicitor: *Mr. Douglas Grant* for the Appellant.

Solicitors: *Messrs. Chapman-Walker* and *Shephard* for the Respondent.

B. D. *Appeal allowed with costs.*

[ORDINARY ORIGINAL CRIMINAL JURISDICTION.]

CHAUDHURI, J.
1916,
20, July.

In the matter of JEWA NATHOO and ors.

Emergency Legislation Continuance Act (I of 1915), if ultra vires—Ordinances 3 and 5 of 1914—Power of Governor-General in Council to pass Act embodying provisions of ordinances—Ordinance 3 of 1914—Sec. 11, effect of—Jurisdiction of Courts to question orders of internment passed under Emergency Legislation Continuance Act—Indian Councils Act, 1861 (24, 25 Vict., c. 67), secs 22, 23.

Under sec. 23 of the Indian Councils Act, 1861 (24, 25 Vict., c. 67), no ordinance can have any force of law for more than six months from its promulgation but the power of the Governor-General in Council to pass an Act embodying the provisions of an ordinance is in no matter controlled or taken away by that section. It is clear that the Governor-General in Council has power to pass an Act like the Emergency Legislation Continuance Act (I of 1915) which embodies the provisions of Ordinances 3 and 5 of 1914.

Held (*as to the contention that inasmuch as sec. 11 of the Ordinance No. 3 of 1914 which is embodied in the Emergency Legislation Continuance Act of 1915 seeks to oust the jurisdiction of the Courts, it offends against sec. 22 of the Indian Councils Act, 1861*), *that the Emergency Legislation Continuance Act of 1915 is not* ultra vires *of the Governor-General in Council and the High Court has not power to call in question orders passed thereunder. It is for the Governor-General in Council to be satisfied on the materials before them and the Court cannot call for the materials or examine them.*

In England the common law rule that when an Act is repealed and the repealing Act is repealed by another which manifests

IN THE MATTER OF JEWA NATHOO.

no intention that the first shall continue repealed the repeal of the second Act revives the first does not apply to repealing Acts passed since 1850 and the last repeal does not now revive the Act or provisions before repealed unless words be added reviving them. The same principle or rule of law applies to this country. Sec. 3 of the General Clauses Act (I of 1868) expressly provided that for the purpose of reviving either wholly or partially a Statute, Act or Regulation repealed, it shall be necessary expressly to state such purpose, and the same is the effect of secs. 6 and 7 of the General Clauses Act (X of 1897).

The facts material for the purpose of this report will appear from counsel's argument as also from the judgment of the Court.

Mr. Norton (with *Mr. A. A. Aratoom*) for the Petitioners.—The Petitioners were residents of Surat. They used to carry on business in South Africa. They were coming from South Africa by "*S.S. Kathiawar*" which arrived in Calcutta on the 19th June 1916 when they were arrested. No attempt has been made to place them before the Magistrate. No warrant was produced nor was any order shown to them. They were informed by the Commissioner of Police that they were arrested under sec. 54 of the Criminal Procedure Code and under the Indian Ordinances which were not specifically mentioned. It appears that five orders were made on the 26th June 1916 by the Governor of Bengal in Council under the Foreigners Ordinance, 1914 (III of 1914) and the Ingress into India Ordinance, 1914 (V of 1914), the power to make such order having been conferred on the Governor of Bengal in Council by the Notification of the Government of India, Home Department, No. 1374, dated 12th September 1914. The orders stated that the Governor in Council was satisfied that in order to protect the State from acts prejudicial to its interest it was desirable to exercise the power in question in respect of those persons and directed that they should be interned temporarily to the Alipur Central Jail, 24-Parganas.

After stating the facts counsel argued that in the first place the Ordinances III and V of 1914 were not in force at the time of arrest. By sec. 23 of the Indian Councils Act (24 and 25 Vict., c. 67) we cannot have an ordinance for more than six months. Act I of 1915, sec. 2, says that the said ordinances should remain in force for the period of war and for six months thereafter. This was clearly *ultra vires*. An Act cannot keep an ordinance in operation for more than six months.

My next point is that the Governor-General in Council had no power to make any ordinance or provide any legislation which was in conflict with sec. 22 of the Indian Councils Act (24 and 25 Vict., c. 67). The legislation infringed the constitution of the East India Company the allegiance of the subjects and the sovereignty of the Crown. The allegiance which the subject paid to the Crown was in return for certain privileges and protection. The Habeas Corpus Act was for the purpose of protecting the subject. In *Rudolph Stallmann's* case (1) Woodroffe and Mooekrjee, JJ., said that there had been no attempt by Legislature to alter sec. 491 of the Criminal Procedure Code and the section was still read in the larger sense used by Mookerjee, J.

Sir S. P. Sinha for the Crown.—The questions before your Lordships are whether those two ordinances are *ultra vires* or had they expired. Ordinances 3 and 5 of 1914 would have expired in six

(1) I. L. R. 39 Cal. 164 : s. c. 15 C. W. N. 1053 (1911).

months' time, but for the Act I of 1915 whereby the legislature enacted that the ordinances should not cease but should remain on the Statute Book for the period therein mentioned. As regards the question as to whether the Habeas Corpus Act could be suspended, the question has been set at rest many years ago. (Cites *In re Tuckul Roy* (3) and *Ameer Khan's* case (4).

[CHAUDHURI, J.—Refers to *Alter Caufman* v. *Government of Bombay* (5)].

Mr. Avetoom in reply.—Having regard to what was said in *Rudolph Stallmann's* case (1) by Woodroffe and Mookerjee, JJ., the point is whether the words of the section are sufficient to take away from the Court its jurisdiction and the right of any person to come there.

[CHAUDHURI, J.—If the Governor in Council is satisfied then I cannot question the validity of the orders. To do so is to sit as an Appeal Court over the decisions of Governor in Council. That is exactly what I am precluded from doing by sec. 11.]

Mr. Avetoom.—Your Lordship can enquire into the reason.

The JUDGMENT OF THE COURT was as follows :—

CHAUDHURI, J.—This is an application under sec. 491, Cr. P. C., on behalf of five persons, inhabitants of Surat, who state that "they had been working as traders in South Africa for some years and had lately invested all their savings in gold and sovereigns as they considered it the most safe and convenient form of investment during the War; that they were coming from South Africa by "*S.S. Kathiawar*" which arrived in Calcutta on the 19th June 1916 when they were arrested under the orders of the Commissioner of Police, with all their belongings including 58 lbs. of gold nuggets and 119 sovereigns, without any warrant being produced or read out to them. They further state that they have been continually in custody ever since their arrest; that they applied for bail to the Senior Deputy Commissioner of Police (in whose hands the case had been placed by the Commissioner of Police) on three occasions "but that it was then said that they had been arrested under sec. 54 of the Criminal Procedure Code and Indian Ordinances which were not specified and that a cable had been sent to South Africa to make enquiries regarding the Petitioners, and that no orders could be passed till an answer was obtained from South Africa, and that the Deputy Commissioner of Police could give them no idea as to when it was likely to be received; that failing to obtain bail they made a representation to the Secretary to the Government of Bengal and were informed that as it was an ordinary criminal case the Government would not interfere. They assert that they have committed no criminal offence. They were at first kept in the Central Police Lock-up at Lal Bazar and are now in the Alipur Central Jail, both places being within the Ordinary Original Jurisdiction of this Court. They applied to me on the 3rd July 1916 that the Commissioner of Police and the Officer in charge of the Alipur Jail should be called upon to produce them before this Court to be dealt with according to law. I thereupon made an order for their production before me. On the 5th of July they were so produced when the learned Standing Counsel appeared and stated that the Petitioners had been in-

(1) I. L. R. 39 Cal. 164 : s. c. 15 C. W. N. 1053 (1911).
(3. 1 Boulnois 354 (1858).
(4) 6 B. L. R. 392, 459 (1870).
(5) I. L. R. 18 Bom. 636 (1894).

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terned under the provisions of Ordinances 3 and 5 of 1914, which had been embodied in the Emergency Legislation Continuance Act (Act I of 1915) and submitted copies of the orders passed by the Governor in Council under which they had been interned. The Petitioners then applied that as they were not aware of the special ordinances under which the Government had purported to act, they should be allowed time to consider the position. I directed that a return should be made on behalf of the Government and the case of the Petitioners be stated both on affidavits.

I have now before me the affidavit of one Vallub Das on behalf of the Petitioners in which he has submitted that the orders for internment are *ultra vires* and illegal in so far as they interfere with their personal liberty, safeguarded as the same is, both by the common law and the statutory provisions of the British Parliament.

It appears from the affidavit, filed by the Deputy Commissioner of Police, F. S. R. Anley, that by Notification No. 11312P., dated the 24th November 1914, the Governor of Bengal in Council delegated certain of the powers delegated to him by the Governor-General in Council to supervising officers whereby *inter alia* such supervising officers were authorized to detain any person entering the Presidency of Bengal whether by sea or land after the 5th of September 1914, when it appeared to them that such person had entered the Presidency of Bengal with intent to prosecute some purpose prejudicial to the safety, interests or tranquillity of the State, and that by Notification No. 12148P., dated 10th December 1914, the said F. S. R. Anley was empowered by the Governor in Council to exercise the powers of such a supervising officer. By reason of certain information received by him, he arrested the Petitioners on the 19th June 1916, in pursuance of the powers so vested in him pending the receipt of orders from the Local Government. He reported the matter to the Local Government through the Commissioner of Police on the 20th June 1916, and five different orders, dated the 26th June 1916, were received from the Local Government, one in respect of each of the Petitioners, under which the Petitioners were interned in the Alipur Central Jail. All the orders are practically in the same terms, one of which is quoted below :—

"Whereas by sec. 3 of the Foreigners' Ordinance 1914 (III of 1914), read with sec. 2 of the Ingress into India Ordinance 1914 (V of 1914), the entry of Foreigners into British India by sea or land can be regulated and restricted.

"And, whereas by Government of India Home Department Notification No. 1374, dated the 12th September 1914, the powers conferred by the said Ingress into India Ordinance 1914, read with the aforementioned Foreigners' Ordinance 1914, have been delegated to the Local Government.

"And, whereas the Governor in Council is satisfied that in order to protect the State from acts prejudicial to its interests, it is desirable to exercise the powers under the said Ordinance in respect of Kana Probhu Patel, son of Parbhoo, village Sossodhra, Police Station Jalalpur, District Surat, who entered the Presidency of Bengal by sea in the "*S.S. Kathiawar.*"

"Now, therefore, the Governor in Council is pleased to direct that the said Kana Probhu Patel shall be interned temporarily in the Alipur Central Jail, 24-Pergunnahs. The person interned under this order shall remain in the place

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appointed unless permitted by the Governor in Council to leave."

(Sd.) J. G. CUMMING,
Additional Secretary to the Government of Bengal.

Counsel for the Petitioners contends that under sec. 23 of Indian Councils Act 1861, (24 and 25 Vict., c. 67) no ordinance can have any force of law for more than six months from its promulgation, and that the Governor-General has no power under that section to extend that period. The contention that an ordinance expires after six months is correct. He argues therefrom that inasmuch as Act I of 1915 extends the period, it is *ultra vires*. In this he overlooks that the power of the Governor-General in Council to pass an Act embodying the provisions of an ordinance is in no matter controlled or taken away by that section. It is clear that the Governor-General in Council has power to pass such an Act embodying the provisions of the ordinances in question. It is not an ordinance extended but an Act, and I hold against the above contention.

It is next argued that under sec. 22 of the Indian Councils Act, 1861, it is not in the power of the Governor-General in Council to make such laws as affect the constitution and rights of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown, or the sovereignty of the Crown. Counsel argues that inasmuch as sec. 11 of the Ordinance No. 3 of 1914 embodied in the present enactment seeks to oust the jurisdiction of the Courts, it offends against sec. 22 of Indian Councils Act, 1861. His argument is that sec. 29, 26 Geo. III, c. 57, known as the East India Company's Act, made residents in India amenable to the Courts and although that section was repealed by Act XI of 1872, the repealing Act itself was *ultra vires*, that inasmuch as Act XI of 1872 has again been repealed, sec. 29 must be considered as restored. It is correct that where an Act is repealed and the repealing enactment is repealed by another which manifests no intention that the first shall continue repealed, the common law rule was that the repeal of the second Act revived the first. But this rule does not apply to repealing Acts passed since 1850. The last repeal does not now revive the Act or provisions before repealed, unless words be added reviving them; secs. 52 and 53, Vict. 63, sec. 11. The same principle or rule of law applies to this country. Sec. 3 of the General Clauses Act, Act I of 1868, expressly provided that for the purpose of reviving either wholly or partially a Statute, Act, or Regulation repealed, it shall be necessary expressly to state such purpose. The same is the effect of secs. 6 and 7 of the General Clauses Act, X of 1897. Act XI of 1872 was repealed and re-enacted with modifications by Act XXI of 1879, which after various amendments was again repealed and re-enacted in a modified form by Act V of 1903. I do not find anything in these subsequent Acts reviving sec. 29 of 26 Geo. III, c. 57. Nor does it seem to me to have been necessary to revive the section as various Acts and Statutes had come into force making the persons mentioned in that section amenable to Courts of Justice. How we are now concerned with the constitution and rights of the East India Company, I have not been able to follow. I therefore hold against the said contentions. It is further argued that the present Act also offends against the allegiance of the subject and the sovereignty of the Crown which are said to be "inter-dependent." One branch of the argument is that the

said ordinance and Act I of 1915 have not expressly suspended the Habeas Corpus, and no inference that it has been suspended can therefore be inferred, and reliance is strongly placed upon the following passages in the judgments of Woodroffe and Mookerjee, JJ., in *Rudolph Stallmann's* case (1). Woodroffe, J., says as follows (see page 182) :—" It must be shown that a supreme right such as that to Habeas Corpus or to directions in the nature of the writ has been expressly, if that be possible to the Legislature, taken away." Mookerjee, J., says (see page 198) :—"The burden lies very heavily upon those, who in the words of Sir Joseph Napier in *Levinger* v. *The Queen* (2), assert that a right of so much importance to the criminal, given by the common law, has been taken away by implication." The learned Judges held in that case that the English Extradition Act expressly referred to the Habeas Corpus, but the Indian Act did not ; that if the Legislature had intended to withdraw the matter from the cognizance of the Indian Courts, it would have said so, but as it had not, the Court had jurisdiction under sec. 491, Cr. P. C., to enquire into the validity of the warrant under which the Petitioner had been kept in custody."

Mookerjee, J., said that it was not necessary in that case to consider whether a writ of Habeas Corpus could be issued by this Court or whether the right of the Court to issue such a writ could be taken away by the Indian Legislature. The question of the prerogative of the Crown and the allegiance of the subject has been discussed in a great many cases in our Courts. Amongst them may be mentioned *In re Tuckut Roy* (3), in which Colville, C. J., in discussing Reg. 3 of 1818 and Act 34 of 1850 expressed himself thus (see p. 357) :—" It cannot now be contended that the Governor-General acting under the Statute (13 Geo. III, c. 33) had no power to legislate for the subjects of the British Government as was done by Reg. 3 of 1818, but it possibly was meant by the Statute to import some such qualification as was afterwards more carefully expressed in sec. 43 of the Statute (3 and 4 Wm. IV, c. 85)." He thought that it certainly was rather a startling proposition that a law passed to increase the power of those who represented the Crown, and in derogation of the rights of those who had withstood that power should be treated as affecting the prerogative, and this probably was one of those cases where confusion arose as to the meaning of a word, from a difference in its use in rhetoric and in logic. He held that by legislation of this character the prerogative is not affected. He said :—" It is not for the Court to assume a power of disregarding what is made part of the law of the land. It is not our part to consider what the legislature ought to have done, we are only to consider the law, and if we find that it has established certain principles and made certain provisions, it is our duty to obey them."

In *Ameer Khan's* case (4), *In re Tuckut Roy* (3) was discussed. The discussion arose is connection with Reg. 3 of 1818, which was said to belong to that class of laws which authorised the infliction of penalties, the privation of liberty, even the destruction of life, with a view to the future prevention of crime, and insuring the safety and well-being of the public. Such legislation, according to Norman, J., falls within the principle *salus populi*

(1) I. L. R. 39 Cal. 164 : s c. 15 C. W. N. 1053 (1911).
(2) L. R 3 P C. 282, 289 (1870).
(3) 1 Boulnois 354 (1858).
(3) 1 Boulnois 354 (1858).
(4) 6 B. L. R. 392 (1870).

suprema lex. That learned Judge held in that case that the Governor-General in Council had a power analogous to that which the Parliament of the United Kingdom exercised when by legislative enactment it suspended the Habeas Corpus Act.' The questions now raised were elaborately discussed and it was held by him that the principles which justified the temporary suspension of the Habeas Corpus Act in England, justified the Indian Legislature in entrusting to the Governor-General in Council an exceptional power of placing individuals under personal restraint, when for the security of the British Dominions, etc., such a course might appear necessary to the Governor-General in Council." He said "The proviso in sec. 22 is not that no law shall be made contrary to the Magna Charta or any other similar Statute. The unwritten constitution of England is of a flexible character. It admitted a relaxation of the rules securing private rights in times of public distress or danger, *ne quid detrimenti capiat respublica*."

In the Appeal Court in the same case Mr. Justice Phear, in discussing the same questions which have been raised before me, said, "The real effect of these Acts is that they create and make lawful a new cause of imprisonment and constitute the Governor-General in Council a Court, endowed with the fullest discretion to adjudicate such a cause."

The argument about allegiance, he thought, could be carried to the extent that "If the Regulation and Acts were void and of no legal force the subject had a right by law to disclaim allegiance to the Crown of the United Kingdom." He considered such an argument "startling" and not fit to be entertained. The other Judge in the Appeal Court, Mr. Justice Markby, said, that he saw no ground for supposing that an act affected the prerogative of the Crown merely because it affected the liberty of the subject. If that were so, then the Indian Legislature would have no power at all to legislate in criminal matters. He held that the allegiance of a British subject in no way, whatever, depended upon the existence, or non-existence of such a power as was conferred on the Governor-General by the Regulation of 1818. He wholly repudiated the doctrine contended for, that the allegiance of a subject to his Sovereign could by any possibility be legally affected by the mere withdrawal from the subject of any right, privilege or immunity whatsoever. Practically the same questions were raised in *Alter Caufman* v. *Government of Bombay* (5), in which the decision of the Calcutta Court in *Ameer Khan's* case (4) was quoted with approval. The Indian Legislature both before and after the passing of the Indian Councils Act, 1861, has from time to time passed similar enactments authorizing the privation of liberty in certain circumstances, and no instance has been cited to me that such acts have been held to be ***ultra vires*** or that any of the above arguments which have been repeated from time to time have ever been accepted as correct. The general powers of the Indian Legislature has been discussed in *The Queen* v. *Burah* (6) which is the leading case on the subject. Lord Selborne has laid down in that case as follows :—"If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to en-

(4) 6 B L. R. 392 (1870).
(5) I. L. R. 18 Bom. 636 (1894).
(6) L. R. 3 A. C. 889 : s. c. L. R. 5 I. A. 178 (1878).

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quire further or to enlarge constructively those conditions and restrictions."

The latest case, in which somewhat similar questions were raised, is that of *The King* v. *Halliday* (7). It was contended that it was the usual practice in England to pass an Act suspending the Habeas Corpus Act when circumstances required, the Suspension Act being always followed by an Indemnifying Act. General words, it was argued, ought not to be interpreted as taking away the fundamental rights of individuals as conferred by Statute or the Common Law but in view of the Defence of the Realm (Consolidation) Act, 1914, it was held in the Court of Appeal that the argument was not sound.

The ordinances in question came into existence in India in circumstances of emergency. Act I of 1915 has been enacted owing to the same emergency and is of a temporary character, it being provided that it is to remain in force during the continuance of the present war and for a period of six months thereafter.

Sec. 11 of Ordinance No. 3 of 1914 incorporated in that Act expressly provides that " No order made under sec. 3 shall be called in question in any Court."

It expressly ousts the jurisdiction of the Courts of Justice, that is to say, when the requirements and provisions of the Act and ordinances are fulfilled.

The orders we are dealing with mention that the Governor in Council is satisfied that in order to protect the State from acts prejudicial to its interests, it is desirable to exercise the powers under the said ordinances in respect of the Petitioners and that they have accordingly been interned.

Arguments have been addressed to me with which I am unable to agree that as the orders do not recite the Act but only the ordinances and do not say that " It is desirable to protect the State from the prosecution by the Petitioners of some purpose prejudicial to its interests," the orders are bad and inoperative. The sections of the ordinances are referred to in the orders as they are incorporated in the Act and the wording of the orders seems to me substantially to comply with the requirements of sec. 2 (2) of Ordinance 5 of 1914. I hold the Act is not *ultra vires* and this Court has no power to call in question the orders which have been passed thereunder. It is for the Governor in Council to be satisfied on the materials before them. The Court cannot call for the materials or examine them. The real effect of these Acts, to adopt the language of Phear, J., is that they create and make lawful a new cause of imprisonment and constitute the Governor in Council a Court endowed with the fullest discretion to adjudicate such a cause.

The usual procedure in these applications is to issue a Rule in the first instance and not to order the production of the Petitioners. I departed from this practice, as it was not mentioned in this case that their detention was under the said ordinances and as it appeared from the affidavit filed on behalf of the Petitioners that they had been detained for a considerable time, without a warrant, merely on a suspicion that they had committed some unknown offence, which seemed to me *primâ facie* illegal and high-handed. It is asserted that even now the Government has no materials upon which they have purported to take action but I have no power to enquire into that allegation, as the orders comply with the requirements of the Act.

I accordingly dismiss this application.

[At the hearing of the appeal against this order, Counsel for the Petitioners intimated to the Court that they had been

(7) [1916] 1 K. B. 739 : s. c. 20 C. W. N. xci (1916).

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released by the Commissioner of Police. The appeal, in these circumstances, was not pressed.—ED.]

Babu Nitendra Krishna Dutt, Attorney-at-Law, for the Petitioner.

Mr. J. T. Hume, Public Prosecutor, for the Commissioner of Police.

M. N. K. *Application dismissed.*

[CIVIL APPELLATE JURISDICTION.]

L. P. APP. No. 93 OF 1913.

SANDERSON, C. J. MOOKERJEE, J. 1916, 11, May.	SM. BHAIGANTA BEWAH Plaintiff, Appellant, *v.* HIMMAT BADYAKAR and anr., Defendants, Respondents.

Evidence Act (I o 1872), secs. 115, 116 and 117—Lessee if may deny lessor's title after expiry of term—Possession given by lessor and retained after expiry of term—Estoppel, rules of—Evidence Act, if exhaustive as to.

A lessee, so long as he retains the possession he obtained from the lessor, cannot, even after his term has expired, set up in the lessor's suit for ejectment the defence that the lessor had no title at the time the lease was granted.

This rule has not been affected by sec. 116 of the Indian Evidence Act.

Secs. 115 to 117 of the Evidence Act are not exhaustive as to the rules of estoppel in force in British India.

This was an appeal under sec. 15 of the Letters Patent, preferred against a decision of Mr. Justice Mullick, dated the 24th June 1913 in second appeal No. 1557 of 1912, which had been preferred against a decision of Maulvie Ali Ahmad, Subordinate Judge, 2nd Court of Dacca, dated the 8th March 1912, reversing a decision of Babu Manmatha Nath Bose, Munsif, 3rd Court, Naraingunj, dated the 11th September 1911.

The material facts of the case will appear from the judgment of Mullick, J., which was as follows:—

MULLICK, J.—The Plaintiff claims the disputed land as part of a holding, which she inherited from her mother and which she leased to the Defendant in 1316 for one year by a *barga* settlement. The tenancy expired on the 30th Paus 1317. On 20th Magh 1317, the Plaintiff brought the present suit to eject the Defendant. The Defendant pleaded that the holding was the property of the Plaintiff's husband, who was his brother, and that by right of inheritance he had a share in it. He denied that it was the property of Plaintiff's mother. The Munsif decreed the suit. On appeal the Subordinate Judge found that the holding was not the property of the Plaintiff's mother but the property of the Plaintiff's husband. The Subordinate Judge also found that the Defendant had been let into the land in 1316 by the Plaintiff as alleged, but that as the period of this lease had expired, the Defendant was not estopped from setting up his own adverse title by right of inheritance. The Subordinate Judge therefore dismissed the suit. The Plaintiff appeals. The only point is whether under sec. 116 of the Evidence Act the Defendant is estopped from denying the Plaintiff's title. I think the answer is in the negative. In England the tenant in possession cannot even, after the expiration of his lease, deny the landlord's title without actually and openly surrendering possession to him or being evicted by title paramount or at least giving notice to his landlord that he shall claim under another and valid title. But in India the expression "holding over" means that the relation of landlord and tenant continued with the assent of both parties and the overt acts by which the relation might be continued are either

the receipt of rent by the landlord or his assenting to the continuance of the tenancy by either acts or words. *Ratan Lal* v. *Farshi Bibi* (20). In the present case the learned Vakil for the Appellant cannot state what overt acts denoting the assent of the landlord have been done and indeed the Subordinate Judge by implication finds that there has not been any such assent on the part of the landlord. In these circumstances the appeal fails and is dismissed with costs.

[The Plaintiff thereupon preferred this appeal under the Letters Patent.]

Babus Tarekswer Pal Chowdhury and *Prokash Chandra Pakrasi* for the Appellant.

Babu Rajendra Chandra Guha for the Respondents.

The Judgment of the Court was as follows :—

Sanderson, C. J.—In this case the suit was brought for ejectment.

In the first Court the Plaintiff was successful and obtained a decree.

In the first Appellate Court, however, the Plaintiff's suit was dismissed, and was dismissed on the ground that the Defendant had succeeded in proving that he was entitled to the land. The learned Subordinate Judge further found, on my reading of his judgment, on the second issue which was " whether the land was settled with the Defendant by the Plaintiff in *barga*," that the Plaintiff had settled the land with the Defendant as alleged by the Plaintiff, but that inasmuch as the tenancy had come to an end, sec. 116 did not apply, and therefore the Defendant was entitled to set up his own title against that of the Plaintiff.

It appears that the Plaintiff alleged that the land was hers and she had obtained it by succession and settled it with Defendant on the 14th of January 1910, for a year's tenancy, which would of course come to an end on the 14th of January 1911. The rent was payable in kind, being half share of the profits of the land. The half share of the jute cultivated on the land was delivered to the Plaintiff, but the half share of the other crop was not so delivered : and, on the 25th of February 1911, after the tenancy had expired, this suit was instituted.

Now, in my judgment the Plaintiff was entitled to obtain a decree for possession of the land, because the learned Subordinate Judge had found in favour of the Plaintiff in respect of the tenancy of 1910; and, in view of that finding, in my judgment, the Defendant was not entitled to set up his title against that of the Plaintiff without in the first instance going out of possession and restoring possession which the Plaintiff had delivered to him by means of the tenancy of 1910. This principle was laid down so long ago as 1832 by Chief Justice Tindal in the case of *Doe dem Manton* v. *Austin* (1) in these words, " The principle is that a tenant shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession."

Now, this was the law of India before the Evidence Act was passed. It is contended, however, that by reason of sec. 116 of the Evidence Act, this principle of law to which I have referred does not apply. Sec. 116 says, " No tenant of immoveable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the

(20) I. L. R. 34 Cal. 391 (1907).

(1) 9 Bing. Rep. 41 (1832).

tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given." It is argued on behalf of the Respondent in this case that that section is exhaustive with regard to the point with which it deals and that the intention of the Legislature was to alter the law to which I have just referred. In my judgment, that is clearly not so. It has been decided by this Court in *Ganges Manufacturing & Co.* v. *Sourujmull* (2) that secs. 115 to 117 of the Evidence Act are not exhaustive and the judgment of the late Chief Justice Sir Richard Garth to which I wish to draw attention is at p. 678. There he is reported to have said, "It has been further contended by the Appellants, that secs. 115 to 117 contained in Chap. VIII of the Evidence Act lay down the only rules of estoppel which are now intended to be in force in British India; that those rules are treated by the Act as rules of evidence; and that by sec. 2 of the Act, all rules of evidence are repealed, except those which the Act contains. But if this argument were well-founded, the consequences would indeed be serious. The Courts here would then be debarred from entertaining any questions in the nature of estoppel which did not come within the scope of secs. 115 to 117, however important those questions might be to the due administration of the law." I desire to point out that the principle of law which was laid down by Chief Justice Tindal to which I have referred is a matter of great importance.

It is not a matter of mere question of form whether the person who has been a tenant should be the Plaintiff or the Defendant, in a suit to establish the title of one or the other; it is a matter of substance, and in order to show that, one may take as an example a case, which is by no means unfrequent, where two parties are claiming title to certain land, and both parties have considerable difficulty in producing strict proof of their title to the land: in such a case as that, possession is of great importance because the party who is in possession of the land has great advantage in such a suit; for, unless the party, who is out of possession, can satisfy the Court and discharge the burden which lies upon him to prove that he has got good title to the land, the person who is in possession, remains in possession of the land.

Therefore in my judgment it is a matter of great importance that the principle of law to which I have referred should be affirmed.

In the Court of first instance and also in the first Appellate Court another question was enquired into and a decision was arrived at upon it, namely, whether the Plaintiff was in reality the owner of the land, or whether the Defendant was in reality the owner of the land. In my judgment, that question was quite immaterial, as soon as it had been decided by the learned Judge that the Defendant had been let into possession of the land under a tenancy granted by the Plaintiff. This case must be decided as if that other question, which in my opinion was immaterial, had not been decided at all.

For these grounds I am of opinion that the appeal from the learned Judge's judgment ought to be allowed, and the result is that the Plaintiff is entitled to the possession of the land, and she is also entitled to such damages as the Munsif awarded her—(that I understand to be Rs. 5)

(2) I. L. R. 5 Cal. 669 (1880).

for the Defendant wrongfully retaining possession.

The Plaintiff is entitled to her costs in all the Courts.

MOOKERJEE, J.—The facts material for the determination of the question of law raised before us are not in controversy. On the 14th January 1910, the Plaintiff let out the land in suit to the Defendant for a term of one year and placed him in possession. The tenancy expired on the 14th January 1911; but the Defendant refused to deliver up possession to the Plaintiff; the result was the institution of this suit for ejectment on the 4th February 1911. The Defendant resisted the claim on the allegation that the Plaintiff had no exclusive title to the property at the date of the lease in his favour; his case was that the Plaintiff had inherited the property not from her mother, as she alleged, but from her husband who was the brother of the Defendant; consequently, upon the death of her husband, the property would, under the Mahomedan Law, descend, not to her alone but to her along with the Defendant and other possible heirs. The Court of first instance made a decree in favour of the Plaintiff. Upon appeal, that decree was reversed. On appeal to this Court, the decree of the Court of Appeal below has been affirmed by Mr. Justice Mullick, who has overruled the contention of the Plaintiff that the Defendant was bound by the doctrine of estoppel and could not challenge the title of the Plaintiff. Reliance was placed by the Plaintiff on sec. 116 of the Indian Evidence Act which provides that "No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property." To this, the Defendant answered that as the tenancy here had terminated, the rule of estoppel was no longer applicable. This contention found favour with Mr. Justice Mullick and the result was that the suit was dismissed.

It has not been disputed before us that according to the law of England a person who has been let into possession as tenant by the Plaintiff is estopped from denying his lessor's title without first surrendering possession. Reference may be made to *Doe* v. *Smythe* (3) decided in 1815 where the tenant in possession paid rent to the lessor and then disclaimed. Bayley, J., observed that "the tenant should have given up the possession to Knight (the lessor), and then the Defendant, if she has title, might have maintained her ejectment." Mr. Justice Dampier added: "It has been ruled often that neither the tenant, nor any one claiming by him can controvert the landlord's title: He cannot put another person in possession, but must deliver up the premises to his own landlord. This, I believe, has been the rule for the last 25 years and I remember was so laid down by Buller, J., upon the Western Circuit." [*Doe* v. *Pegge* (4)]. This exposition of the law has been repeatedly re-affirmed. [*Alchorne* v. *Gomme* (5), *Doe* v. *Austin* (1) and *Tadman* v. *Herman* (6)]. There is an instructive discussion on this subject in *Bayley* v. *Bradley* (7), to which reference may usefully be made. In the course of the argument in that case, Wilde, C. J., observed: "Does the lease operate as an estoppel except during the term?". Serjt. Byles answered "A

(1) 9 Bing. Rep. 41 (1832).
(3) 4 M & S. 347 (1815).
(4) [1785] 1 T. R. 758n.
(5) 2 Bing. 54 (1824).
(6) [1893] 2 Q. B. 168.
(7) 5 C. B. 396 (1848).

tenant is at all times estopped from disputing the title of his landlord " and referred to a long line of cases, including *Doe* v. *Smythe* (3). At a later stage of the argument, Mr. Justice Vaughan Williams repeated the question, " whether the estoppel does not end with the term." Serjt. Byles answered " the estoppel is limited in point of extent; but there is no authority for saying that it is limited in point of time." Wilde, C. J., then intervened with the following observation : " In Co. Litt. 47b, it is said that ' if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended ; for, by the making of the lease, the estoppel doth grow, and consequently, by the end of the lease the estoppel determines.' The only qualification I am aware of that has been engrafted upon that rule, is, that if the tenant came into possession under the lessor, he must restore the possession before he disputes the title." The position is different, as Erle, C. J., pointed out in *Accidental Death Insurance Co.* v. *Mackenzie* (8), when the tenant had possession before he took the lease.

Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions, then, are essential to the existence of the estoppel, *first*, possession, *secondly*, permission; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues. That this was unquestionably the law in this country before the Indian Evidence Act was passed, is clear from a long line of decisions. The doctrine was expressly formulated in *Mohesh Chandra Biswas* v. *Guru Prosad Bose* (9) and *Vasudeb Daji* v. *Babaji Ranu* (10) and was impliedly recognised in *Banee Madhab* v. *Thakoor Das* (11), *Gouree Das* v. *Jugurnath* (12), *Burn & Co.* v. *Rushomoyee* (13) and *Jainarain* v. *Kadambini* (14). We have further the weighty opinion of Sir Subramanya Aiyar, C. J., expressed in the case of *Muthunaiyan* v. *Sinna Samavaiyan* (15) that the law has not in this respect been altered by the Indian Evidence Act, and that now, as before, a tenant who had been let into possession was estopped from denying the landlord's title without first surrendering possession (see also *Ram Chandra* v. *Gulam Zilani* (16). The Respondent, however, has contended that this view is erroneous and that the law as embodied in sec. 116 of the Indian Evidence Act is an intentional departure from the English law on the subject. In my opinion, there is no foundation for the contention that the Legislature in 1872 intended to revive and introduce into this country the archaic rule prevalent in England in the days of Lord Coke. Sec. 116 does not, by its very terms, affect the present case. That section merely provides that, during the continuance of the tenancy, a tenant of an immoveable property or persons claiming through such tenant, cannot be permitted to deny that the landlord of such tenant, at the beginning of such tenancy, had no title to the immoveable property. This does not imply that after the expiration of the tenancy the tenant is free to dispute the title of the landlord. There is no conceivable reason why we should

(3) 4 M. & S. 347 (1815).
(8) 5 L. T. N. S. 20 (1861).
(9) Marshall 377 (1863).
(10) 8 Bom. H. C. R. 175 (1871).
(11) B. L. R. (F. B Rulings) 588 (1866).
(12) 7 W. R. 25 (1867).
(13) 14 W. R. 55 (1870).
(14) 7 B. L. R. 723n (1869).
(15) I. L. R. 28 Mad. 526 (1905).
(16) I. L. R. 34 Bom. 329 (1909).

read into the Section such an implication; if the Legislature had intended to lay down the rule indicated by the Respondent, the Section might easily have been differently framed. Besides, as laid down in *Ganges Manufacturing & Co.* v. *Sourujmull* (2) and *Rup Chand* v. *Sarbeswar Chandra* (17), secs. 117 and 116 of the Indian Evidence Act are not exhaustive, and there may be rules of estoppel applicable other than what is contained in those sections. Reference was finally made to the decisions in *Ammu* v. *Ramakrishna Sastri* (18) and *Subbaraya* v. *Krishnappa* (19) which are clearly distinguishable, as they merely affirm the principle that a tenant is not estopped, either before or after the expiration of the term, from showing that the title of his lessor had determined. In the case before us, the defence is, not that the title of the lessor had determined, but that the lessor had no title at the time the lease was granted. This defence was clearly not available to the Defendant so long as he retained the possession which he had obtained by permission of the Plaintiff.

I agree on these grounds that this appeal must be allowed and a decree made in the terms proposed by the Chief Justice.

N. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 118 OF 1914.

MOOKERJEE, J.
CUMING, J.
1916,
Heard, 16, June.
Judgment, 21, June.

BAMANDAS BHATTACHARYYA and ors., Plaintiffs, Appellants,
v.
NILMADHAB SAHA and ors., Defendants, Respondents.

***Bengal Tenancy Act* (*VIII of 1885*), *sec. 85* (*2*)**

(2) I. L. R. 5 Cal. 669 670) (1880).
(17) 10 C W. N. 747 (1906).
(18) I. L. R. 2 Mad. 226 (1879).
(19) I L R. 12 Mad. 422 (1888).

—Lessee inducted on land by a void lease if may plead lease void and created no rights—Lease registered in contravention of the law—Suit for damages for breach of covenant—Estoppel—Scope of the Bengal Tenancy Act, whether it excludes operation of rules of equity in the relation of landlord and tenant.

In a suit for damages by a lessor against a lessee for breach of a covenant contained in a registered lease purporting to have been granted by the lessor as tenure-holder to the lessee as under-tenure-holder, it was found that in fact the lessor was an occupancy raiyat, and the lessee urged that the lease, having been granted and registered in contravention of sec. 85 of the Bengal Tenancy Act, was void and inoperative:

Held—*That the lessee was estopped from showing that the lease was void and that no interest passed to him.*

BHAIGANTA BEWAH v. HIMMAT BADYAKAR (3) *followed.*

That the Court was not precluded from so holding by the previous decisions of the High Court.

The Bengal Tenancy Act is not a complete Code even in respect of the law of landlord and tenant; much less does it profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence in so far as they may have to be applied in the determination of disputes between landlords and tenants.

This was an appeal from a decree of Babu Nogendra Nath Dhar, Subordinate Judge, Krishnaghur, dated 22nd December 1913.

The facts of the case will appear from the judgment.

Babus Mohendra Nath Roy, Baranashibasi Mookerjee, Khetra Mohan Ghosh,

(3) 20 C. W. N. 1335 (1916).

BAMANDAS BHATTACHARYYA *v.* NILMADHAB SAHA.

Sarat Chandra De and *Santosh Kumar Bose* for the Appellants.

Sir S. P. Sinha and *Babus Surendra Chandra Sen* and *Dwijendra Nath Mookerjee* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

This is an appeal by the Plaintiff in a suit for recovery of arrears of rent under a lease, and of damages for breach of a covenant contained therein. On the 27th August 1896, the Plaintiff granted the lease to the Defendants in respect of an area of 942 bighas; the interest of the grantors was described as that of tenure-holders and the grantees who paid a premium of Rs. 1,280 were made under-tenure-holders by the instrument. The rent was fixed in perpetuity at Rs. 688-4-0; the tenants undertook to pay Rs. 538-4-0 direct to the superior landlord of their grantors and, the balance Rs. 150, to the lessors themselves. The lease contained a covenant that if by reason of non-payment of the rent due to the superior landlords, year after year, instalment by instalment, a suit is brought against the lessors and if in execution of the rent decree the tenure or other property of the lessors is attached and sold in auction, the lessees will be bound to pay the rent due with interest, costs and damages, and the proper value of such properties of the lessors as may be sold. The contingency thus contemplated did not happen for many years, as the lessees, who entered into possession of the lease-hold property under this instrument, duly performed their obligations. On the 29th November 1910, however, the superior landlord instituted a suit against the present Plaintiffs for recovery of rent for the two years, 1908-10; it is not disputed that this rent had fallen into arrears, because the present Defendants had failed to pay to the superior landlord the rent due as they had undertaken to do in the lease. The suit was decreed on the 4th January 1911 for a sum of Rs. 2,987; execution was taken out in due course and the tenure was sold on the 14th June 1911, when it was purchased by the present Defendants for a sum of Rs. 1,600. As the rent decree was thus satisfied only in part, the Plaintiffs, on the 21st December 1911, paid to the decree-holder the balance of the judgment-debt, that is a sum of Rs. 1,264. The superior landlord, on the 10th May 1912, obtained against the Plaintiffs a supplementary decree for Rs. 549 and costs and interest, on account of rent due for the period between the date of institution of the previous suit and the date of sale of the tenure. The Plaintiffs satisfied this decree on the 30th June 1912. On the 7th August 1912 they instituted this suit for recovery of Rs. 6,470 composed of five items, namely, Rs. 1,280 as their share of the proceeds of the sale held on the 14th June 1911, Rs. 3,000 as the value of the property sold, Rs. 1,264 as the amount paid in satisfaction of the first decree, Rs. 626 as the amount paid to satisfy the second decree, and Rs. 300 as the arrears of rent due for two years. The Defendants resisted the claim, substantially on the ground that the Plaintiffs were not tenure-holders but occupancy ryots, that the permanent lease in their favour was void and inoperative as granted in contravention of sec. 85 of the Bengal Tenancy Act and that they were, consequently, not bound by any of the covenants in the lease. They further pleaded that the damages claimed were excessive. The Subordinate Judge has found the main facts in favour of the Plaintiffs,

but he has dismissed the suit on the ground that as the Plaintiffs were in reality occupancy ryots and not tenure-holders, the lease was void under sec. 85 of the Bengal Tenancy Act. On the present appeal, the decree of the Subordinate Judge has been assailed as erroneous in law and as not really supported by the decisions mentioned by him, namely, *Jarip Khan* v. *Dorfa Bewa* (1) and *Telam Pramanik* v. *Adu Sheikh* (2).

Sec. 85 of the Bengal Tenancy Act provides as follows:—"(1) If a ryot sublets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord, unless made with the landlord's consent: (2) A sub-lease by a ryot shall not be admitted to registration if it purports to create a term exceeding nine years." The third sub-section refers to sub-leases granted before the commencement of the Bengal Tenancy Act and has obviously no possible application to the present case. The question for consideration is whether the first two clauses apply, and, if so, what is their effect upon the rights of the parties. It is plain that the first sub-section has no application, because the superior landlord of the Plaintiffs is not a party to this litigation, and neither the Plaintiffs nor the Defendants have argued that the lease of the 27th August 1896 is valid against him. The controversy is thus restricted to the second sub-section. With reference thereto, the Defendants contend that the lease of the 27th August 1896 is in essence a sub-lease by a ryot within the meaning of sub-sec. 2, that it should not have been admitted to registration, that the fact of registration contrary to law must be ignored, that the instrument is thus inadmissible in evidence under sec. 49 of the Registration Act, and that there is accordingly no proof that the Defendants hold as tenants under the Plaintiffs on the conditions mentioned therein. The Plaintiffs put forward a twofold answer to this argument, namely, *first*, that the Defendants who entered into possession under the lease are barred by the doctrine of estoppel and are not competent to question the title of their lessors as tenure-holders on proof that they were in reality occupancy ryots, and, *secondly*, that if the Defendants are permitted to question the title of their lessors and to prove that the instrument which is the root of their own title is inoperative under sec. 85 (2), still it is open to the Plaintiffs to establish independently of the lease that the Defendants were their tenants, that they entered upon the land as such and that they have been in occupation for many years by payment of rent, on certain terms and subject to certain liabilities in the event of default. It is obvious that the second branch of this contention will not require examination if the first is, as we think it must be, sustained.

It is well-settled, that the creation of the complete relation of landlord and tenant has the effect in law of estopping the tenant to deny the validity of the title which he has admitted to exist in the landlord; the estoppel arises not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor. The grounds of this rule were recently examined by this Court in *Bhaiganta Bewah* v. *Himmat Badyakar* (3), where the following observation was

(1) 17 C. W. N. 59: s. c. 16 C. L. J. 144 (1912).

(2) 17 C. W. N. 468 (1913).

(3) 20 C. W. N. 1335 (1916).

made: "Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord; two conditions are essential to the existence of the estoppel, *first*, possession; *secondly*, permission; when these conditions are present, the estoppel arises and the estoppel prevails so long as such possession continues." From this point of view, the Defendants are not competent to deny that the Plaintiffs are tenure-holders; they cannot be permitted to allege or prove that the Plaintiffs were occupancy ryots at the date of the lease executed in their favour; consequently, the case does not attract the operation of sec. 85 (*2*) of the Bengal Tenancy Act; in other words, the Defendants cannot show that the lease was void and that no interest passed to them. The case thus falls within the rule that where no interest passes, an estoppel arises [*Trevivan* v. *Lawrance* (4)], and, not within the converse rule that where an interest passes no estoppel arises [*Doe d Strode* v. *Seaton* (5) and *Langford* v. *Selmes* (6)]. The justice of the view we take will be obvious from a consideration of the case converse to what has happened here. Suppose after the lessees had gone into possession, the lessors had sued to eject them on the plea that they were occupancy ryots and not tenure-holders and that the sub-lease was consequently void under sec. 85 (*2*). The lessees would plainly have been entitled to rely on the doctrine of estoppel to defend their position. But, as was pointed out by the Judicial Committee in *Girija Kanta* v. *Hurrish Chandra* (7), and by the House of Lords in *Concha* v. *Concha* (8), estoppels are, as a general rule, mutual, or in the language of Lord Coke: "every estoppel ought to be reciprocal, that is, to bind both parties and this is the reason that regularly a stranger shall neither take advantage of nor be bound by the estoppel." [Co. Litt. 352; *Lilabati* v. *Bishan* (9)]. We feel no doubt whatever that the parties to this litigation are mutually bound by the terms of the lease of the 27th August 1916 and that it is no more open to the Defendants than to the Plaintiffs to prove facts contradictory to the allegations which formed the basis of the contract, after that contract had been carried into execution and the contracting parties had enjoyed benefits thereunder. In fact, the Advocate-General, with the candour which always characterises his arguments, did not seriously contest the correctness of this view.

The question remains, however, whether the numerous judicial decisions which interpret sec. 85 of the Bengal Tenancy Act and which are by no means easy to reconcile, militate against this conclusion. The majority of those decisions, to which we shall presently make a brief reference, do not really touch the cardinal question in controversy in this suit; but before we consider them, two important principles may be conveniently restated. In the first place, as is clear from the decision of the Full Bench in *Kripa Sindhu* v. *Annada Sundari* (10), the Bengal Tenancy Act is not a complete Code even in respect of the law of landlord and tenant; much less does it profess to incorporate the general principles of the law of contract, and the doctrines of

(4) 1 Salk 276; 6 Mod. 258 (1794).
(5) 2 C. M. & R. 728 (1833).
(6) 3 K & J. 220 (1857).
(7) 19 W. R 114 (117) (1872).
(8) 11 App. Cas. 541 (1886).
(9) 6 C. L. J. 621 (627) (1907).
(10) I. L. R. 35 Cal. 84: s. c. 6 C. L. J. 273; 11 C. W. N. 983 (1907).

equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlords and tenants. In the second place, as pointed out by Lord Haldane, L. C., in *G. & C. Kreglinger* v. *New Patagonia Meat, etc.*, (11), each case forms a real precedent only in so far as it affirms a principle, and the binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle: "To follow previous authorities, so far as they lay down principles, is essential, if the law is to be preserved from becoming unsettled and vague. In this respect the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount authority is that of a Code. But when a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance."

As regards the decisions upon the construction of sec. 85 of the Bengal Tenancy Act, it is plain that a long line of cases affirm the view that a lease granted in contravention of sec. 85 (*1*) is operative as between the grantor and the grantee [*Madan* v. *Jaki* (12), *Gopal* v. *Eshan* (13), *Tamijuddi* v. *Ajgar* (14), *Bipinbehari* v. *Amritalal* (15), *Arab Ali* v. *Rachimuddi* (16), *Ali Muhammed* v. *Nayan Rajah* (17), *Abdul Karim* v. *Abdul Rahman* (18), *Janakinath* v. *Prabhasini* (19) and *Lani Mia* v. *Easin Mia* (20)]. The only case which supports the contrary view is the decision of Geidt, J., in *Basarutullah* v. *Kasirunnessa* (21), which, so far as we have been able to discover, has not been followed in any subsequent decision. The conclusion as to the binding character of the lease as between grantor and grantee may be supported on one of two grounds, namely, *first*, that the validity of a lease granted in contravention of sec. 85 (*1*) can be questioned only by the landlord of the grantor or by the holder of a derivative title from him; or, *secondly*, that the doctrine of estoppel binds the grantor and grantee equally and debars each from disputing the validity of the lease to the detriment of the other. The first of these principles has not been universally accepted and is possibly in conflict with the rule enunciated in *Jarip Khan* v. *Dorfa Bewa* (1) and *Telam Pramanik* v. *Adu Sheikh* (2). These cases, however, do not affect the authority of the decision in *Manik Borai* v. *Bani Churn* (22), which was followed in *Ganesh*

(11) [1914] App. Cas. 25 (39) (1913).

(1) 17 C. W. N. 59: s. c 16 C. L. J. 144 (1912).
(2) 17 C. W. N. 468 (1913).
(12) 6 C. W. N. 377 (1902).
(13) I. L. R. 29 Cal. 148 (1901).
(14) I. L. R. 36 Cal. 256: s. c. 13 C. W. N. 183 (1908).
(15) 9 C. L. J. 76 (1908)
(16) 13 C. L. J. 656 (1911).
(17) 15 C. L. J. 122 (1903).
(18) 16 C. W. N. 618: s. c. 15 C. L. J. 672 (1911).
(19) 19 C. W. N. 1077: s. c. 22 C. L. J. 98 (1915).
(20) 20 C. W. N. 948 (1915).
(21) 11 C. W. N 190 (1906).
(22) 13 C. L. J. 649 (1910).

v. *Thanda* (23), (decided by Fletcher and Richardson, JJ., on 22nd July 1914). It is not necessary for our present purpose to make a choice between the two classes of cases, one of which places a limited construction on sec. 85 and holds it to have been enacted for the benefit of the superior landlord, while the other places a wider construction upon the section and allows a stranger to avail himself of its provision to defeat the title of a grantee who had not obtained possession before or after the grant. Apart from the conflict on this point, there is no serious doubt as to two propositions, namely, *first*, that the title of a grantee, who can fall back upon prior possession as tenant or otherwise cannot be defeated by mere proof of contravention of sec. 85, and, *secondly*, that, as between grantor and grantee, the rule of estoppel applies when the elements essential to attract its operation are proved to exist. In the case before us, as we have already explained, the Defendants are precluded by the doctrine of estoppel from asserting that their obligations are other than those set out in the lease of the 27th August 1896, on the strength whereof they obtained possession from their grantors. In this view, the decree of the Subordinate Judge cannot be supported.

We have finally to consider the question of the measure of damages. The Defendants dispute only the first two items claimed by the Plaintiffs. The first item must obviously be disallowed; the Plaintiffs cannot claim the value of the property lost to them as also the sale-proceeds which simply represent the property transformed into money. As regards the second item, the claim is clearly excessive. As between the Plaintiffs and the Defendants, the property may be deemed to be a tenure; but the only reliable evidence as to the market value of a permanent tenure, which comes from the side of the Defendants, is that it sells for 13 years' purchase. As the net profit derivable by the Plaintiffs was Rs. 150 a year, the value cannot be estimated at a higher figure than Rs. 1,950. The appeal will consequently be allowed and the Plaintiffs will have a decree for Rs. 4,318 with interest thereon at 6 per cent. per annum from the date of the institution of the suit to the date of realisation. The Plaintiffs will also have their costs in proportion to the sum decreed, both here and in the Court below.

N. G. *Appeal allowed.*

(23) S. A. 2246 of 1912 (decided by Fletcher and Richardson, JJ., on 22nd July 1914).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 159 OF 1915.

FLETCHER, J. TEUNON, J. 1916, 15, June.	AKAHOY CHANDRA MAJHI and ors., Defendants, Appellants, *v.* MANMATHA NATH CHATTERJEE, Plaintiff, Respondent.

Indian Registration Act (XVI of 1908), sec. 35—Registration of deed of gift—Death of donor—Execution admitted by donee—Registration if proper.

The donee under a deed of gift is an "assign" of the executant within the meaning of sec. 35 of the Registration Act and may, when the donor is dead, admit the execution of the deed before the Registering Officer.

This was an appeal preferred on the 2nd February 1915 against a decree of Babu Ashutosh Ghosh, Subordinate Judge of Zillah Burdwan, dated the 13th November 1914, reversing a decree of Babu

Nirmal Chandra Mitra, Munsif at Katwa, dated the 4th September 1913.

The Plaintiff brought the suit out of which the appeal arose for establishment of his title to and recovery of possession of land on the strength of a deed of gift executed by one Bhaba Sundari Dasi.

Both the Courts below found that Bhaba Sundari had a disposable title in the property and did in fact execute the deed, but as she died almost immediately, the deed was registered upon the admission of execution before the Registering Officer by the Plaintiff himself who was the donee. The Munsif held that the deed was in the circumstances not duly and properly registered. The Subordinate Judge on appeal reversed that decision, holding that Plaintiff was as the donor's assign competent to admit execution of the deed and that in consequence it was properly registered. He accordingly decreed the suit.

The Defendants then preferred this second appeal.

Babus Satish Chunder Mukherjee and *Khetra Gopal Banerjee* for the Appellant.

Babu Surendra Coomar Bose (for *Babu Sanat Coomar Pal*) for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is an appeal from the decision of the learned Subordinate Judge of the Second Court of Burdwan, dated the 13th November 1914, reversing the decision of the Munsif of the Second Court at Katwa. The suit brought before the learned Munsif was one for recovery of possession of certain lands to which the Plaintiff founded his title on a deed of gift executed by a lady. The lower Appellate Court has found that the deed of gift was executed. The only question that was raised before that Court and which has also been pressed before us in this appeal is as to the registration of that deed. Under the provisions of the Transfer of Property Act, a gift of an immoveable property can only be made by a deed of transfer duly registered. The lady died a few hours after executing the deed of gift. The document was, however, registered within the four months required by the Indian Registration Act and the only question is " was the Plaintiff an assign of the deceased lady within the meaning of the third clause of sec. 35 of the Indian Registration Act, which authorises the registration of a document where the executant is dead and his representative or assign appear before the Registering Officer and admits the execution "? The Plaintiff was vested with the interest that the deceased lady had in the property comprised in the deed of gift; and, ordinarily, he would be an assign of the lady. No reason has been shown why the word " assign " should not be given its ordinary signification; and it is quite possible, that the legislature inserted the word " assign " in the third clause of sec. 35 to provide for the case where the representative would not appear and, unless the transferee was authorised to appear and admit the execution, the deed could not be registered. I think the conclusion arrived at by the learned Subordinate Judge of the lower Appellate Court is correct. The present appeal, therefore, fails and must be dismissed with costs.

TEUNON, J.—I agree.

N. G. *Appeal dismissed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 607 OF 1916.

SANDERSON, C. J.
WALMSLEY, J.
1916,
Heard, 28, July.
Judgment, 3, August.

F. A. BROWN, Accused, Petitioner,
v.
ANANDA LAL MULLICK, Opposite Party, Complainant.

Criminal Procedure Code (Act V of 1898), sec 195—Sanction—Scope of section—Proceedings in relation to which sanction of Court necessary—Information to police followed by complaint in Court.

Where the information to the Police was followed by a complaint to the Court based on the same allegations and on the same charge as that contained in the information to the police and the complaint was investigated by the Court, sanction or a complaint of the Court itself under sec. 195 (b), *Cr. P. C., would be necessary before the Court could take cognizance of an offence punishable under sec. 211, I. P. C., alleged to have been committed by making a false charge to the police, on the ground that it was an offence committed in relation to a proceeding in Court.*

This was a Rule granted on the 19th June 1916 against the criminal proceedings taken against the Petitioner under sec. 211, I. P. C., which were pending trial in the Court of Mr. K. N. Chaudhuri, Honorary Magistrate of Sealdah.

The facts of the case sufficiently appear from the judgment.

Babus Atulya Charan Bose and *Jogat Chandra Bose* for the Petitioner.

Mr. Gregory and *Babu Manmotha Nath Mukherjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this case the Petitioner, Mr. Brown, on the 25th of February 1915, laid an information at the Chitpore Police Station, charging one A. L. Mullick, who was the Managing Director of the Company, in which Mr. Brown was a shareholder, with the theft of certain steel joists and other articles belonging to the Company. The Engineer of the Company was charged with aiding and abetting the alleged offence.

The Sub-Inspector after investigating the matter refused to take action upon the information.

Thereupon, the Petitioner, on the 1st of March 1915, lodged a complaint before the Sub-divisional Officer of Sealdah, and the charge which was alleged in that complaint was under sec. 380 of the Indian Penal Code, against A. L. Mullick, namely, theft, and against the Engineer, for aiding and abetting that offence.

This was sent by the Sub-divisional Officer to the Honorary Magistrate at Sealdah for disposal.

Before the Honorary Magistrate the Petitioner was examined on oath, and then process was issued by the Magistrate against A. L. Mullick, charging him with an offence under sec. 380, and the Engineer with an offence under sec. 380 read with sec. 109, of the Indian Penal Code.

It should be noted that this was a charge to the same effect as that made by the Petitioner to the police.

Then the Honorary Magistrate retired, and the result was that the Sub-divisional Magistrate put the case on his own file.

On the 10th of March 1915, the Engineer laid a complaint charging the Petitioner, Mr. Brown, under sec. 211 of the Indian Penal Code, that is to say, with making a false charge against him know-

ing that there was no just or lawful ground for such charge, and with intent to cause injury to the complainant. With regard to that matter, on the 23rd of March 1915, the Sub-divisional Officer, according to the note on the order-sheet, said, "I have seen the police papers. They do not justify any step being taken in this case. There is a cross case in the file of Rai B. N. Bose Bahadur. Put up after the disposal of that case." A similar application was made by A. L. Mullick and a similar order, as I understand, was passed.

Then the case which was instituted by Mr. Brown, the Petitioner, was enquired into, 15 witnesses were examined for the prosecution, and after numerous adjournments, on the 23rd of December 1915, the Sub-divisional Officer discharged the accused A. L. Mullick and the Engineer basing his judgment upon this: He said, "the question is, can a case like this lie against the Managing Director at the instance of only one share-holder who holds only 600 shares out of 2500 shares. . . . . A member of a company cannot maintain an action in which he sues on behalf of himself and all other members of the company in respect of wrongs committed against or frauds upon the company, as the wrongful or fraudulent acts can be confirmed by the majority of the corporation. . . In the present case also nothing has been done to ascertain the views of the other share-holders and taking it for granted that the prosecution story is true, it is not known what view the majority of the share-holders in a meeting of the company will take in the matter, and, as such, no case can lie." The correctness of this judgment has not been argued and is not under discussion, but it is to be noted that the Sub-divisional Officer did not decide that the prosecution had been brought without *bonâ fides*.

On the 11th of March 1916, two cases were brought; the *first* by A. L. Mullick; and, the second by the Engineer against the Petitioner Mr. Brown, and they were made over to the Honorary Magistrate: and, after several adjournments and orders with reference to the two cases, a Rule was obtained in this Court on the 19th of June 1916 to show cause why the proceedings against the Petitioner Brown which were pending at the instance of A. L. Mullick should not be quashed.

The charge made by A. L. Mullick in his complaint was that the Petitioner Mr. Brown had brought a false charge of theft against him at the Chitpore *thana*, knowing that he had no justification for it, and that such charge was brought maliciously to do harm to A. L. Mullick; and, this charge was based upon sec. 211 of the Indian Penal Code.

The main point upon which the Rule was obtained was that the offence charged was in relation to a proceeding in the Court and that no sanction of that Court had been obtained; and consequently under sec. 195 (*b*) of the Criminal Procedure Code that Court could not take cognizance of the alleged offence.

Learned Counsel for A. L. Mullick showed cause and argued that inasmuch as the alleged false charge which was complained of was made in the Chitpore *thana* and not in Court no sanction was necessary.

The learned Vakil for the Petitioner replied that when an information is followed by a complaint to the Court, sanction is necessary under sec. 195.

Apart from any authorities, I should have no doubt as to the construction of

the statute, and that under the circumstances of this case where the information to the police was followed by a complaint to the Court based on the same allegations and on the same charge as that contained in the information to the police, and when the complaint has been investigated by the Court, sanction, or a complaint of the Court itself under sec. 195 (*b*) of the Criminal Procedure Code would be necessary, before the Court could take cognizance of an offence punishable under sec. 211 of the Indian Penal Code alleged to have been committed by making a false charge to the police, on the ground that it was an offence committed in relation to a proceeding in Court. If A. L. Mullick had based his charge on sec. 182 of the Indian Penal Code, which he might have done, the sanction of the police officer to whom the alleged false charge was made, or the sanction of some public servant to whom he was subordinate would have been necessary. If he had based his case on the allegations made by the Petitioner in the Court, clearly the sanction of the Court would be necessary before he could take proceedings against the Petitioner under sec. 211. But it is alleged that A. L. Mullick can base his charge upon sec. 211, confining it to the allegations of the Petitioner in the police office and proceed without the Court's sanction, although there was no material difference between the information to the police and the allegations presented in the Court. I do not think this was the intention of the Legislature. To hold otherwise might lead to unreasonable results, *e.g.*, assume a case where the information to the police is followed up by a complaint of a similar nature and to the same effect in Court, which after investigation by a Magistrate is discharged: the person who had been accused then applied to the Court for sanction to prosecute the person who laid the complaint for making a false charge in Court: the Court refuses such sanction: According to Mr. Gregory's argument the person who had been accused can then proceed without any sanction against the prosecutor alleging that he made a false charge to the police in the *thana*, relying on the same allegations and the same facts, which the Magistrate has already investigated and as to which he had refused his sanction. Such a construction would be most unreasonable and in my judgment is not warranted by the language of the statute.

With regard to the cases which were quoted to us, the first was *Putiram Ruidas* v. *Mahomed Kasem* (1). It is to be noted that in that case the Rule was granted in the following terms, "Let a Rule issue to the Magistrate to show cause why the sanction for prosecution granted by the Honorary Magistrate should not be revoked upon the ground that such sanction could only have been given by the Court to which the original complaint had been made." The Rule was discharged upon that ground. But the Court went on to deal with the further question and laid it down in these terms: "It appears, however, that sanction has really been granted by the Honorary Magistrate to prosecute the Petitioner for bringing a false charge against Mahomed Kassem and others before the Balliaghatta Police, but that was not an offence "committed in or in relation to any proceeding" in his Court, and therefore it seems to us that no sanction from the Honorary Magistrate was necessary, and upon that ground we think we ought to set it aside." In my judgment, that decision was an *obiter dictum*—it was not necessary for the decision. The learned

(1) 3 C. W. N. 33 (1895).

F. A. BROWN *v.* ANANDA LAL MULLICK.

Judges had already discharged the Rule upon another ground: and, having regard to what appears at the end of the judgment I do not quite follow the reasoning of the learned Judges, because they say as follows:—"Observing at the same time that we see no reason why the prosecution should not proceed without any sanction whatever, the offence having been committed in the laying of a criminal charge before the police, that charge having now been enquired into judicially and the enquiring Magistrate being of opinion that it is a fit case for the prosecution of the Petitioner." If they thought that no sanction of the Magistrate was necessary, then I fail to understand why it was necessary for them to draw attention to the fact that the inquiring Magistrate was of opinion that it was a fit case for the prosecution of the Petitioner. I do not myself feel bound by the decision of that case, as I have said the opinion of the learned Judges was *obiter dictum*.

The other case cited by Mr. Gregory, was the case of *Jadu Nandan Singh* v. *Emperor* (2). There the question was as to the proper construction of sec. 476 of the Criminal Procedure Code, as to which different considerations arise, having regard to the language which is used in sec. 476, different to that of the section which is now under consideration. The *ratio decidendi* is made quite clear by the learned Judges at page 254, where they say "Let us now turn to sec. 476. That section—we quote only so much of it as applies to the present case—provides, that, when any Criminal Court is of opinion that there is ground for enquiring into any offence referred to in sec. 195 and committed before it, or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary enquiry that may be necessary, may send the case for enquiry or trial to the nearest Magistrate of the first class." The construction of the section which is now being considered only came into consideration incidentally in that case; and, in my judgment, the point which is now under consideration does not seem to have been present to the learned Judges' mind, and I do not think having regard to the terms of the judgment that they ever intended that decision to cover the point in the present case.

A case was cited by the learned Vakil for the Petitioner, *viz.*, *Emperor* v. *Hardwar Pal* (3). It is not necessary for me to express any opinion as to whether that judgment is correct, because the judgment in that case goes a great deal further than the judgment that we are giving in this case, inasmuch as the facts are quite different from the facts in this case. They were to this effect that the person who was alleging that a false charge was made against him in the police station was not before the Magistrate, although others who were implicated in the same charge were. The head-note is this: "He made a report against several persons, including one S., at a police station, charging them with rioting and voluntarily causing hurt. The police made inquiry and sent up several persons for trial, but not S. Some of these were convicted by the Magistrate, but acquitted by the Sessions Judge. Thereupon S. made a complaint to the Magistrate, charging H. with having made a false report in respect of himself to the police. The Magistrate took cognizance of the complaint. *Held* that the Magistrate had no power to take

(2) I. L. R. 37 Cal. 250: s. c. 14 C. W. N. 330 (1909).

(3) I. L. R. 34 All. 522 (1912).

F. A. BROWN *v.* ANANDA LAL MULLICK.

cognizance of the complaint by reason of the absence of sanction." As I have said before, it is not necessary for my judgment to express any opinion as to whether we are prepared to go so far as the decision in the case in the Allahabad series, because the facts in the present case are different from the facts in that case; and, in my opinion the present question is much easier for decision than the one presented in the other case. There is one passage in the judgment to which I wish to refer, which I think helps this case, and it is this, (at page 527) " It is obvious that there is considerable relation between the first report and the proceeding in Court, for the latter is the result of the former. The report led to the police enquiry and the latter to the proceeding in Court. The offence if it be one under sec. 211 committed in respect to Sher Bahadur Singh was committed in relation to the proceeding in Court, and at least the sanction of the Court would be necessary under sec. 195 (1) (*b*)." As I have said before, I guard myself by saying that I am not now expressing an opinion whether this case is right or wrong: If it is right, then the reasoning applies *a fortiori* to this case which is now before us, and confirms the opinion at which I have already arrived upon the construction of the words of the statute.

I am confirmed in the judgment which I have arrived at by a decision of Mr. Justice Mookerjee and Mr. Justice Sheepshanks in the case of *Tayab Ullah* v. *King-Emperor* (4) and it must be remembered that Mr. Justice Mookerjee was a party to the decision in the case of *Jadu Nandan Singh* v. *Emperor* (2). The head-note of that case is this: " No sanction to prosecute is necessary under sec. 195 (1) (*b*) of the Code of Criminal Procedure when a false charge has been made to the Police and has not been followed by a judicial investigation thereof by a Court. Where, therefore, the complainant to the Police never applied to the Magistrate for investigation, nor did he impugn the correctness of the Police report as to the falsity of the complaint nor did he pray that the person accused by him might be brought to trial, nor was he examined on oath by the Magistrate, *Held* that the order for sanction to prosecute him was bad, if it was deemed to have been granted under sec. 195 of the Code, inasmuch as there was no " complaint " within the meaning of sec. 4 (*h*) of the Code, and the offence could not be said to have been committed in a proceeding in a Court." The passage in the judgment to which I wish to refer is this (page 135)—" No sanction was required in this case under sec. 195 (1) (*b*). A sanction is requisite in respect of an offence under sec. 211, I. P. C., only when such offence has been committed in or in relation to any proceeding in any Court; no sanction is necessary when a false charge has been made to the police and has not been followed by a Judicial investigation thereof by a Court." . . . . . " The position is different where, upon the Police report as to the falsity of the complaint, the complainant insists upon a judicial investigation; if he does so, he is deemed to have preferred a complaint to the Magistrate; if the Magistrate finds his case to be false, a sanction would be requisite under sec. 195 (1) (*b*), as the offence may be said to have been committed in a proceeding in a Court." It is satisfactory to us that we had arrived at the abovementioned decision before we knew of the conclusion to which Mr.

(2) I. L. R. 37 Cal. 250: s. c. 14 C. W. N. 330 (1909).

(4) 20 C. W. N. 1265: s. c. 24 C. L. J. 134 (1916).

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Justice Mookerjee and Mr. Justice Sheepshanks came the other day, and to find that their judgment is in conformity with ours.

For these reasons I think that the Rule must be made absolute and the proceedings against the Petitioner must be quashed.

Walmsley, J.—I agree in the judgment that has been delivered by the learned Chief Justice.

S. C. M. *Rule made absolute.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

L. P. App. No. 41 of 1916.

Chamier, C. J. Sharfuddin, J. 1916, 11, July.		Babua and ors., Defendants, Appellants, *v.* Mussammat Sarli, Plaintiff, Respondent.

Rent suit, valued below Rs 100 - Whether second appeal lies—Sec. 153, Bengal Tenancy Act (VIII of 1885,—Setting up title by the Defendant in himself, whether involves a question of title in land between parties having conflicting claims thereto—Concurrent findings of fact of Courts below, dismissal of appeal for.

Where the Plaintiff brings a suit for rent the value of which is less than Rs. 100 against the Defendants claiming that she is a raiyat of the land and that the Defendants are her under-raiyats and liable to pay rent to her and the Defendants deny that they are under-raiyats under the Plaintiff but plead that their father had purchased the land from the heir of the admitted previous raiyat of the land and that they had been holding the land as the raiyat of the landlord, and both the Courts below found that the Plaintiff was in possession for a large number of years and that the Defendants failed to prove that they ever held the land as raiyat of the landlord;

Held, *that a second appeal was not barred under sec. 153 of the Bengal Tenancy Act, as the Courts below decided a question of title to land between parties having conflicting claims thereto.*

The appeal was dismissed, there being concurrent findings of fact of the Courts below.

This was an appeal under sec. 10 of the Letters Patent against a judgment of the Hon'ble Mr. Justice Mullick, sitting singly, dated 10th May 1916, in Second Appeal No. 1649 of 1915.

The facts appear sufficiently from the judgment of the Hon'ble Mr. Justice Mullick, which was as follows :—

Mullick, J.—One Newaz had a holding of ten bighas odd. The husband of the Plaintiff was one of the sons of Newaz who predeceased his father. The Defendant was admittedly an under-raiyat under Newaz in respect of the holding now in suit measuring 18 cottas odd and claims to have purchased raiyati interest in this area from Palak, the son of Newaz's brother.

The Plaintiff now sues the Defendant for the rent of the under-raiyati holding. The cadastral survey record shows the Defendant to be an under-raiyat of Newaz.

The defence is that the Defendant has by his purchase acquired the raiyati interest and is therefore not liable to pay rent to the Plaintiff.

An issue was raised as to whether the relationship of landlord and tenant exists and the Munsif came to the conclusion that the Plaintiff was put in possession of the lands by Newaz for her maintenance, that Palak had never been in possession and that the Plaintiff was entitled to the rent claimed. The learned Subordinate Judge has come to the same finding.

It is clear that as between the Defen-

dant and the Plaintiff there were conflicting claims to the raiyati interest and although the decree is under Rs. 100 a second appeal would under sec. 153 of the Bengal Tenancy Act lie if there has been a decision on the question of title between the parties. But in my opinion there has been no such decision. It is difficult to understand upon what basis it was held that the Defendant was liable to pay the rent claimed to the Plaintiff.

The Plaintiff set up a gift but that gift has not been proved. The Defendant set up a purchase from Palak but the genuineness of that purchase has not been decided. Mere possession by the Plaintiff does not seem to be a valid reason for holding the Defendant liable for rent. But although the lower Court's decree seems to me to be wrong, I cannot upon the findings of the Court say that there is any second appeal. The Court has made a mistake but as it has not decided the question of title, no second appeal lies. A decision by implication is not sufficient. The effect of the decree is that the Plaintiff is entitled to get rent for the years in suit from Defendant. The question of title, in my opinion, is not *res judicata*. No second appeal therefore lies and the preliminary objection advanced by the learned Vakil for the Respondent must succeed. The appeal is dismissed with costs."

Mr. Sarashi Charan Mitra for the Appellants.

Mr. Rajendra Prasad for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

CHAMIER, C. J.—This is an appeal under sec. 10 of the Letters Patent against a judgment of Mr. Justice Mullick. It arises out of a suit brought by the Respondent for rent of two small plots of land. The Respondent claimed to be raiyat of the land and she alleged that the Defendants were her underraiyats and liable to pay rent to her. The Appellants denied that they were underraiyats of the Respondent and pleaded that she had no right to institute the suit. They alleged that their father had purchased the land in 1898 from one Palak, the nephew and heir of one Newaz, who was, according to the case of both parties, formerly raiyat of this land. Both the Munsif and the Subordinate Judge held definitely that the Respondent's allegations had been established, that whether or not Palak was the legal heir of Newaz it had been proved that the Respondent stepped into the shoes of Newaz who was her father-in-law and had been in possession of his land including the land now in question for a large number of years. Both Courts held definitely on the evidence that the Appellants had failed to prove that they ever held this land as raiyat of the landlord. A second appeal to this Court was dismissed by Mr. Justice Mullick on the ground that a second appeal was barred under sec. 153 of the Bengal Tenancy Act. It seems to me that the Courts below decided a question of title to land between parties having conflicting claims thereto and that a second appeal did lie to this Court. The case indeed seems to be covered by authority, but in my opinion the appeal to this Court ought to have been dismissed on the ground that both Courts below held definitely on the evidence that the present Respondent had proved that she had been in possession of the land as raiyat since at least 1304 Fasli and was therefore entitled to recover rent from the Appellants. I would therefore dismiss this appeal with costs.

BABUA *v.* MUSSA[illegible] ANAN[illegible] JARLI.

SHARFUDDIN, J.—I agree.

A. K. R. *Appeal dismissed.*

PATNA HIGH COURT.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 74 OF 1913.

SHARFUDDIN, J.
ROE, J.
1916,
8, June.

BRIJ BEHARI LAL and anr., Defendants, Appellants,
v.
SHIVANATH PRASAD and ors., Plaintiffs, Respondents.

Civil Procedure Code (Act V of 1908), sec. 92—Public trust, cause of action as to—Practice of District Courts to enquire first whether subject-matter of trust is public—Public trust, if may be declared, when suit dismissed for want of cause of action—Costs if payable out of trust estate when no cause of action—Findings in the judgment, immaterial to the decision, if appealable—Sec. 115, C. P. C., revision under, of decree or costs.

Where the Plaintiffs' suit is dismissed for want of cause of action, the Defendant has no right of appeal against some findings of fact which are not in his favour.

THAKUR MAGUNDEO *v.* THAKUR MAHADEO SINGH (1) *and* JAMAITUNNISSA *v.* LUTFUNNISSA (2) *followed.*

It has generally been the practice of the District Courts to enquire first into the question whether the trust is a public trust or not and this is probably a convenient course. Under sec. 92, C. P. C., no cause of action arises save in a case of alleged breach of a trust for a public purpose or where the directions of the Court are deemed necessary for the administration of such trust.

Where the Plaintiffs after obtaining sanction from the Advocate-General instituted a suit against the Defendant for his removal from the management of a trust which was alleged by the Plaintiffs to be a public trust and the defence was that the trust was not a public trust and that there was no misfeasance and the District Judge found that the trust was indeed a public trust but that the Defendant had not been guilty of misfeasance and so dismissed the suit for want of cause of action with costs to be paid out of the trust estate to the Plaintiffs because the defence was that the trust was not a public trust:

Held—*That when the Judge has come to the decision that there was no cause of action for the suit he could not record a decision binding on the parties that the trust was a public trust and he could not make an order for the payment of costs from the estate as a public trust.*

Held further, *that the order for costs out of the estate was without jurisdiction within the meaning of sec. 115, C. P. C.*

This was a first appeal against the decision of R. L. Ross, Esq., District Judge of Darbhanga, dated the 14th November 1912.

The facts out of which this appeal arose were briefly as follows :—

This was an action brought by the Plaintiffs after obtaining sanction from the Advocate-General of Bengal under sec. 92 of the Code of Civil Procedure against the Defendant for his removal from the management of a trust which was alleged to be a public trust. The defence *inter alia* was that the trust was not a public trust at all and that there was no misfeasance as alleged in the plaint. The learned District Judge held that the trust was a public trust but that the Plaintiffs had failed to prove that the Defendant had been guilty of misfeasance in connection with the trust. He therefore dismissed the Plaintiffs' suit but

(1) I. L. R. 18 Cal. 647 (1891).
(2) I. L. R. 7 All. 606 (F. B.) (1885).

in view of the fact that the Defendant had taken a false plea that the trust was a public trust, he ordered that the costs of the Plaintiffs should be paid from the trust estate. The Defendant thereupon preferred this appeal to the High Court against the finding that the trust was a public trust.

On a preliminary objection raised by the Respondent that no appeal lay against a mere finding, the High Court held that no appeal lay. But the Appellants then presented a petition under sec. 115 of the Code of Civil Procedure to consider whether the order for costs passed by the Court below was correctly made.

Dr. Dwarka Nath Mitter and *Mr. Baikuntho Nath Mitter* for the Appellants.

Mr. Luchmi Narayan Sinha for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal is directed against a decree of the District Judge of Darbhanga dismissing the Plaintiffs' suit. The appeal is by the Defendants. A preliminary objection is taken that no appeal lies. We have examined the decree and find that the suit was dismissed because the Plaintiffs had no cause of action. The Appellant argues that he should be allowed to contest in appeal to this Court the findings of fact arrived at by the learned District Judge which are not in his favour. This is against the opinions expressed in *Thakur Magundeo* v. *Thakur Mahadeo Singh* (1) and *Jamaitunnissa* v. *Lutfunnissa* (2). "The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the Plaintiff's right to any portion of the relief sought by him as declared by the decree amount to no more than *obiter dicta* and do not constitute a final decision of the kind contemplated by sec. 2, cl. 2 of the Civil Procedure Code." There is in the finding in this suit nothing which can be hereafter quoted against the Defendants as *res judicata*. All that has been decided is that on the suit as framed the Plaintiffs had no cause of action. There is nothing in the decree against which the Defendant can appeal. The appeal must be dismissed with costs. In the special circumstances of the case we assess a special pleader's fee Rs. 300.

It is next contended that that part of the decree which awards costs to the Plaintiff out of the estates in the hands of the Defendant is open to revision. We are prepared to go into that question when an application for revision under sec. 115 shall have been filed. The decree for costs is not a part of the decree itself and no appeal lies against an order as to costs only.

[The application under sec. 115, C. P. C., having been filed as stated above, the following order was passed.]

By this application we are invited to interfere with the decree for costs made by the District Court of Darbhanga. The facts of the case briefly are that the Plaintiffs after obtaining sanction from the Advocate-General instituted a suit against the Defendant for his removal from the management of a trust which was alleged by the Plaintiffs to be a public trust. The learned Judge after full enquiry into the facts found that the trust was indeed a public trust but that the Plaintiffs had failed to prove that the Defendant had been guilty of misfeasance in connection with the trust. He there-

(1) I. L. R. 18 Cal. 647 (1891).
(2) I. L. R. 7 All. 606 (F. B.) (1885).

BRIJ BEHARI LAL v. SHIVANATH PRASAD.

fore dismissed the Plaintiffs' suit but in view of the fact that the Defendant had taken as one of his grounds of defence the plea that the trust was not a public trust he ordered that the costs of the Plaintiffs should be paid from the trust estate. Under Sec. 92 no cause of action arises save in the case of an alleged breach of a trust for a public purpose or where the direction of the Court is deemed necessary for the administration of any such trust. Before the learned Judge had jurisdiction to decide the nature of the position of the Defendant it was necessary for the Plaintiffs to shew a cause of action in respect of some such breach or some necessity for a direction by the Court. From the moment the District Judge decided that there had been no misfeasance his jurisdiction in the matter ended. It has generally been the practice of the District Courts to enquire first into the question whether the trust is a public trust or not and this is probably a convenient course. But when the Judge has come to a decision that there was no cause of action he could not record a decision binding on the parties that the trust was a public trust. Therefore he could not make an order for the payment of costs from the estate as a public trust. Therefore within the meaning of sec. 115 the order for costs was without jurisdiction. It must, therefore, be set aside and in lieu thereof an order made that each side will bear its own costs. We make no orders as to the costs of the present application.

Appeal dismissed,
Rule made absolute.

A. K. R.

[END OF VOL. XX.]

JUDGES OF THE HIGH COURT.

Chief Justice:

HON'BLE SIR LANCELOT SANDERSON, KT., *K.C.*

Puisne Judges:

HON'BLE SIR J. G. WOODROFFE, KT., *M.A., B.C.L.*

" " ASUTOSH MOOKERJEE, KT., *C.S.I., M.A., D.L.*

" " H. HOLMWOOD, KT., *I.C.S.*

" " C. W. CHITTY, KT.

" MR. E. E. FLETCHER.

" " SAIYID SHARF-UD-DIN.*

" " DIGAMBAR CHATTERJEE, *M.A., B.L.*

" " NALINI RANJAN CHATTERJEA, *M.A., B.L.*

" " W. TEUNON, *I.C.S.*

" " T. W. RICHARDSON, *I.C.S.*

" " A. CHAUDHURI.

" " SAYID HASAN IMAM.

" " C. P. BEACHCROFT, *I.C.S.*

" " H. WALMSLEY, *I.C.S.*

" " E. P. CHAPMAN, *I.C.S.**

" " BASANTA KUMAR MULLICK, *I.C.S.**

" " W. E. GREAVES.

" " B. B. NEWBOULD, *I.C.S.*

" " F. R. ROE, *I.C.S.*, (*Offg.*)

" " R. SHEEPSHANKS, *I.C.S.*, (*Offg.*)

" " A. H. CUMING, *I.C.S.*, (*Offg.*)

" " M. SMITHER, *I.C.S.*, (*Offg.*)

HON'BLE G. H. B. KENRICK, *K.C., Advocate-General* (*Retired.*)

" SIR S. P. SINHA, *Advocate-General* (*Offg.*)

B. C. MITTER, *Standing Counsel.*

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* Appointed Judge of the Patna High Court from the 1st March 1916.

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——— 1897, V. See Estates Partition Act.

——— 1898, III, s. 9 (11). See Bengal Tenancy Act, s. 106 275

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ERRATUM.

Page 618, Col. II, last para., last line (headnote)

For

as provided

Read

as provided

Page 814, Col. I, para. 2, lines 3, 4 (headnote)

For

public being interfered with sections of the Act

Read

public from being interfered with under other sections of the Act

Page 644, short headnote, 1st line

For

Indian Contract Act (IX of 1872), sec. 56

Read

Indian Contract Act (IX of 1872), [illegible]

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of the Indian Contract Act, the former of which deals with undisclosed principal and the latter with falsely contracting as agent, were not applicable to this case, **Held** also, that evidence of usage of trade applicable to the contract which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose importing [illegible] contract [illegible] the instrument itself [illegible] **Hutchet** v. **Murton,** L. R. 7 Q. B. [illegible]), followed. That the usage being known to the Chamber the matter was within their jurisdiction and the award was properly made. JOY LALL & CO. v. MONMOTHA NATH MULLIK 365

———, **Civil Procedure Code (Act V of 1903), Sch. II, sec. 1—Agreement to refer signed by adult parties and by guardian ad litem of a minor party—Application for order of reference assented to by guardian but not signed by him—Proceedings if valid—Decree upon award—Revision—Review—Secs. 114, 115.**] Sec. 1 of Sch. II of the Civil Procedure Code does not require that the application in writing for an order of reference should of necessity be signed by the parties to the suit who have agreed to refer the matter in difference to arbitration. Where one of the parties to a suit being an infant the agreement to refer was signed by the adult parties and by the guardian **ad litem** of the infant, and the parties then appeared before the Trial Judge and, producing the agreement, applied for an order of reference in the presence of the guardian **ad litem** and with his assent, **Held**—That the fact that the application was not signed by the guardian **ad litem** did not invalidate the proceeding. THAKUR UMED SINGH v. RAI BAHADUR SETH SOBHAG MAL DHADHA **(P. C.)** 137

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———— **discharging himself, if may detain clients' papers, pending suit—Lien in such case how secured—When discharged by client, except for misconduct, if may detain papers.**] Sanderson, C. J. (Woodroffe, J., agreeing).—Where an attorney who had been acting for his client in the ordinary way refused to go on acting for him unless his out-of-pocket expenses were paid,

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————, Attorney's costs, if may be declared a charge on infant's immoveable property recovered by suit when irrecoverable from next friend—Infant if may be sued and personal decree made against—Immoveable and moveable property, no distinction between—Attorney's lien, meaning of.] An attorney appointed by the next friend of an infant to prosecute a suit for recovery of immoveable property may sue the infant for and obtain a decree declaring a charge in respect of the balance of costs in the property recovered by the suit where it appears that there is no chance of such costs being recovered from the next friend. No decree can be made in such a suit against the infant personally. KUMAR KRISHNA DUTT v. HARI NARAYAN GANGULI 537

————, application by, for discharge—Notice to client, sufficiency of.] If an attorney wishes to withdraw from a case even for good grounds, he must give his client reasonable notice of his intention so that the client may have a reasonable opportunity of getting other advice and making arrangements before the hearing of the application of the attorney for obtaining his discharge. When an attorney gave notice to the client on the day previous to his making application before Court for obtaining his discharge and obtained the order, Held, on appeal, that the order must be set aside for insufficiency of notice. PRABHU LAL v. KUMAR KRISHNA DUTT 443

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————, s. 30—Scope and effect of—All roads within Municipal limits vested in the Municipality—Sec. 6, cl. (13)—Road over which the public have a right to go—Right of control of Municipality over such roads.] The Plaintiff brought a suit against the Defendant Municipality for a declaration that a certain pathway was private and for an injunction restraining the Municipality from exercising any right or control over it: Held—That sec. 30 of the Bengal Municipal Act does not operate to vest in the Municipality all roads, whether private or not, within the municipal limits. Chairman of the Howrah Municipality v. Khetra Mohan Mitter, I. L. R. 33 Cal. 1290 at p. 1304: s. c. 10 C. W. N. 1044 (1906), approved: That for the decision of the case it was necessary to find whether the disputed pathway was a road within the meaning of sec. 6, cl. (13) of the Act, over which the public had a right to go. If the public had such right the Municipality had certain rights of control over it as provided in the Act to prevent the road from becoming a nuisance or the rights of the public from being interfered with under other sections of the Act. THE CHAIRMAN OF MUNICIPAL COMMISSIONERS OF HOWRAH v. HARI DAS DUTT 613

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tion of landlord and tenant.] The Bengal Tenancy Act is not a complete Code, even in respect of the law of landlord and tenant; much less does it profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence in so far as they may have to be applied in the determination of disputes between landlords and tenants. RAMANDAS BHATTACHARYYA v. NILMADHAB SAHA ...1340

——— s. 1, as amended by sec. 3 of Act I B. C. of 1907—Land in suburb of Calcutta let out in 1898 for 5 years—Lessee holding on till sued in ejectment in 1910—Status of lessee, non-occupancy raiyat—"Town of Calcutta," extension of, by amending Act—Limitation—Sch. III, Art. 1 (a).] Defendant on 16th December 1898 took a five years' lease from Plaintiff of an agricultural holding situated within the present Municipal limits of Calcutta but beyond the limits of the town of Calcutta as determined by the proclamation of the Governor-General in Council, dated the 10th September 1794, issued under sec. 159 of statute 33, Geo. III, c. 52. Plaintiff on 9th November 1910 having sued to eject the Defendant, Held—That until the Bengal Tenancy Amendment Act of 1907 came into force, the Bengal Tenancy Act applied to the case and Defendant had in consequence acquired the status of a non-occupancy raiyat when the Amendment Act came into force, and this status was not affected by the provisions of sec. 3 of the Amendment Act which gave a new definition of the expression "Town of Calcutta" as used in sec. 1 of the Bengal Tenancy Act, making it co-extensive in area with the present municipal limits of Calcutta. The explanation added to sub-sec. (3) of sec. 1 of the Bengal Tenancy Act by sec. 3 of Act I B. C. of 1907 is an amending statute and not merely one of a declaratory character and cannot therefore be given retrospective operation, Held—That the suit was barred by Art. (1) (a) to Sch. III of the Bengal Tenancy Act. JOTIRAM KHAN v. JONAKI NATH GHOSE 258

———, ss. 6, 7—Rent, enhancement of—Part of tenure created before Permanent Settlement but separated by assignment and held at proportional rent by assignee—Confirmatory sanad if creates new tenure.] When a part of a tenure existing at the date of the Permanent Settlement was assigned subject to confirmation by the landlord, a sanad granted by the landlord in favour of the assignee confirming the transfer and allowing the assignee to hold his purchased share on payment of a proportionate share of the original rent did not create a new tenure, and the rent payable was not liable to enhancement except in the circumstances specified in clauses (a) and (b) to sec. 8 of the Bengal Tenancy Act. Mookerjee, J.—It is well settled

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that the continuity of a transferable tenure is not affected by sub-division or by consolidation. Udoy Chandra Karji v. Nripendra Narayan Bhup, I. L. R. 36 Cal. 287: s c. 13 C. W. N. 410 (1909), commented on. CHANDRA KANTA CHAKRABARTI v. RAM KRISHNA MAHALANABISH 1002

——— s. 12, Amending Act [illegible]—Portion of, by registered instrument—Non-payment of landlord's fee—Effect if passes—Purchaser allowing vendor to represent him to landlord—Effect on rent sale.] The transfer of a portion of a tenure was complete upon registration although the landlord's fee was not paid and no notice of the transfer was given to him. Kristo Bulluv Ghose v. Kristo Lal Singh, I. L. R. 16 Cal. 642 (1889), Chintamoni Dutt v. Rash Behary Mondal, I. L. R. 19 Cal. 17 (1891), Hemendra Nath Mukerjee v. Kumar Nath Roy, 12 C. W. N. 478 (1908) and Giris Chandra Guha v. Khagendra Nath Chatterjee, 16 C. W. N. 64 (1911), relied on. But where the purchaser subsequent to his purchase allowed his vendor to represent him before the landlord, paying rent in the latter's name, the landlord was entitled to frame his suit for rent without impleading the purchaser, and the sale in execution of the decree obtained therein passed the entire tenure. ALI MAHAMUD v. AFTAHUDDIN BHUIYA 355

———, s. 22—Thika taken by a cultivating raiyat—Conversion into tenure-holder—Merger—Liability to eviction after expiry of the period of thika—Construction of lease.] A thikadar is liable to eviction after the expiry of the period of his lease, even though it is found that he was a cultivating raiyat with respect to the lands of which he took the thika prior to it. His interests as a raiyat became merged into the rights he acquired under the lease. MR. MANNERS v. SATROGHAN DAS (Patna) 800

———, s. 38, cl. 1 (a)—Permanent deterioration, what is.] The word "permanent" in sec. 38 of the Bengal Tenancy Act must in every case be construed with reference to existing conditions and when a piece of land gets covered with sand the deterioration is permanent with reference to existing conditions. Gouri Patra v. H. R. Reily, I. L. R. 20 Cal. 579 at p. 586 (1893), followed. BABU KRISHNA SAHAY v. PALAKDHARI ROUT ...1157

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———, ss. 49, 85—Under-raiyati lease for a term under nine years, if heritable on death of tenant within term.] A sub-lease granted by a raiyat for a term not ex-

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ceeding nine years carries with it the ordinary incidents of a lease for a term of years—one of such incidents being that if the lessee dies before the end of the term, his heirs are entitled to succeed him in the tenancy. **Midnapore Zamindary Company** v. **Hrishikesh Ghose**, I. L. R. 41 Cal. 1108: s. c. 18 C. W. N. 828 (1914). **Arip Mondal** v. [illegible] 21 Cal. 757: [illegible] 8 C. W. N. 479 (190[illegible]), **Sundari Dasi** v. **Rajendra Nath Mutty**, 11 C. W. N. 519 (1906), refer[illegible] SRIMATI ABJAN BIBI v. RAHA[illegible] ALI 756

———, s. 85—Under-raiyati lease—Heritability. See s. 49 ... 756

———, s. 85—Under-raiyati lease for 9 years with covenant of renewal if valid—Ejectment, suit for, at termination of term.] Notwithstanding the provisions of sec. 85 of the Bengal Tenancy Act, a stipulation in a lease granted by a raiyat to an under-raiyat that after the expiry of the nine years for which the lease was granted, the raiyat would grant the under-raiyat a fresh lease of the land is valid. **Ali Mahomed** v. **Nayan Rajah**, 15 C. L. J. 122 (1903), followed. **Abdul Karim** v. **Abdul Rahaman**, 15 C. L. J. 672: s. c. 16 C. W. N. 618 (1911), referred to. When there is a covenant for renewal, if the option does not state the terms of the renewal the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself. If it is possible to interpret an agreement between the parties so as to make it operative, effect should be given to it and the contract should not be pronounced unenforceable. Held—That the only reasonable interpretation of the covenant in this case was that the parties agreed that the lease would be renewed on the same terms and for the same period as the original lease. LANI MIA v. MUHAMMAD EASIN MEA 948

———— s. 85, cl. (2)—Under-raiyati lease for a term exceeding 9 years, if void—Objection by trespasser—Oral evidence and admission by the raiyat, if admissible to prove tenancy—Prior possession as tenant—Putra-poutradikramay, meaning of.] Where an under-raiyat by virtue of a registered sub-lease created in his favour by a raiyat for a term described as "putra-poutradikramay" sued the Defendants for ejectment on the ground that they were trespassers and he also sought to prove his tenancy, irrespective of the lease, by an admission of the raiyat that he granted the lease to the Plaintiff and took selami from him and that Plaintiff obtained possession of the remainder of the land covered by the lease, Held—That Plaintiff's lease was for a term exceeding 9 years and as such it was not admissible in evidence and did not create any title in

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the Plaintiff. **Jarip Khan** v. **Dorfa Bewa**, 17 C. W. N. 59 (1912), followed. Held—That the admission of the raiyat, being evidence relating to the transaction of the lease in respect of which there was a document, was not admissible in evidence and possession by Plaintiff of other land covered by the lease, even if proved, was not sufficient to prove Plaintiff's tenancy in the land in suit. Held—Further, that having regard to the expression "putra-poutradikramay" the patta granted to the Plaintiff was perpetual lease. KARTIK MANDAL v. BAMA CHARAN MANDAL 182

———, s. 85 (2)—Lessee inducted on land by a void lease if may plead lease void. See Estoppel 1340

———, s. 93—Receiver if may be appointed in proceedings to appoint common manager. See Civil Procedure Code, Or. 40, r. 1 1009

———, s. 106, before amendment by Act III, B. C. of 1898—Decision of question of rent-free title, by settlement officer under, if operates as decree—Jurisdiction to decide question—Act III, B. C. of 1898, s. 9 (1).] Sub-sec. (1) to sec. 9 of Act III of 1898 B. C. (which came into force on 2nd November 1898) did not give the force and effect of a Civil Court decree to the decision of a dispute by a Settlement Officer passed before the Act came into force, which it was beyond the jurisdiction of the Revenue Officer to decide under sec. 106. Where in the course of a proceeding under Chapter X of the Bengal Tenancy Act, the Settlement Officer decided on 17th April 1897 that the Defendants had failed to establish their alleged rent-free title, and on the basis of this decision rent was subsequently settled and the record finally published on the 1st December 1898: Held, in a subsequent suit by the landlords against the Defendants for assessment of rent of the land, that the Settlement Officer had no jurisdiction under sec. 106 of the Bengal Tenancy Act as it stood before the amendment to decide a question of this character and his decision did not preclude the Court from determining the question of lakhiraj title on the merits. **Donay Das** v. **Keshub Pruthi**, 8 C. W. N. 741 (1904), **Radha Kishore** v. **Durganath**, I. L. R. 32 Cal. 162 (1904), **Secretary of State for India in Council** v. **Nitye Singh**, I. L. R. 21 Cal. 38 (1893), **Dharani Kant Lahiri** v. **Gaber Ali Khan**, I. L. R. 30 Cal. 339: s. c. 7 C. W. N. 33 (1902) and **Karmi Khan** v. **Brojo Nath Das**, I. L. R. 22 Cal. 248 (1894), referred to. **Nobin Chandra** v. **Radha Kishore**, 11 C. W. N. 859 (1907), commented on. MAHARAJA BIRENDRA KISORE MANIKYA BAHADUR v. KALITARA DEBI 275

———. s. 199A—Decision of Special Judge in appeal from order of Settlement Officer in proceeding under sec. 105 allowing enhanced rent on basis of excess area, if open to

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second appeal to High Court—Finding of fact based on erroneous interpretation of contract.] In a proceeding under sec. 105 of the Bengal Tenancy Act the landlords' case was that the area in the occupation of the tenant as found on measurement in the settlement proceedings under Chap. X of the Bengal Tenancy Act by the revenue authorities exceeded the area mentioned in the **kabuliyat** wherein it was stipulated that the landlord could have the land measured within the term and if the area or the classification was found to be wrong the tenant would be bound to pay additional rent or be entitled to a reduction as the case might be. The landlord claimed assessment of rent on the difference between these two areas and prayed for a fair and equitable rent being settled for all the lands in the holding. The tenant denied that he was in possession of excess lands. The Settlement Officer found that the tenant was in occupation of excess area and he assessed fair rent on this basis. In appeal the Special Judge held in substance that the tenant was not in occupation of excess lands because he must be deemed under his contract to be in occupation of the area mentioned therein. Against this decision of the Special Judge the landlord preferred an appeal to the High Court, **Held**—That when in a proceeding under sec. 105 of the Bengal Tenancy Act the Settlement Officer is asked to increase the rent under subsec. (4) in accordance with the rules laid down in sec. 52 and the claim is refused on appeal to the Special Judge on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid a second appeal to the High Court is not barred by sec. 109A of the Bengal Tenancy Act. That in the present case a second appeal lay to the High Court and should also succeed on the merits, inasmuch as the finding of the Special Judge involved an error of law. JNANADA SUNDARI CHOWDHURANI v. ADU SHEIK (F. B.) ... 428

——————, s. 116. See Sch. III, cl. 1 (a) 1097

——————, s. 116. See Sch. III, Art. 1 (a) 14

——————, s. 120 (2) (a) —Zerait **land let out to tenant claimed as—Tenant's admission in** kabuliyat **if admissible.**] The new sub-sec. (2) (a), to sec. 120 which shows that "any other evidence that may be produced" does not include an agreement or a compromise between the landlord and the tenant, confirms the view taken in the case of **Sher Bahadur** v. **Mackenzie**, 7 C. W. N. 400 (1902), that a statement made in a **kabuliyat** executed after the 2nd March 1883 that the land is **zerait** was not admissible, not on the ground that it was not included in the expression "any other evidence that may be produced" but for the reason that when the Legislature expressly made evidence

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of letting before the 2nd March 1883 admissible in proof of the character of the land, they must be intended to exclude evidence of letting after the 2nd March 1883. Where therefore the only evidence to prove that land let out for a term of seven years expiring on 4th June 1909 was zerait was a recital to the effect in the kabuliyat dated the [illegible] that the [illegible]idence of the alleged [illegible] of the land. **Nilmoney Chakraburty** v. **Bykant Nath Bera**, I. L. R. 17 Cal. 466 (1890), **Ajodhya Prosad** v. **Ram Golam**, 13 C. W. N. 661 (1908), **Bhagtu Singh** v. **Raghunath**, 13 C. W. N. 994: s. c. 9 C. L. J. 15 (1908) and **Masudan Singh** v. **Goodar Nath Pandey**, 1 C. L. J. 456 (1905), referred to. GANPAT MAHTON v. RISHAL SINGH ... 14

——————, s. 153—**Rent suit, valued below Rs. 100—Whether second appeal lies—Setting up title by the Defendant in himself whether involves a question of title in land between parties having conflicting claims thereto—Concurrent findings of fact of Courts below, dismissal of appeal for.**] Where the Plaintiff brings a suit for rent the value of which is less than Rs. 100 against the Defendants claiming that she is a raiyat of the land and that the Defendants are her under-raiyats and liable to pay rent to her and the Defendants deny that they are under-raiyats under the Plaintiff but plead that their father had purchased the land from the heir of the admitted previous raiyat of the land and that they had been holding the land as the raiyat of the landlord, and both the Courts below found that the Plaintiff was in possession for a large number of years and that the Defendants failed to prove that they ever held the land as raiyat of the landlord; **Held**, that a second appeal was not barred under sec. 153 of the Bengal Tenancy Act, as the Courts below decided a question of title to land between parties having conflicting claims thereto. The appeal was dismissed, there being concurrent findings of fact of the Courts below. BABUA v. MUSSAMMAT SARLI (Patna) ...1352

——————, s. 153—**Question of title raised but not decided by Munsif exercising final jurisdiction—Appeal to District Judge if lies—District Judge deciding question of title in appeal—Second appeal if lies.**] In a suit to recover arrears of rent (the amount in claim being less than Rs. 50) the Defendant objected that the Plaintiff was his **benamidar**. The Munsif, who had final jurisdiction under sec. 153 of the Bengal Tenancy Act, declined to go into the question of title but dismissed the suit on the ground that the Plaintiff had failed to prove realisation of rent from the Defendant in previous years. The Plaintiff appealed to the District Judge and also preferred an application for revision under the proviso to sec. 153. The District Judge overruled the De-

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fendant's objection in the appeal that no appeal lay under sec. 153, and found for the Plaintiff on the merits, Held —That no appeal lay to the District Judge from the decision of the Munsif as no question of conflicting title was decided by it; and the decision of the District Judge to the contrary was erroneous in law. That a second appeal lay against this decision. Sekhar Basini, 23 C. L. J. overruled, Held, per Sanderson That an appeal lay from the decision the District Judge, which decided a question of conflicting title under sec. 153, Bengal Tenancy Act. Bhagabati Bewa v. Nanda Kumar Chuckerbutty, 12 C. W. N. 835 (1908), explained. Per Mookerjee, J.—Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction. Bhagabati Bewa v. Nanda Kumar Chuckerbutty, 12 C. W. N. 835 (1908), Abdul Hossein v. Kashi Shahu, I. L. R. 27 Cal. 362 (1899), Meenakshi Naidoo v. Subramaniya Sastri, L. R. 14 I. A. 160 (1887) and Ranjit Misser v. Ramudar Singh, 16 C. L. J. 77 (1912), discussed. The Court directed the District Judge to deal with the application for revision under the proviso to sec. 153 of the Bengal Tenancy Act. GANGADHAR KARMAKAR v. SEKHAR BASINI DASYA 96

——————, s 153—Second Appeal, whether lies—Tenant claiming mafi, as jeth raiyat—Meanings of jeth raiyat and mafi.] Where in a rent suit valued at less than Rs. 100, the tenant claimed Rs. 3-5 as. as mafi on the whole rent on the ground that he was a jeth raiyat and the District Judge allowed the mafi and the landlord preferred a second appeal, Held, that no second appeal lies under sec. 153 of the Bengal Tenancy Act, as it does not involve a question of the amount of rent annually payable by the tenant. Jeth raiyats have to perform certain duties under the landlord, as for example, calling tenants for the collection of rent and such similar duties and for that they are allowed by the landlord, by way of wages and instead of payment in cash, a mafi from the total rent instead of payment in cash. Mafi is not rent because it is a sum of money payable by the landlord to the tenant, whereas rent is money payable by the tenant to the landlord and mafi is a set-off against the rent. SHAIKH SAFAIT KOSAIN v. SHAIKH WAIZUDDIN (Patna) ...1207

——————, s. 155—Suit to eject tenant under—Limitation. See Limitation Act, Sch. I, Art. 32 ... 661

——————, ss. 163, 164, 165 —Sale subject to registered and notified incumbrances—Amount bid less than decree with costs—Sale if one under Civil Procedure Code.] Where a tenure is notified for sale subject to registered notified incumbrances, the sale which takes place operates as one under sec. 164, sub-sec. (1) of the Act and not as a sale under the Civil Procedure Code, even though the amount for which it is sold does not reach a sum sufficient to liquidate the amount of the decree and costs. The procedure in sec. 165 is permissive and enacted solely for the benefit of the decree-holder. Banbehari Kapur v. Khetrapal Singh Roy, I. L. R. 38 Cal. 923: s. c. 16 C. W. N. 259 (1911), referred to. NAWAB SIR SALIMULLA BAHADUR v. RAHEMDDI 156

——————, s. 170 (3)—Occupancy-holding, purchaser of, if may deposit, when holding put up to sale in execution of rent-decree against his vendor—"Interest voidable on the sale."] An unregistered purchaser of a non-transferable occupancy-holding is entitled to make a deposit under sec. 170, (3) of the Bengal Tenancy Act when the holding has been advertised for sale in execution of a rent-decree obtained subsequently to his purchase by the landlord against the registered tenant—and this even though he has been in possession of the holding for less than twelve years. Tarak Das Pal v. Harish Chandra Banerjee, 17 C. W. N. 163: s. c. 16 C. L. J. 548 (1912) and Dayamayi v. Ananda Mohan Roy, 18 C. W. N. 971 (1914), referred to. He has an interest in the holding which is viodable on the sale. AHAMADULLA CHOWDRY v. PRAYAG SAHU ... 79

——————, s. 170 (4)—Right of purchaser of occupancy-holding to set aside sale by deposit. See Civil Procedure Code, Or. 21, r. 89 ... 40

——————, s. 182—Homestead land, if means land capable of being used but not actually used as homestead—Homestead land if must be held by raiyat of same village and under same landlord—Agricultural purpose, storage of corn if.] There is nothing in the language of sec. 182 of the Bengal Tenancy Act to justify its restriction to cases where the homestead and the holding are situated in one village and are held under one landlord. The section is not applicable where it is established that the land is not used by the raiyat as his homestead, and it is not sufficient for the raiyat to show that the character of the land is such as would justify its use as a homestead. The provisions of the Bengal Tenancy Act are applicable to all lands used for agricultural purposes and are not restricted to such lands alone as are actually under cultivation. Land taken with a view to gather and store thereon crops raised in adjacent lands actually cultivated by the raiyat is land used for agricultural purposes. DINA NATH NAG v. SASI MOHON DEY TARAFDAR ... 550

——————, s. 184. See Sch. III, Art. 3 872

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——————, Sch. III, cl. 1 (a)—Khas khamar land held by tenant under lease for term—Suit for khas possession brought more than six months after expiration of lease—Limitation—Heading of Chapter if may be looked at for construing sections.] The Plaintiffs sued for khas possession of land held by the Defendants under a lease for five years on the ground that they were entitled to re-entry at the expiration of the agreement. It was found that the Defendants were not in possession of the land before they entered it under their lease and that the land in suit was khas khamar. The suit was brought more than six months after the expiration of the lease: Held—That the Defendants were not included in the term "non-occupancy raiyat" within cl. 1 (a), Sch. 3 of the Bengal Tenancy Act and the suit was not barred. That the Court could look at the heading of Chap. XI of the Bengal Tenancy Act for the purpose of construing the sections. DWARKA NATH CHOWDHURI v. TAFAZAR RAHMAN SARKAR ...1097

——————, Sch. III, Art. (1) (a). See s. 1 258

——————, Sch. III, Art. (4) (a)—Zerait land—Suit for ejectment—Limitation.] A suit to eject a raiyat of zerait land brought more than six months after the expiry of the term of his lease is barred by Art. (1), (a), of Sch. III of the Bengal Tenancy Act, sec. 45 of the Act which was not applicable to zerait lands under sec. 116 having been replaced by the said article which is applicable. GANPAT MAHTON v. RISHAL SINGH ... 14

——————, Sch. III, Art. 2—Limitation—Agricultural purpose if necessary for lease to come under the Tenancy Act—Transfer of Property Act (IV of 1882), sec. 117.] The Plaintiff sued to recover arrears of rent due under two kabuliats given in respect of agricultural lands leased to the Defendant. The leases were mustagiri leases and contained the provision that "the mustagir shall enjoy the parti land which may be converted into culturable land in the jamabandi of the mauza which may be increased till the term of the settlement." Held per Fletcher, J.—That one of the purposes for which the leases were granted was to authorise the Defendant to bring under cultivation the waste land which is obviously an agricultural purpose and the period of limitation applicable to the suit was that provided under Art. 2 of Sch. III, Bengal Tenancy Act. That even if the leases were held not to be for agricultural purposes they were governed by the Bengal Tenancy Act for the purposes of limitation. Burnamoyi Dassi v. Burna Moyi Choudhrani, I. L. R. 23 Cal. 191 (1895). Per Richardson, J.—Whether the leases which were temporary leases relating to agricultural lands granted to a rent farmer, were or were not leases for agricultural purposes, the Bengal Tenancy Act applied and the period of limitation applicable was that provided by that Act. That in view of the cases, Durga Prosad v. Brindaban, I. L. R. 19 Cal. 504 (1892), Peary Mohun v. Sreeram Chandra, 6 C. W. N. 794 (1902) and Burnamoyi Dassi v. Burna Moyi Choudhrani, I. L. R. 23 Cal. 191 (1895), and of the terms of sec. 117 of the Transfer of Property [illegible] follow that because a [illegible] agricultural land) is not a [illegible] agricultural purposes it is [illegible] ject only to the Transfer of Property Act and is not governed in any respect by the Bengal Tenancy Act. Per Fletcher, J.—Although a mustagiri lease is sometimes and perhaps usually a lease to a middleman yet in Bihar the term is applied frequently to temporary leases instead of the word thika. RASH BEHARI LAL MUNDER v. TILUKDHARI LALL 485

——————, Sch. III, Art. 3—Legitimate purpose and scope of—Governs relations of landlord and tenant only—Special limitation—Dispossession sufficient to deprive tenant of right of suit.] In determining what Art. 3 of Sch. III of the Bengal Tenancy Act means the purpose and scope of the Act, which governs the relations of landlord and tenant only, must not be left out of sight. It was not the design of the Act to deprive a tenant of the rights that he otherwise possess against a third person between whom and himself there was no relationship of landlord and tenant. It was only intended to deal with such rights as existed between landlord and tenant. To deprive a tenant of his right of suit there must be a plain dispossession within the meaning of Art. 3 of the Schedule. KRISHNA CHANDRA BAGDI v. SATISH CHANDRA BANERJI ... 872

BROKER liable as undisclosed principal—Custom and usage of Calcutta Gunny Market. See Arbitration 365

BROKERAGE—Where the owner of an oil mill gave the following letter to a broker: "I agree to allow you to sell my mill at Rs. 40,000 only. You will get brokerage 5 per cent. on the same when the mill will be sold through you. This condition is to be in force till a fortnight (15 days) from date." Held—That the broker would be entitled to the commission if he introduced to the seller a purchaser within 15 days who was ready and willing to purchase the mill for Rs. 40,000. Woodroffe and Mookerjee, JJ., held on the evidence that the broker had not introduced a purchaser within the time limit of the agreement and was not entitled to recover brokerage thereunder. LALLJEE MAHOMED v. DADABHAI JIBANJI GUZDAR 335

—————— CONTRACT terminable by parties by three months' notice before the end of the term—Under-broker who had notice of brokerage contract

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if may claim damages for whole term when brokerage contract legally terminated before expiry of term—Under-broker wrongfully dismissed before brokerage contract terminated—Damages, measure of—Brokerage contract, if terminable by fresh agreement —Under-broker, if may insist on termi[illegible] notice—Hindu joint family, carrying on [illegible] business—Contract by family, if [illegible] death of co-parcener—Co[illegible] (IX of 1872), s. 253, cl. [illegible] of Hindu law, if to be considered. By an agreement between A and B, dated 31st May 1911, the former appointed the latter to act as broker for him for 5 years or for such further period as might be mutually agreed upon between the parties. It was provided in the agreement that it might be determined by either party by giving three months' notice to the other party. In pursuance of another term of the said agreement B (the broker) appointed C to act as under-broker for him during the subsistence of the said agreement and C (the under-broker) had notice of the said agreement. On 12th August 1912, the broker B, wrongfully dismissed the under-broker C, and subsequently on 2nd December 1912 in good faith entered into a second agreement with A inconsistent with the first. **Held**, in a suit by C against B for wrongful termination of the under-brokerage contract, that as the under-brokerage contract depended upon the subsistence of the brokerage contract and the latter contract was validly terminated on the 2nd December 1912, the under-brokerage contract also came to an end on the same day, and the Plaintiff was entitled to recover damages as for the period from his dismissal on the 12th August to the termination of the contract on 2nd December 1912. **Per** Mookerjee, J.—That the three months' notice required by the contract between A and B was for the benefit and protection of the contracting parties themselves and C was not entitled to make a grievance that either party has allowed the other to determine that agreement without insisting on the prescribed notice. Where X and Y members of a joint family (of which Y was the karta) carrying on a joint family business entered into a contract of under-brokerage and X subsequently died; but Y and the other party to the contract went on dealing with each other as if the contract subsisted: **Held, per** Curiam, that X's death did not terminate the contract. **Per** Mookerjee, J.—Where there are two joint agents and one of them dies, upon his death the contract of agency terminates only so far he is concerned, but not as regards the surviving agent. The rights and liabilities of coparceners in a joint Hindu family cannot be determined by exclusive reference to the Indian Contract Act, but must be considered also with regard to the general rules of Hindu Law; according to these rules, the death of one of the co-parceners does not dissolve a family partnership. RAGHUMULL v. LUCHMONDAS 708

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CALCUTTA HIGH COURT, decision of, binding upon Patna High Court, until dissented from by Full Bench. See Patna High Court 983

CALCUTTA IMPROVEMENT ACT (V, B. C. of 1911), s. 71—Special Tribunal, if Court, and may call for records of other Courts—Land Acquisition Act (I of 1894), sec. 53.] The Special Tribunal constituted to hear references against orders passed by the Calcutta Improvement Trust has been constituted a Court under the Land Acquisition Act of 1894 and, under sec. 53 of that Act, is governed by the provisions of the Code of Civil Procedure and has the powers of a Judge under that Code. The power to call for the records of other Courts is a power which is inherent in the Judge of a Land Acquisition Court and consequently in the Special Tribunal. NARESH CHANDRA BOSE v. HIRA LAL BOSE 350

CAUSE OF ACTION—Defendant admitting Plaintiff's title in written statement, though claim notified before suit—Suit if may be dismissed for want of cause of action. See Pleadings 636

CHAMBER OF COMMERCE, BENGAL Arbitration and award by—Jurisdiction. See Arbitration 305

CHAUKIDARI ACT (VI, B. C., of 1870), s. 1—Simanadari land, if chaukidari Chakran land—Bengal District Gazetteer for Bankura, referred to, in the absence of findings by Courts.] Where the question was whether certain lands in thana Indas in the District of Bankura and called "simanadari lands" were "chakran lands" within the meaning of sec. 1 of Act VI, B. C. of 1870, the High Court, in second appeal, in the absence of any finding on the point of the lower Appellate Court, held, on reference to the Bengal District Gazetteer of Bankura, that the simanadars performed the duties of chaukidars and so Act VI of 1870 applied to the case. LALU DOME v. BEJOY CHAND MAHATAP 404

——— CHAKRAN—Control of Government over private chakran if exists. See Remand 1245

CHOTA NAGPUR, lex loci custom of. See Grant 876

——— aboriginal tribes in—Inheritance amongst—Law applicable—Indian Succession Act or custom. See Succession Act 1052

——— MAHARAJA OF, grants by—Custom of primogeniture—Resumption. See Grant 876

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——— ss. 81, 83, 87, 256—Dispute under s. 83, juris-

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diction of Settlement Officer, upon such dispute, to record entry that tenure mundari khuntkati—Suit for rent instituted under Act X of 1859—Decree and purchase by landlord in execution after Chota Nagpur Tenancy Act brought into force and land recorded as above at Settlement—Title to tenure.] Under sec. 83 of the Chota Nagpur Tenancy Act, the Settlement Officer has jurisdiction to decide a dispute between landlord and tenant as to whether the latter was a mundari khuntkatidar and to record an entry to the effect in the record-of-rights. Where pending a suit for rent brought under Act X of 1859, the Chota Nagpur Tenancy Act VI of 1908 B. C. came into operation, and the landlord in execution of the decree obtained in the suit put up the holding to sale and purchased it, but meanwhile in the course of settlement proceedings the land was recorded as the mundari khuntkati of the Defendant. Held—That although the new Act did not apply to the suit, it governed proceedings in execution instituted after the suit had terminated in a decree; and the entry that the land was the mundari khuntkati of the tenants being conclusive evidence under sec. 256 of the Act, the landlord acquired no title in the land. JOGENDRA NATH DEY v. GOUR SINGH MURA 582

———————, ss. 184, 191 (2), 208 (2), 210—Rent decree—Execution by arrest of judgment-debtor in the first instance, if legal—Effect.] A landlord who has obtained a decree for rent of a tenure under the Chota Nagpur Tenancy Act may proceed at once to execute it against the person of the tenant and he is not bound to put up the tenure to sale in the first instance. The warrant of arrest so taken out will only stay proceedings for sale of the tenure. Sec. 191 (2) of the Chota Nagpur Tenancy Act which refers to a person arrested in execution of a decree for money has no application to such a case. THAKUR MADAN MOHUN NATH SAHI DEO v. MAHARAJA PRATAP UDAI NATH SAHI DEO 111

———————, s. 231—Mortgage-decree—Execution sale—Purchase by decree-holder—Application by judgment-debtor to set aside sale—Limitation Act (IX of 1908), Sch. I, Art. 166, or s. 231, Chota Nagpur Tenancy Act (VI, B. C., of 1908), applicable.] In execution of a mortgage-decree, the mortgaged property was sold on 21st December 1912 and was purchased by the decree-holder and the sale was confirmed on the 15th February 1913. On 28th August, 1914, the judgment-debtor applied to set aside the sale on the ground that under sec. 47 of Chota Nagpur Tenancy Act, the sale was null and void: Held—That the application was barred by limitation, if not under Art. 166 of the Limitation Act at any rate under sec. 231 of the Chota Nagpur Tenancy Act. NILMONI GOSWAMI v. ROBAN MAJHI. (Patna) ...1243

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CIVIL PROCEDURE CODE (Act XIV of 1882), s. 230—Application for execution—Court to which should be presented. See s. 637 889

———————, s. 232—Assignment in writing—Refusal to take assignment on decree being time-barred—Duty to keep decree alive whether intending assignee's. See Specific Performance 866

———————, s. 248, [illegible] may be issued—Notice [illegible] as 'revivor.' See Limitation Act, Sch. I, Art. 183 889

———————, s. 462—Compromise by guardian ad litem of minor without Court's sanction—Validity. See Trustee 201

———————, s. 539—Court's power under—Question for consideration in such suit—Public interest to be preferred to individual claims to management—Mosque for public worship, established by people of particular locality, and controlled by them—Court's functions in settling a scheme for carrying on the trust—Wide discretion of Kâzi in cases of public trusts—Exclusive control of public trust, if may be claimed by any particular group of worshippers—Founder's wishes and history of trust, and changing conditions, effect to be how far given to each—Control by indeterminate and fluctuating body, if desirable—Court's power to establish a committee of control appointed by itself—Court's power to frame rules for their guidance and for appointment of mutwallis.] The Mussulman law, like the English law, draws a wide distinction between public and private trusts. Generally speaking, in case of a wakf or trust created for specific individuals or a determinate body of individuals, the Kâzi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kâzi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution. In giving effect to the provisions of sec. 539 of the Civil Procedure Code of 1882, and in appointing new trustees and settling a scheme, the Court is en-

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titled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down [illegible] to facilitate the work of management, and the appointment of trustees in future: Held (on the evidence)—that the mosque in Rangoon, commonly known as the Sunni Juma Musjid, was a public mosque, dedicated at its original foundation to the performance of worship by all Sunni Mahomedans. That a trust deed of 1872 which provided *inter alia* that its management should remain exclusively in the hands of people who came from Randher (Randherias) did not create a new dedication, but the mosque remained as before a public mosque. That in a suit under sec. 539 of the Civil Procedure Code, for settling a scheme of worship in respect of the mosque, the matter for the Court's consideration was not the determination of conflicting rights of management of Randherias and other sections of Mahommedans, but what would be the best method for fully and effectively carrying out the purpose for which the trust was created. That having regard to the fact that the mosque was originally founded by a Randhera, that the bulk of the money for the purchase of land had come from Randherias, that the management of the mosque had been throughout in the hands of Randherias and it was not shown that the latter had mismanaged the trust or committed any dereliction of duty or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers, the Randheria section of the worshippers—all other conditions being equal—were, in the discretion of the Kâzi, preferably entitled to the mutwalleeship of the mosque. In view of the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, such as a Punchayet or Jamaet, the Judicial Committee directed that the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which should be in the discretion of the Judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances did not vary, a majority of such committee should be Randherias; and that in settling the scheme, the Judge should lay down rules for their guidance in the discharge of any supervisitorial functions that it might appear necessary to confide to them and for filling up vacancies on their body subject to his control. MAHOMED ISMAIL ARIF v. HAJEE AHMED MOOLLA (P. C.) ...1118

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CIVIL PROCEDURE CODE (1882)—contd.
——————, s. 544. See Contract 1054

——————, s. 583—Restitution—Decree for redemption against mortgagee with possession in first Court reversed on appeal—Mortgagee's application to first Court for recovery of mesne profits for period of dispossession in execution of first Court's decree—Jurisdiction—Remedy when jurisdiction wrongly exercised, by appeal or revision.] Where the Plaintiffs in a suit for redemption of a mortgage with possession having obtained a decree in the Court of a Subordinate Judge recovered possession in July 1878, but the High Court on appeal varied that decree by directing the Plaintiffs to pay a further sum of Rs. 9,000 but on their failure to do so, the mortgagee recovered possession in April 1880 and then applied to the Subordinate Judge for an order for mesne profits for the period he was out of possession, and obtained a decree for a sum of over Rs. 5,000, and in execution of that decree, the Plaintiffs' equity of redemption was sold and purchased by the decree-holder, and an application under sec. 311 of the Civil Procedure Code of 1882 to set aside the sale failed: Held, in a second suit for redemption brought by an assignee of the mortgagors, that the Subordinate Judge had jurisdiction to make the decree for mesne profits by way of restitution, and if he exercised that jurisdiction wrongly the persons aggrieved had their remedy, under the Code of Civil Procedure, either by appeal to the High Court or by an application for revision, and the present action was wholly misconceived. PANDIT PARBHU DYAL v. KALYAN DAS (P. C.) 425

——————, s. 584—Second appeal—High Court if may remit case for re-hearing on a new case not raised in the pleadings. See Remand ...1245

——————, s. 637—Question whether decree capable of execution if may be determined on application for transmission—Order, if quasi judicial and may be delegated to Registrar.] That to determine whether the decree was or was not capable of execution was a judicial act which could not be delegated to the Registrar under sec. 637 of the Civil Procedure Code of 1882. Per Mookerjee, J.—Sec. 230 of the Code makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution. CHUTTERPUT SINGH v. RAI BAHADUR SAITA SOOMARIMULL 889

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——————, s. 11. See Res judicata.

——————, s. 47—Suit for money—Death of Defendant during suit leaving Will—Heirs substituted in ignorance of Will and decree against heirs—Execution against estate—Objection by executor upheld—Executor, if bound—Appeal—Remedy of decree-holder—Suit upon judgment, if lies—Limitation Act (IX of 1908), Sch. I, Art. 122.] M, the Defendant in a suit for recovery of money having died during its pendency leaving a Will whereby he had appointed the wives of his sons executrices to his estate, the Plaintiff who was unaware of the existence of the Will substituted his sons in his place on the records without objection, and got a decree. Execution of the decree against the estate of M was opposed by the executrices: Held—That the executrices were not bound by the decree and the decree could not be executed against the estate in their hands. Quære.—Whether the order of the executing Court dismissing the application on the objection of the executrices was not an order under sec. 47, merely because the executrices could not in popular language be called representatives of the sons of the deceased debtor. Held—That the executrices were not representatives of the judgment-debtors inasmuch as they were not bound by the decree. That the remedy of the decree-holder was either (i) to have the decree vacated, the suit restored, the executrices brought on the record and a new decree made against them; or (ii) to institute a suit on the judgment and obtain a decree thereon against the executrices. Ashibhusan v. Pelaram, 18 C. L. J. 362: s. c. 18 C. W. N. 173 (1913) and Prosunno Chander v. Kristo Chaitanya, I. L. R. 4 Cal. 342 (1872). Quære.—Under what circumstances a suit lies upon a judgment passed by a Court in British India. Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action to enforce the judgment may be maintained provided the judgment cannot be enforced in some other way. The Limitation Act cannot give rise to a cause of action where none exists independently of the provisions thereof. KALI CHARAN NATH v. SUKHODA SUNDARI DEBI ... 58

——————, s. 47, applicability of. See Or. 21, r. 95 ... 829

——————, s. 47, sub-s. (3), Or. 21, r. 16—Assignee's application for execution opposed by attaching creditor of decree—Matter if appealable.] S, a purchaser of a decree, having applied for execution after substitution of his name as a decree-holder, M a creditor of the judgment-debtor who had attached the decree opposed the application alleging that S's purchase was fraudulent and benami. The first Court upheld the objection, but the Appellate Court found S's purchase to be good and valid, Held—That the order came within the purview of sub-sec. (3) to sec. 47 of the Civil Procedure Code even though (M's objection apart) the matter came under Or. 21, r. 16 of the Code. Provision of sec. 47, sub-sec. (3) distinguished from the corresponding provision of sec. 244 of the old Code. Ram Chunder v. Mussammat Ham[illegible], 11 C[illegible] ... 67

——————, s. 48—Limitation—Sec. 48 if would govern applications for execution of mortgage-decrees passed when the previous Code (Act XIV of 1882) was in force—Sec. 6, General Clauses Act (X of 1897)—Rights and remedies under a repealed Act—Acknowledgment—Sec. 19 of the Limitation Act (IX of 1908).] In support of an application for execution made in 1913 for realisation of the balance of the decretal amount due on a mortgage-decree made absolute in 1898, sec 6 of the General Clauses Act, 1897, which provides that the repeal of an enactment shall not affect any right acquired under the enactment repealed or affect any legal proceeding or remedy in respect of any such right was relied on and it was contended that sec. 48 of the Code of Civil Procedure (Act V of 1908) did not apply as the decree was passed when the previous Code (Act XIV of 1882) was in force, and inasmuch as sec. 230 thereof did not apply to mortgage decrees, the application was not time-barred. Held—That the application was governed by sec. 48 of the present Code (Act V of 1908) and was time-barred as it could not be said that the decree-holder acquired any right under the Code of Civil Procedure of 1882 within the meaning of sec. 6 of the General Clauses Act, 1897. Bisseswar Sonamut v. Jasoda Lal, I. L. R. 40 Cal. 704: s. c. 17 C. W. N. 622 (1913) and Manjhoori Bibi v. Akhel Mahmud, 17 C. W. N. 889 (1913), followed. Kaunsilla v. Ishri Singh, I. L. R. 32 All. 499 (1910), dissented from. Held further, that assuming that there was an acknowledgment of liability within the meaning of sec. 19 of the Limitation Act by the judgment-debtor in March 1902, it would give the decree-holder only three years from the time of such acknowledgment within which the decree-holder would be entitled to apply for further execution of the decree. That the passing of the Code of 1908 could not be held to give retrospective operation to the acknowledgment of 1902 in such a way as to give the decree-holder a fresh period of 12 years within which to apply for further execution. The words "a fresh period of limitation" in sec. 19 of the Limitation Act do not refer to the term of 12 years prescribed by sec. 48 of the Code of Civil Procedure. MAHANTH KRISHNA

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DAYAL GIR v. MUSST. SAKINA BIBI (Patna) 952

——————, s. 60 (c)—Exemption from attachment of agriculturist's house—Agriculturist, who is—Plea claiming exemption must be set up and proved by judgment-debtor.] The agriculturist whose house is protected from attachment by sec. 60 (c) of the Code of Civil Procedure is a person of common agriculturist class known in Bengal, whose main livelihood is by cultivation, i.e., a raiyat who tills the field. The plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment-debtor. ASHMATULLA SARKAR v. RAN MAHMUD CHOWDHURY ... 874

——————, s. 66—Suit to recover property from certified purchaser, alleged to be benamdar, if lies where real purchaser was put in possession and was later on dispossessed.] Sec. 66 of the Civil Procedure Code aims at discouraging benami purchases at execution sales by rendering the real purchaser helpless if he is cheated by his benamdars. To allow the real purchaser to sue his benamdar on the fact of possession would be to defeat the object of the section. Sasti Charan Nandi v. Annapurna, I. L. R. 23 Cal. 699 (1895), doubted. Bishan Dial v. Ghaziuddin, I. L. R. 23 All. 175 (1901), approved. HANUMAN PERSAD THAKUR v. JADUNANDAN THAKUR .. 117

——————, s. 92—Public trust, cause of action as to—Practice of District Courts to enquire first whether subject-matter of trust is public—Public trust, if may be declared, when suit dismissed for want of cause of action—Costs if payable out of trust estate when no cause of action—Findings in the judgment, immaterial to the decision, if appealable—Sec. 115, C. P. C., revision under, of decree for costs.] Where the Plaintiffs' suit is dismissed for want of cause of action, the Defendant has no right of appeal against some findings of fact which are not in his favour. Thakur Magundeo v. Thakur Mahadeo Singh, I. L. R. 18 Cal. 647 (1891) and Jamaitunnissa v. Lutfunnissa, I. L. R. 7 All. 606 (F. B.) (1885), followed. It has generally been the practice of the District Courts to enquire first into the question whether the trust is a public trust or not and this is probably a convenient course. Under sec. 92, C. P. C., no cause of action arises save in a case of alleged breach of a trust for a public purpose or where the directions of the Court are deemed necessary for the administration of such trust. Where the Plaintiffs after obtaining sanction from the Advocate-General instituted a suit against the Defendant for his removal from the management of a trust which was alleged by the Plaintiffs to be a public trust and the defence was that

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the trust was not a public trust and that there was no misfeasance and the District Judge found that the trust was indeed a public trust but that the Defendant had not been guilty of misfeasance and so dismissed the suit for want of cause of action with costs to be paid out of the trust estate to the Plaintiffs because the defence was that the trust was not a public trust: Held—That when the Judge had come to the decision that there was no cause of action for the suit he could not record a decision binding on the parties that the trust was a public trust and he could not make an order for the payment of costs from the estate as a public trust, Held further, that the order for costs out of the estate was without jurisdiction within the meaning of sec. 115, C. P. C. BRIJ BEHARI LAL v. SHIVANATH PRASAD (Patna) ...1354

——————, s. 104, scope and effect of. See Letters Patent, s 15 594

——————, s. 107, Or. 41, rr. 23 and 25—Appeal Court if may remand cases otherwise than under—Addition of parties on appeal and amendment of plaint, if justify remand.] The Appellate Court has power to amend a plaint by adding new parties, and when this has been done, the added as well as the original Defendants have a right to file fresh written statements and to have the whole case re-opened. In such circumstances the Appellate Court has power to remand the case for trial independently of rr. 23 and 25 of Or. 41 of the Civil Procedure Code. The general power, given by sec. 107 of the Code to the Appellate Court, of remanding cases for trial by the original Court, is not governed or limited by Or. 41 alone, but it is subject to such conditions and limitations as may be prescribed in the Rules and Orders, and the amendment of a plaint and addition of parties in a Court of Appeal is one of the conditions prescribed in the Rules and Orders. Nabin Chandra Tripati v. Pran Krishna De, I. L. R. 41 Cal. 108 (1913), referred to. MIAH UZIR ALI SARDAR v. SAVAI BEHARA ... 547

——————, s. 107. See Remand.

——————, s. 110—Appeal to Privy Council—Appealable value—Subject-matter of appeal if mortgage-debt or property claimed.] Where in a mortgage suit a person who claimed a certain share in the mortgaged property as against the mortgagor under a title adverse to his, was made a party Defendant, and her claim was allowed in part by the trial Court, but wholly disallowed by the High Court, and she sought to appeal from that decree to His Majesty in Council: Held—That the subject-matter of the appeal was the property which she was claiming and its value was the value of that property and not the value of the mortgage debt. MUSST. RADHA KUNWAR v. THAKUR REOTI SINGH (P. C.) ...1279

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——————, ss. 114, 115—Revision—Review. See Arbitration 137

——————, s. 115, revision under, of decree for costs. See s. 92 1354

——————, s. 115, jurisdiction under. See Pre-emption ... 860

——————, s. 115—Return of plaint by Small Cause Court—High Court's power to interfere. See Provincial Small Cause Courts Act, s. 23 (1) 1086

——————, s. 115—Revision by High Court under—Finding of fact. See Or. 46, r. 7 1110

——————, s. 115—Alternative remedy by way of revision under, if lies—Erroneous application of section of law, if open to revision under sec. 115. See Or. 1, r. 10 752

——————, s. 117—Jurisdiction of Appellate Court to entertain application for security for costs in appeal from order in insolvency. See Costs 140

——————, ss. 133, 169—Order competent only under latter section, drawn up erroneously, if may enable Defendant to escape liability. See Limitation Ordinance 833

——————, s. 141. See Or. 40, r. 1 1009

——————, s. 148. See Pre-emption 860

——————, s. 151—Jurisdiction of Appellate Court to make order for security for costs in appeal from an order in insolvency. See Costs ... 140

——————, s. 153—Partition suit—Omission by Plaintiff to put in some properties in the list of joint properties in the plaint—Dismissal of suit—Power of amendment of plaint by the first Court as also by the Appellate Court.] Per Jwala Prasad, J.—In a suit for partition of joint family property by a Hindu all the properties must be included in the action, and the reason for this proposition is to save the parties from multiplicity of proceedings. If by inadvertence, mistake or fraud of any of the parties, some of the joint properties are not partitioned in the original suit, there will be no bar after the partition to have the properties, excluded at the first partition, divided when the mistake or fraud is discovered. **Jogendra Nath Mukherji v. Jugobundhu Mukherji**, I. L. R. 14 Cal. 122 (1886) and **Jogendra Nath v. Baladeo Das**, I. L. R. 35 Cal. 961: s. c. 12 C. W. N. 127 (1907), referred to. Or. VI, r. 17, enables the Court to allow either party to alter or amend his pleadings at any stage on such terms as may be just. Sec. 153, C. P. C., empowers the Court to make itself all necessary amendments for the purpose of determining the real questions or issues raised in the action. This power is vested both in the original as well as in the appellate Court. **Srimohan Thakur v. MacGregor**, I. L. R. 28 Cal. 769 (1901), approved. Per Atkinson, J.—To avoid multiplicity of suit the law has endowed all Courts in all countries with just and most ample powers of amendment. The widest power of amendment is given not only to the primary Court but to the High Court, which enables the Court to tr[illegible] MUKUND[illegible] ARTI v. JOGESH CH[illegible] CHAKRAVARTI (Patna) ...1276

——————, s. 169. See s. 133 833

——————, Or. 1, r. 10—Suit instituted by administratrix after power as such had terminated—Bona fide mistake—Due care and attention if must be established.] For a bona fide mistake as contemplated by Or. 1, r. 10 of the Civil Procedure Code, it is not necessary that the party who committed it should have exercised due care and attention. Where it is not deliberately but honestly made, the mistake is bona fide. NISTARINI DASYA v. SARAT CHANDRA MAZUMDAR 49

——————, Or. I, r. 10, cl. (2)—Scope and effect of, as to powers of Courts in striking off and adding parties—Dismissing suit for non-prosecution, when Plaintiffs compromise with only some of the Defendants—Court if bound to pass a decree embodying the terms of the compromise under Or. XXIII, r. 3—Appeal if lies, when no decree passed—Alternative remedy by way of revision under s. 115, C. P. C., if lies—Erroneous application of section of law, if open to revision under sec. 115, C. P. C.] In a suit for dissolution of partnership and for accounts, the Plaintiffs having received a large sum of money from some of the Defendants, filed a compromise petition and asked for dismissal of the suit. The other Defendants objected to the dismissal of the suit, praying that they might be made Plaintiffs and allowed to continue the suit, and the Plaintiffs, if necessary, might be made Defendants. The Court held that it had no power under the new Civil Procedure Code to make the transposition of parties asked for, and hence dismissed the suit for non-prosecution. The objecting Defendants then asked the Court to draw up a decree, so that they might appeal, but the Court did not draw up any decree. Held—That the Court had ample powers under the new Civil Procedure Code to make transposition of parties and it ought to have done that. That it was not bound to pass a decree under Or. XXIII, r. 3, and no appeal lies against the order of dismissal. That the lower Court, having failed to exercise the discretion vested in it under Or. I, r. 10, failed to exercise a jurisdiction vested in it in refusing to make the transposition prayed for, and hence that order is liable to be set aside on revision by the High Court. Krishnabai v. Sonubai,

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2 Bom. H. C. R. 310 (1865), Eduljee v. Vulleebhoy, I. L. R. 7 Bom. 167 (1883) and Saiyad Abdul Hak v. Gulam Jilani, I. L. R. 20 Bom. 677 (1895), followed. BROJENDA KUMAR DAS v. GOBINDA MOHAN DAS 752

——————, Or. 2, r. 2—Omission to sue for a portion of claim [illegible] suit for [illegible] tion if [illegible] Plaintiff [illegible] of a holding consisting [illegible] stead and arable lands attached [illegible] He had previously sued for khas possession of that portion of the holding only which included the homestead on the allegation that the Defendant had dispossessed him of the homestead. This suit was dismissed. Held—That as it appeared from the evidence in this case that Plaintiff had been dispossessed of the arable land at the same time as the homestead, the whole suit was barred. The Plaintiff having in the previous suit omitted to sue for a portion of his claim, namely, for the arable lands could not under Or. 2, r. 2 of the Code of Civil Procedure be permitted to sue for them subsequently. Jibunti Nath Khan v. Shib Nath Chakraburty, I. L. R. 8 Cal. 819 (1882) and Pitapur Raja v. Suriya Roy, I. R. 12 I. A 116: s. c. I. L. R. 8 Mad. 520 (1885), distinguished. KALI KUMAR CHUCKERBUTTY v. ASLAM ... 163

——————, Or. 2, r. 2, sub-r. (3)—Suit for royalty—Accidental omission of portion of claim already due—Court's power to reserve portion of cause of action—Amendment of plaint which would deprive Defendant of plea of limitation if should be allowed—Consolidation of suits pending appeal.] Where it appeared from certain leases that the causes of action as regards minimum royalty and excess royalty were the same, but the lessor sued only for the minimum royalty which had fallen due at the date of the suit: Held—That he was precluded by Or. II, r. 2, of the Civil Procedure Code from suing again for the excess royalty, even though in decreeing the previous suit, the Court expressly reserved the Plaintiff's cause of action in respect of excess royalty. Or. II, r. 2, sub-sec. (3) of the Civil Procedure Code does not authorise the Court to split up the Plaintiff's cause of action but only to allow the Plaintiff to pursue the reliefs in respect of the same cause of action at different times. Where the Plaintiff sued for royalties due on a mining lease during a specified period, exoluding from his claim certain previous arrears which were also due, on the ground that certain amounts paid by the Defendants during the period in suit had been appropriated in discharge of these previous arrears, but the Court held that the payments should have been appropriated in discharge of a portion of the arrears sued for, Held—that a subsequent suit for the recovery of the arrears excluded from the claim in the previous suit was barred by Or. II, r. 2, of the Civil Procedure Code. Even an accidental or involuntary omission by a Plaintiff of a portion of his claim is covered by the rule. Buzloor Ruheem v. Shamsoonnissa Begum, 11 Moo. I. A. at p. 551 (1867), followed. Radhakishoree Bevia v. Ram Coomar Choudhury, 12 W. R. 79 (1869), referred to. The Court would proceed to consolidate suits, if at all, only where the consolidation is asked for before the trial of the suits begins, and the evidence to be given is common to both. The High Court declined to consolidate two suits already decided in the first instance by the lower Courts, in which appeals were pending before it, the suits having been tried in the lower Courts by different Judges and no evidence recorded separately in each suit. The High Court also refused leave to amend a plaint when the amendment, if permitted, would deprive the Defendants of the right that the law had given them, viz., to state or allege that the claim was legally barred. JANARDAN KISHORE LAL SINGH DAO v. SIB PROSAD RAM ... 475

——————, Or. 2, r. 3—Consolidation of suits pending appeal. See Or 2, r. 2, sub-r. (3) 475

——————, Or. 3, r. 4—Vakalatnama, acceptance of, by pleader—Endorsement of acceptance in writing if necessary. See Vakalatnama ... 287

——————, Or. 5, rr. 12, 17 and Or. 9, r. 13, Or. 43, r. 1 (d) Appeal against order refusing to set aside ex parte decree—Service of summons, substituted service, sufficiency as to.] Where it is a question of substituted service, the requirements of the Code should be strictly observed in every respect even though the Defendant knew of the issue of the writ. Where the serving officer went to a Defendant's place of business and made enquiries about him, and, not finding him on any one of the three separate occasions when he went there, posted a copy of the writ on the outer door of the said house which he erroneously believed to be the Defendant's ordinary place of residence, Held—This was not sufficient service of the summons. Proper enquiries and real and substantial effort should be made to find out when and where the Defendant is likely to be found and proper effort made to find the Defendant in the place where he ordinarily resides or carries on business. Cohen v. Nursing Dass Auddy, I. L. R. 19 Cal. 201 (1892), followed. The mere fact that the Defendant or his solicitor knew that a suit has been instituted would not dispense with the necessity of proper service of summons. KASSIM EBRAHIM SALEJI v. JOHORMULL KHEMKA 173

——————, Or. 6, r. 17—Dismissal of suit for omission in plaint to put necessary particulars—Power of amendment of plaint by the first Court as also by the Appellate Court. See s. 153 1876

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——————, Or. 7, r. 7—Prayer for general relief—Special relief other than that prayed for when may be given. See Digwar 446

——————, Or. 8, r. 5. See Or. 9, r. 6 1192

——————, Or. IX, r. 6—Undefended cases, Plaintiff to prove his case in—Indian Penal Code (Act XLV of 1860), secs. 191 and 193—Plaint verified, if evidence—Verification, object of—Damages unliquidated, pleadings and proof as to—Remand, power of High Court as to—Pleadings—Practice.] Sanderson, C. J.—The fundamental principle of law is that the Plaintiff, when he comes to Court, must prove his case, and he must prove it to the satisfaction of the Court. Under the Civil Procedure Code (Act V of 1908) such proof can be dispensed with and the allegations in the plaint considered as admitted, only in undefended cases of bills of exchange, promissory notes and hundis as contemplated in Or. XXXVII, r. 2 of the Code. Or. VIII, r. 5 of the Code does not apply to undefended cases. It is clear from the wording of that rule that it is not intended to apply to a case where a pleading has been put in by the Defendant. Per Curiam.—Or. VIII, r. 5, does not apply where there is no written statement and it does not justify a decree without any evidence where no written statement has been filed. Woodroffe and Mookerjee, JJ.—Or. VIII, r. 5 is really a rule of construction of the Defendant's pleading. The provision in Or. IX, r. 6 for the Court to "proceed ex parte" in undefended cases means "proceed to take and determine on evidence." Sanderson, C. J.—It would be unreasonable to conclude from sec. 191 of the Indian Penal Code that it was ever intended that a plaint which has got the usual verification by the Plaintiff, could be adopted by a Court of Justice as sufficient proof of the facts which are contained in the plaint. Woodroffe and Mookerjee, JJ.—Because a false verification may be the basis of a prosecution under sec. 191 of the Indian Penal Code, that is, it may come within the definition of "False Evidence" for the purposes of the Indian Penal Code, that does not make a verification evidence on which a decree can be founded in a civil suit whether the Defendant appears or not. Woodroffe, J.—Verification does not dispense with evidence. The object of verification of the plaint is to fix on the Plaintiff the responsibility for the statements which it contains and to afford a guarantee of his good faith. Verification of pleadings may be by persons other than those who have personal knowledge of fact and who may verify same, as in the present case, on information and belief of the facts being true. Sanderson, C. J.—A Court would not be justified in allowing the plaint to be put in as evidence of the facts on which the Plaintiff wished to rely. In

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the present case, which was one for breach of contract and unliquidated damages, the Defendants had taken no steps to defend and the trial Judge gave a decree for full amount claimed by the Plaintiffs without taking any evidence; Held on Appeal—That the Plaintiffs should be called upon to prove all the material fac[redacted] tha[redacted] ion upon which they [redacted] the actual amount of damages have in fact sustained. Held also—That in this case where the claim is for unliquidated damages, it was not incumbent on the Defendant under Or. VIII, r. 3, to deny specifically the allegations of fact regarding damages and the Court should even then make some enquiry to ascertain the damages to which the Plaintiff would be entitled. Mookerjee, J.—The Defendant, merely because he did not appear, cannot, in the present case, be in a worse position in this respect, than what he would have been in if he had appeared and filed a written statement. Woodroffe and Mookerjee, JJ.—Where a Plaintiff did not offer any evidence, strictly speaking, the suit should be dismissed. Per Curiam.—Having regard to the fact that a written statement was not filed under a bona fide mistake and to the circumstances of the case, it was remanded for rehearing with liberty to Defendant to put in a written statement and adduce evidence. Mookerjee, J.—Although there is a provision in the Code for remand in certain specified circumstances, it cannot legitimately be contended that our powers are restricted thereby and that we cannot make an order of remand if exigencies of the case demand that such an order should be made. J. B. ROSS v. C. R. SCRIVEN 1192

——————, Or. 9, r. 9, Or. 43, r. 1, cl. (c)—Application by judgment-debtor under Or. 21, r. 90 to set aside sale—Dismissal for default—Application for restoration, rejection of—Order if appealable—Application to set aside sale if "suit."] Or. IX, r. 9 of the Civil Procedure Code is applicable to applications for setting aside sales which have been dismissed for default. Deljan Nichha Bibee v. Hemanta Kumar Ray, 19 C. W. N. 758 (1915) and Safdar Ali v. Kishun Lal, 12 C. L. J. 6 (1910), relied on. An application to set aside a sale is a proceeding which may terminate in an adjudication such as is referred to in sec. 2 of the Civil Procedure Code, and if the question had been *res integra*, the Court would have held that it was a suit within the meaning of Or. XLIII, r. 1, cl. (c). Charu Chandra Ghose v. Chandi Charan Ray Chowdhury, 19 C. W. N. 25 (1914), referred to. BHUBAN BEHARY NAG MAZUMDAR v. DHIRENDRA NATH BANERJI 1203

——————, Or. 9, r. 13—Appeal against order refusing to set aside ex parte decree. See Or. 5, rr. 12, 17 173

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——————, Or. 9, r. 13—Ex parte decree and sale thereunder—Suit to set aside decree and sale on ground of fraud, when no application made under Or. 9, r. 13—Suit if maintainable. See Fraud 819

——————, Or. 16, rr. 10, 12—Fine for non-production of documents, conditions to be fulfilled before [illegible] Courts and Settlement Officers [illegible]ow the law relating to issue of summons.] Or. XVI, r. 10, Civil Procedure Code does not apply where there has been no summons upon any body to produce the documents, and no order under r. 12 can be made until the procedure laid down in r. 10 has been followed where that Rule applies. The Civil Courts, and particularly the peripatetic Settlement Courts which cause a large amount of disturbance to local interests, cannot be too careful to follow the provisions of law strictly as regards summoning persons and documents before them. NABADIP CHANDRA NANDI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL ... 511

——————, Or. 20, r. 14. See Pre-emption 860

——————, Or. 21, r. 2—Indian Limitation Act (IX of 1908), secs. 19, 20—Payment extending limitation—Certification of payment by decree-holders—Statement of payment in application for execution of decree if sufficient.] A decree-holder in his application for execution of his decree notified to the Court that he had received a certain sum from the judgment-debtor and relied on this payment as saving limitation. It was found that the payment had in fact been made by the judgment-debtor himself by way of interest, Held—That the decree-holder may either apply to certify payment before execution or may do so in his application for execution of the decree. That there was sufficient certification by the decree-holder and under the circumstances it was not necessary for the Court to record the certification and Or. XXI, r. 2 did not stand in the way of the decree-holder. That in the face of the finding, the fact of the endorsement and the question as to who made it and the authority by which it was made were immaterial. KHATIBANNESSA BIBI v. SANCHIA LAL NAHATA ... 272

——————, Or. 21, r. 16. See s. 47, sub-sec. (3) 679

——————, Or. 21, r. 46 (3)—Money paid under compulsion of legal process, suit to recover, if lies—Bonâ fides of party receiving payment—Attachment of debt ostensibly payable to other than judgment-debtor—Necessity of enquiry as to who is real creditor—Duty of Court to guard against its order prejudicing party not before the Court.] A sued B for recovery of money and obtained an order for attachment before judgment. The property attached was a debt due ostensibly from C to D but the debt was attached on the allegation that B and not D was the real creditor and the Court issued a prohibitory order on C. A obtained an ex parte decree in his suit against B and C was then called upon to pay into Court the money due from him ostensibly to D. C deposited the money in Court on an order being made that the money would be retained in Court till the adjudication of the question whether B or D was beneficially interested therein. No enquiry was made into this question and without notice to C or D the Court on the application of A paid out the money to him. D subsequently sued C and recovered judgment against him on the debt. C now sued A to recover the money which he had deposited in Court and which without notice to him or his creditor D had been withdrawn by A. Both the Courts below concurrently found that not B but D was the real creditor of C. Held—That though the principle is that where money has been paid by the Plaintiff to the Defendant under compulsion of legal process, which is afterwards discovered not to have been due, the Plaintiff cannot recover it back in an action for money had and received, there must be bonâ fides on the part of the party who has got the benefit of his opponent's payments in order to bring this principle in force. If the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down above may not prevent the Defendant from recovering the money back. Marriot v. Hampton, 7 T. R. 269; 2 Smith's leading Cases 420 (1797), and Ward v. Wallis, [1900] 1 Q. B. 675. That in the present case the Defendant was able to appropriate the money by what constituted a grave abuse of the process of the Court and the principle laid down above had no application. That the money deposited in this case did not cease to be the money of the Plaintiff merely because he had brought it into Court on the faith of a conditional order which directed its retention in Court pending enquiry into the question raised as to who was the real creditor and the Court had full authority to compel the Defendant to bring back the money into Court to be repaid to the Plaintiff. Or. 21, r. 46, cl. (3), contemplates a case where there is no dispute that if the suit results in a decree against the Defendant or there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor. There being such a dispute in this case, it was incumbent on the Court to make an enquiry, and the conditional order was the proper order to make in this case. The Court has inherent power to guard against an abuse of its process and to ensure that

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its orders do not operate to the prejudice of persons who have no notice of the proceedings. HARINATH CHAUDHURI v. HARADAS ACHARYYA CHOUDHURI 185

——————, Or. 21, r. 52—Scope of—Attachment of money in the custody of Court.] One S mortgaged to the Respondents his beneficial interest in his trade or business of a contractor. Subsequently he executed a similar mortgage in favour of the Appellant. The Respondents recovered judgment on their mortgage against the representatives of the estate of S and an order was made by the Court directing the registration and attachment of the money due to the estate of S from the Executive Engineer, Lower Ganges Bridge, and a letter was written by the Court to the Examiner of Accounts, Lower Ganges Bridge, stating that the moneys due to the heirs of S were attached by the Court at the instance of the Respondents and requesting the Examiner to hold the moneys under attachment until further order of the Court. Thereafter the Appellant obtained a decree against the heirs of S on his mortgage and an order was made by the Court for the registration and attachment of the bills payable to S in the office of the said Executive Engineer and the Court requested this officer to send two specified sums to the Court for payment to the Appellant. After the money was sent to the Court the Respondents filed a petition to the effect that the Appellant was trying to take out the money but that it might be kept under attachment by an order of the Court. On this petition the Court ordered that the Appellant was not to receive payment of the money unless and until the Respondent's application was disposed of. At the hearing of the execution cases the Respondents contended that the question of title and priority in respect of the money in Court should be decided under Or. 21, r. 52. Held—That the order of the Court withholding payment of the money to the Appellant virtually amounted to an attachment of the money after it came into the custody of the Court. That Or. 21, r. 52, was clearly applicable to a case like the present and there was no reason to narrow the words of the rule so as to make it applicable only to a case in which the property sought to be attached was in the custody of a Court other than the Court executing the decree. That as regards the question of priorities neither party perfected their charge by giving notice to the persons who were to make the payments to their mortgagor and accordingly apart from any question of notice the Respondents' charge which was prior in date must prevail. SURAJMALL AGARWALLAH v. RAM CHANDRA MAINTRI 412

——————, Or. 21, r. 89—Non-transferable occupancy-holding—Purchase at mortgage sale—Subsequent rent sale and purchase by landlord—Right of first purchaser to set aside sale by deposit—Bengal Tenancy Act (VIII of 1885 as amended by E. B. and A. C. Act I of 1907), s. 170 (3).] Where (in a case governed by Act I of 1907 E. B. and A. C.) the landlord himself purchases a non-transferable occupancy-holding at a sale held in execution of a decree for rent obtained against [redacted] who had within 12 [redacted] the whole holding at a [redacted] execution of a mortgage-decree is not entitled to set aside the sale by making a deposit under Or. 21, r. 89 of the Civil Procedure Code. Tarak Das Pal v. Harish Chandra Banerjee, 17 C. W. N. 163: s. c. 16 C. L. J. 548 (1912), Dayamayi Dasi v. Ananda Mohan Roy, 18 C. W. N. 971 (1914) and Ahamadulla Chowdry v. Prayag Sahu, 20 C. W. N. 39 (1914), referred to. ABDUR RAHAMAN SARKAR v. PROMODE BEHARY DUTT ... ...

——————, Or. 21, r. 95—Execution sale—Purchase by decree-holder—Delivery of possession—Order, whether appealable—Sec. 47, C. P. C., whether applicable.] Where on a decree-holder auction-purchaser applying for delivery of possession of the properties purchased and obtaining possession by order of Court notwithstanding the objection by the judgment-debtor that the properties did not pass by the sale, the judgment-debtor preferred an appeal: Held, on a review of the authorities of all the Indian High Courts (which are conflicting), that the Patna High Court should not without very good reason depart from a long course of decisions in the Calcutta High Court where the balance of opinion has been since 1883 strongly in favour of the view that an appeal does not lie. HAZI ABDUL GANI v. RAJA RAM (Patna) ...

——————, Or. 22, r. 10. See Or. 43, r. 1, cl. 1 ... ...

——————, Or. 22, rr. 11, 9—Withdrawal of surplus sale-proceeds belonging to Plaintiff by Defendant—Suit instituted more than 3 years from the date of withdrawal—Limitation. See Limitation Act, Sch. I, Art. 62 ...

——————, Or. 22, r. 14—Price for pre-emption directed to be deposited within one month—Decree-holder's application for extension of time—Court's power to extend time. See Pre-emption ... ...

——————, Or. 23, r. 1 (2)—Application to withdraw from suit with liberty to sue again—Court if may grant application but without liberty.] Where the trial Court, being of opinion that no sufficient ground had been made out for allowing the Plaintiff to withdraw from the suit with liberty to institute a fresh suit in the same cause of action, passed order allowing him to withdraw without such leave: Held

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—That the suit was not disposed of by the order. Where a Plaintiff does not desire to withdraw from the suit unless with liberty to bring a fresh suit, and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application. **Mohant Bihagidasji Guru Govinddasji** v. **Parshotamdas Ramdas**, I. L. R. 32 Bom. 345 (1908), followed. SURADHANI DEBYA v. CHANDRA NATH [illegible]MANIK 1011

... 23, r. 1 (b)—Suit dismissed [illegible]n evidence allowed to be [illegible] liberty to sue again by ap[illegible] though no formal defect by reason of which suit might fail was made out—Fresh suit if barred—Res judicata.] Where a contested suit, in which evidence was called on both sides, having been dismissed by the trial Court, the Plaintiff was allowed by the Appellate Court to withdraw from the suit with liberty to bring a fresh suit, though no formal defect by reason of which the suit would fail was made out and really because the Plaintiff was unable to produce the necessary evidence in time: **Held**—That the order of the Appellate Court was made without jurisdiction and a subsequent suit in respect of the same property and in which the same relief was prayed for was barred by the rule of **res judicata**. The "sufficient grounds" for permitting withdrawal with liberty to bring a fresh suit on the same cause of action referred to in cl. (b) of r. 1, Or. 23 of the Civil Procedure Code must be something of the same nature as the "formal defect" mentioned in cl. (a). **Kharda Co., Ld.** v. **Durga Charan Chandra**, 11 C. L. J. 45 (1909) and **Mabulla Sardar** v. **Hemangini Debi**, 11 C. L. J. 512 (1910), followed. KALI PRASANNA SIL v. PUNCHANAN NANDI CHOWDHURY ...1000

—, Or. 23, r. 3—Procedure in probate case how far determined by. See Probate and Administration Act, s. 83 986

—, Or. 23, r. 3, —Court if bound to pass a decree embodying the terms of compromise under—Appeal if lies, when no decree passed. See Or. 1, r. 10 752

—, Or. 33, rr. 5, 6. See Or. 33, r. 15 669

—, Or. 33, r. 15 —Application to sue in forma pauperis, effect of rejection under r. 5—Distinction if any between orders under r. 5 and r. 6.] On the rejection of an application for leave to sue as pauper the only course open to the Applicant is to institute a suit in the ordinary way. There is no distinction between rejection under r. 5 and an order of refusal under r. 7. ATUL CHANDRA SEN v. RAJA PEARY MOHAN MOOKERJEE 669

—, Or. 40, r. (1) —Receiver, if may be appointed in proceeding to appoint common manager—

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Bengal Tenancy Act (VIII of 1885), sec. 93—Sec. 141, C. P. C.—Ex parte order, appointing Receiver, if necessarily bad—Remedy of aggrieved party.] Or. 40, r. 1, of the Civil Procedure Code does not provide that the appointment of a Receiver should be confined to a suit. A proceeding for the appointment of a common manager is a proceeding in the nature of a suit within the meaning of sec. 141 of the Civil Procedure Code, and a Receiver can be appointed during the pendency of such a proceeding, if it should appear to the Court to be just and convenient to appoint a Receiver. In cases of emergency, when the issue of notice to other parties may so delay the proceedings as to defeat the object of the order, the Court has to pass such order ex parte leaving the party aggrieved to object to it either in the Court making the order or by way of an appeal to a higher Court. ASADALI CHOWDHURY v. SYED MOHAMMED HOSSAIN CHOWDHURY ... ...100[illegible]

—, Or. 41, r. 10 —Appeal from an order in insolvency—Security for costs, jurisdiction of Appellate Court to make order for. See Costs ... ... 14[illegible]

—, Or. 41, rr. 22 (3), 33—Cross-objection where may be urged against co-respondent—Court's power to permit when justice requires—Change of law. See Local Self-Government Act, sec. 138 (d) ... ... 37[illegible]

—, Or. 41, rr. 23, 25—Decision if preliminary decree or interlocutory order. See Remand Order... 4[illegible]

—, Or. 41, rr. 23, 25—Power of Appellate Court to remand case otherwise than under. See s. 107 547

—, Or. 41, r. 24. See Trespass ... ... 77[illegible]

—, Or. 41, r. 33 —Scope and effect of, as to powers of Appellate Courts—Dismissing entire suit on Plaintiff's appeal when part of claim admitted by Defendant who prefers no appeal.] In a suit for arrears of rent the Plaintiff claimed rent at a particular rate. The Defendants admitted a lower rate and the Court of first instance decreed the suit at this admitted rate. The Plaintiff having appealed, the District Judge dismissed the entire suit although the Defendants did not prefer an appeal nor file any cross-objection. **Held**—That r. 33 of Or. 41 is very widely expressed but it should not be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of statutes like those which relate to limitation or payment of Court-fees. That ordinarily r. 33 should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the Appellant further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. That in the present case the lower Appellate Court

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allowed the Defendants in substance to evade the provisions of the Civil Procedure Code, the Limitation Act and the Court Fees Act; and even assuming that r. 33 is applicable to a case of this description the judicial discretion vested in the Court of Appeal below was not properly exercised. ADJAL MAJHI v. INTOO BEPARI 542

——————, Or. 41, r. 33.
See Contract 1054

——————, Or. 41, r. 33 —Appellate Court, power of, to allow withdrawal of suit with liberty to bring a fresh suit when part only of decree is appealed against.] The Plaintiff's suit for recovery of possession of land on declaration of title was decreed in part and the Defendants appealed against the decree in so far as it was against them. The Plaintiff did not prefer any cross-appeal or cross-objection. Held—That under r. 33 of Or. 41, it was competent to the High Court in appeal to allow the Plaintiff to withdraw from the entire suit with liberty to bring a fresh suit upon the same cause of action; but this power must be cautiously exercised and should not be permitted to be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes, e.g., the Limitation Act and the Court Fees Act. In the circumstances of the case the High Court allowed the Plaintiff on terms as to costs to withdraw from the suit with liberty to bring, subject to the law of limitation, a fresh suit in respect of the same cause of action only with regard to the lands which had been decreed in his favour by the lower Court. AKIMUNNESSA BIBI v. BEPIN BEHARY MITTER 544

——————, Or. 43, r. 1, if applies to appeal from one Judge of the High Court to others. See Letters Patent, sec. 15 594

——————, Or. 43, r. 1, cl. 1—Suit by Hindu widow—Adoption pending suit—Widow allowed to prosecute suit, though divested, on strength of ante-adoption agreement—Order, if appealable.] Where during the pendency of a suit brought by a Hindu widow, the Defendant objected that by an adoption made since the institution of the suit, the Plaintiff had divested herself of the estate of her husband and so could no longer prosecute the suit, but the Court overruled the objection in the view that Plaintiff was entitled to prosecute the suit under an ante-adoption agreement with the natural father of the adopted son: Held—That the order was not one under r. 10 of Or. 22 of the Civil Procedure Code and was not appealable under Or. 43, r. 1, cl. 1. PROMOTHA NATH ROY CHOWDHURY v. DINAMONI CHOWDHRANI 552

——————, Or. 43, r. 1, cl. (c). See Or. 9, r. 9 1203

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——————, Or. 43, r. 1 (d)—Appeal against order refusing to set aside ex parte decree. See Or. 5, rr. 12, 17 173

——————, Or. 47, r. 2 —Judge who did not decide case but signed the decree if may entertain review application under r. 2—"Judge who passed decree," meaning of—Review granted without notice by Judge who decided case if authorises Judge [illegible] view [illegible]n.] An application under r. 2, of the Civil Procedure Code for a review of a decree upon some grounds other than the discovery of new and important matter or evidence or the existence of a clerical or arithmetical mistake cannot be made to a Judge who signed the decree but did not write or deliver the judgment in accordance with which the decree was drawn up. The expression "the Judge who passed the decree" in r. 2, Or. 47, C. P. C., means the Judge who decided the case and not the Judge who merely signed a decree after satisfying himself that it has been drawn up in accordance with the judgment delivered by his predecessor, and the fact that the former had granted an application for review which was set aside on the ground of the order having been passed without notice to the other side did not authorise the latter to entertain the application. TAMIJUDDI SHEIKH v. SATYA SANKAR GHOSHAL ... 391

——————, Or. 47, r. 4 —Review on ground not before taken when allowed. See Pre-emption ...1099

——————, Or. 47, r. 7 —Reference by District Judge of case tried by Small Cause Court—Sec. 115, C. P. C.—sec. 25, Small Couse Courts Act (IX of 1887)—Interference by High Court on question of fact.] The Plaintiff brought his suit in the Court of Small Causes for recovery of damages against the Defendant who was said to have held some land under a contract to take half the proceeds as remuneration for his labour and expense. The Small Cause Court found that the Defendant was a servant remunerated by the receipt of half the produce and decreed the suit. On a reference by the District Judge recommending the setting aside of the decree of the Small Cause Court Judge on the ground that the Defendant should have been held to be a tenant against whom the suit could not be entertained: Held—That the Court of Small Causes was a Court subordinate to the District Judge and Or. XLVII, r. 7 contemplated a reference by the District Judge of cases tried by such Court. That in cases of revision under sec. 115, C. P. C., or under sec. 25 of the Small Cause Courts Act the High Court does not generally interfere with findings of fact arrived at by the first Court if those proceedings are supported by evidence before the Court. No case having been made out

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for interference on a question of fact the reference was discharged. SHEIKH RATAN BEPARI v. HIRA LAL SARKAR 1110

——————————, Or. 47, r. 8 —Decree of Division Bench of High Court of two Judges found erroneous, giving Plaintiff more than he claimed—Application for amendment before one of the —Jurisdiction of single Judge to am decree—Court in granting ap- plic Review, who case—Re-hearing of ca single Judge without authority Chief Justice—Jurisdiction.] An application for amendment of a decree made in favour of the Plaintiff by a Division Bench of the High Court of two Judges was moved by some of the Defendants before one of them (the other Judge having left the Court) and a Rule was issued on the Plaintiff to show cause why the decree should not be set aside or amended, or why such other order should not be made as might seem fit, on the ground that the decree purported to give Plaintiff a relief not claimed by him. The Judge made the Rule absolute, and then in terms of r. 8, Or. 47, C. P. C., proceeded to rehear the case with the result that the judgment and decree of the Division Bench were amended. The Plaintiff appealed against this last decision. Held—(Per Jenkins, C. J. and N. R. Chatterjea, J.)—That in the absence of an order by the Chief Justice authorising the learned Judge alone to sit for the hearing of the case, his decision was without jurisdiction. The case thereafter was heard before the Regular Bench, the Judges whereof refused to rehear the whole case, and confining themselves to the point of amendment only passed a decree amending the judgment and decree. Some of the Defendants having applied for review of this last decree, on the ground that the learned Judges should have reheard the whole appeal, Held—That the decree of the Division Bench stood amended, as soon as the Rule to amend it was made absolute, and all subsequent proceedings were superfluous. That as the last decree of the High Court only affirmed that order, it was not necessary to set it aside. Per Mookerjee, J.—R. 8 of Or. 47 of the Civil Procedure Code clearly leaves it optional with the Court to determine whether, when a review is granted, the case should be reopened in part or in its entirety. GOUR SUNDAR BHOWMIK v. RAKHAL RAJ BHOWMIK ...1165

——————————, Sch. II. See Arbitration.

CLAIM, omission to sue for a portion of—Subsequent suit for that portion if lies. See Civil Procedure Code, Or. 2, r. 2 ... 163

"COMMON TENANCY" what is. See Estates Partition Act, s. 99 ... 319

COMPANY—Liquidation, attachment prior to—Property attached if vests in liquidator—Property attached sold and proceeds brought into Court—Proceeds how to be distributed.] Where after property belonging to a limited liability Company had been attached by a creditor, the Company went into voluntary liquidation, Held—That after the property had been sold and the proceeds brought into Court, the distribution thereof must be governed by the provisions of the Code of Civil Procedure. That the attachment and sale could not be set aside at the instance of the liquidator. The liquidator of a Company differs in this respect from the Official Assignee in that the property of the Company does not vest in him. AMRITA LAL KUNDU, v. ANUKUL CHANDRA DAS 358

COMPROMISE by guardian, ad litem of minor without Court's sanction—Validity. See Trustee 202

—————— — Summons against one of the Defendants residing outside British India returned unserved—Compromise of suit by the other Defendant both for himself and the absent Defendant acting on power of attorney empowering management of business and institution, conduct and defence of suits—Compromise decree if binding on absent Defendant. See Decree 943

CONSIDERATION—Suit by purchaser under registered Kobala against Defendant in possession—Plaintiff if has to prove passing of consideration—Recital in deed admitting receipt of consideration, value of. See Onus 254

CONSOLIDATION of suits pending appeal. See Civil Procedure Code, Or. 2, r. 2, sub-r. 3 475

CONTRACT—Anticipatory breach—Delivery by instalments—Damages, assessment of. See Damages 240

—————— Part performance—Rescission See Local Self-Government Act, s. 138 (d) 370

——————, kabuliyat containing stipulation to pay excessive rate of interest —Assurance by landlord that covenant will not be enforced, effect of, on the document. See kabuliyat 1067

——————————, Bond signed by Defendant only and registered, suit upon.] A contract in writing in this country does not necessarily imply that the document must be signed by both the parties thereto; Apaji Bapuji v. Nil Kanta, 3 Bom. L. R. 667 (1901), Ramasami Chetti v. Sekhanoda Chetti, 1 M. L. J. 737 (1887), Grish Chandra v. Kunjo Behary, I. L. R. 35 Cal. 683: s. c. 12 C. W. N. 628 (1908), Ambalayani Pandarama v. Vaguram, I. L. R. 19 Mad. 52 (1895), Kotappa v. Vallur Zemindar, I. L. R 25 Mad. 50 (1901), Zemindar of Vizianagram v. Behara Suryanarayana, I. L. R. 25 Mad. 587 (1901), and Sanney Kotappa v. Venkata Narasimham Naidu, 11 M. L. J. 125 (1901), referred to. MOUWANG RAJA CHELLAPHROO CHOWDHURI v. BANGA BEHARI SEN ... 408

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————, illegal, money taken by Corporation under—Liability to refund. See Local Self-Government Act, s. 138 (d) 370

———— **Part performance, equitable doctrine of, if may be invoked by stranger to—Relinquishment of share in tenure without registered deed but for consideration by purchaser out of possession to person in possession —Remand order, scope of.]** Where a permanent tenure having been sold in execution of a decree for rent obtained against G, the question was whether C at the date of the sale had a subsisting interest in the tenure, so that (if he had) certain under-tenures held by G were not touched by the sale, and it appeared that C having acquired a share in the tenure at an execution sale, had subsequently for consideration relinquished the share to G who was and continued in possession but no conveyance was executed to give effect to this transaction: **Held**—(in a suit by the purchaser at the rent sale to eject G) that though a a mere admission or disclaimer cannot operate to pass title to property where a conveyance is required under the law to transfer title, here G could have sued C for specific performance of the contract and G could have successfully resisted a suit to recover possession by C. That by the application of the equitable doctrine of part performance, C was precluded from setting up any title against G and had no subsisting right to the share at the date of the rent suit. **Walsh** v. **Lonsdale**, L. R. 21 Ch. D. 9 (1882), **Puchha Lal** v. **Kunj Behari Lal**, 18 C. W. N. 445 (1913) and **Mohamed Musa** v. **Aghore Kumar Ganguli**, L. R. 42 I. A. 1: s. c. 19 C. W. N. 250 (1914), relied on. **Jadunath Poddar** v. **Rup Lal Poddar**, 4 C. L. J. 23: s. c. 10 C. W. N. 650 (1906), **Oodey Koowur** v. **Ladoo**, 13 M. I. A. 585 (1870) and **Dharam Chand Baid** v. **Mauji Sahu**, 16 C. L. J. 436 (1912), distinguished, **Held**—Further, that the purchaser though no party to the contract was entitled to invoke the aid of this doctrine in the same way as a creditor could in respect of contract of purchase made by his debtor with a stranger. That a remand order by the High Court directing a trial upon the issue whether C had a subsisting interest in the property covered an enquiry as to whether G had lost his interest in the property by the operation of the equitable doctrine of part performance. KHAGENDRA NATH CHATTERJEE v. SONATON GUHA 149

———— **Specific performance of contract—Agreement to reduce terms into writing—Contract if complete before writing—Contract completed subject to insertion of "usual terms and conditions," if specifically enforcible—Vendor if may waive such terms and enforce others—Earnest-money, payment of, if conclusive of completed contract —Uncertainty—Variance between pleading and proof.]** In a suit for specific performance of a contract for sale and purchase of immoveable property where the purchaser agreed to buy the property at a certain price and agreed to certain terms and conditions as he understood them and paid earnest-money and the terms of the contract were sought to be proved partly by evidence in writing [redacted] ap- [redacted] the parties cont[redacted]d a written agreement to be [redacted]ppro-ved and afterwards executed embodying the special terms and conditions already supposed to have been agreed upon and the "usual terms and conditions" of sale and purchase and it appeared that there were a number of terms and conditions admittedly not agreed to or discussed between the parties which were afterwards embodied in a draft agreement prepared by the vendor's solicitor and submitted for the approval of the purchaser and which draft agreement the purchaser did not approve, **Held** that there was no completed contract between the parties capable of being specifically enforced. **Per Jenkins, C. J.**—It being expressly pleaded in the plaint that it was a matter of actual agreement and not merely the expression of a desire that the terms should be embodied in a written agreement there was, in the absence of such a formal contract in writing, no concluded contract between the parties. That where the terms of a contract are sought to be proved by oral evidence the provision for a prospective written agreement cannot be treated as negligible the more so where the supersession is of an oral by a written agreement and not merely of one writing by another. That even in the case of a suppression of a written document by a more formal writing the circumstance that the parties do intend to make a subsequent agreement has been held to be strong evidence that they did not intend the previous negotiation to amount to an agreement. That even if the main terms be substantially agreed upon and to that extent the purchaser may have considered that there was a contract and have used language appropriate to that position nevertheless where it appears that the prospective written agreement contemplated embodying the term agreed upon or supposed to have been agreed upon together with other terms and conditions described as "usual terms and conditions" the contract cannot be specifically enforced for uncertainty. That the mere payment of earnest-money did not preclude the purchaser from pleading that there was no concluded contract. **Per Woodroffe, J.**—The Court will not enforce specific performance of a contract the terms of which are uncertain. The question whether a contract is uncertain is a question of fact which arises on the documents and oral evidence tendered in support of it. An Appeal Court is not bound to accept the first Court's appreciation of the facts of the case. Both

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the facts and law are open to the Court of Appeal. But Appellant should satisfy the Appeal Court that the judgment appealed against is erroneous. The mere reference to a formal agreement will not prevent a binding bargain. The fact that the parties refer to the preparation of an agreement by which the [redacted] more formal shape does not prevent the existence of a binding contract. The payment of earnest-money is itself evidence of a concluded contract. Per Mookerjee, J.—It is well settled that the fact that the parties intended to embody the terms of the contract in a formal written agreement is strong evidence that the negotiations prior to the drawing of such writing are merely preliminary and not intended or understood to be binding. If it is definitely expressed and understood that there is to be no contract until the formal writing is executed there is plainly no binding agreement formed until this provision is complied with. It is also true that if all terms of the agreement have not been settled and it is understood that these unsettled terms are to be determined by the formal contract, there is no binding obligation until the writing is executed. But if the oral agreement or written memorandum is complete in itself and embodies all the terms to be inserted in the intended formal writing a binding obligation is fixed on the parties unless it is understood and intended that such contract shall not become operative until reduced to writing. The question is mainly one of intention. If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract; if however, it is viewed as the consummation of the negotiations, there is no contract until the written draft is finally signed. To determine which view is entertained in any particular case several circumstances may be helpful, as for example whether the contract is of that class which are usually found to be in writing, whether it is of such a nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or usual contract, whether the negotiation itself indicates that a written draft is contemplated as a final conclusion of the negotiation. If a written draft is proposed, suggested or referred to during the negotiations it is some evidence that the parties intended it to be the final closing of the contract. The Court should refuse specific performance where there is substantial variance between the pleading and proof. The draft agreement containing terms which were never settled before between the parties, the legitimate inference to be drawn is that the parties intended the written draft to be the consummation of their negotiations which were to be treated as con-

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cluded only upon the final execution of the written agreement. Where many terms still remained undetermined it is a sure index that the contract had not yet been concluded. Where there is ambiguity in any of the conditions of sale in restriction of the rights of the purchaser the condition should be construed more strictly against the vendor. J. I. J. HYAM v. M. E. GUBBAY ... 66

——Specific performance. See Specific Performance.

—— to settle property in consideration of donee coming and living with donor—Promise—Acceptance by word and conduct—Consideration—Part performance—Contract if may be repudiated—Locus penitentiæ—Contract, if requires writing—Specific performance—Civil Procedure Code of 1882, sec. 544—Civil Procedure Code of 1908, Or. 41, r. 33—Suit in ejectment—Court in allowing a Defendant's appeal against decree of ejectment, if may decree it in favour of non-appealing Defendants—Appeal by Plaintiff by leave of High Court to His Majesty in Council—Defendant not made Respondent added and allowed to file cross-objection by Privy Council.] P, a childless widow, was greatly attached to her grandniece, the Plaintiff, and valued her companionship, and, on her marriage, was anxious that she and her husband, who was a man of independent means, should continue to live with her, and to this end offered to settle property on her. Plaintiff and her husband being thus induced to come and reside with her, remained with her from 1886 to 1893, between which dates P settled some small properties on Plaintiff. In 1893 she wished to settle property of a more substantial value, and with this object in view purchased a property worth Rs. 40,000, but in her own name. The Plaintiff's husband, not being satisfied with this arrangement, left P's house and went to reside on his own property. P, thereupon, in order to persuade Plaintiff to stay with her, wrote to her husband, pressing him to return, and she also gave Plaintiff herself her assurance in writing that the property in question was purchased for Plaintiff, that there were incumbrances on the property which were to be discharged, that P would retain the property so long as she was alive, and afterwards convey it to the Plaintiff. The Plaintiff as well as her husband agreed to this arrangement and, until P's death in 1899, Plaintiff and her husband lived with P, Held—That the letter was a promise quite definite as to its subject-matter, the person who was to be its owner (the Plaintiff) and with regard to the time she was to enter into possession, and the same was accepted, and P obtained the consideration she desired, inasmuch as in compliance with the stipulation made by her the Plaintiff and her husband went on living with her. That there was thus a concluded contract

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from which P could not resile and which was specifically enforcible, the law of India not requiring such a bargain to be in writing. **Maunsell** v. **Hedges**, 4 H. L. C. 1039 (1854), **Maddison** v. **Alderson**, 8 App. Cas. 467 (1883) and **Mahomed Musa** v. **Aghore Kumar Ganguli**, L. R. 42 I. A. 1: s. c. 19 C. W. N. 250 (1914), referred to. That the dying declaration of P that the property in question had been given away to Plaintiff and that possession of the same should be delivered to her after her death, did not constitute a nuncupative will but a re-affirmation and confirmation of the previously concluded contract. Upon appeal to the High Court by one of the Defendants, N, against a decree in ejectment passed in favour of the Plaintiff, another Defendant, S, who had been made a Respondent in the appeal, prayed that the Court, which proceeded to decree the appeal, should make a decree in favour of all the Defendants. The prayer was overruled and the decree was in respect of the appealing Defendant's unascertained share only. The Plaintiff having then obtained leave of the High Court to appeal to His Majesty in Council, S who was not made a Respondent in the appeal moved His Majesty in Council to be added as such and for leave to file cross-objections. This was allowed subject to all objections at the hearing. At the hearing it was urged that the cross-objections could not be entertained as (1) no leave had been obtained from the High Court; (2) S's application to His Majesty in Council was time-barred; (3) under sec. 544 of the Civil Procedure Code of 1882 which applied when the appeal was lodged in the High Court (though it was not disposed of until Or. 41, r. 33 of Act V of 1908 had come into force), S was not entitled to the relief he asked for. These objections were overruled by the Privy Council. SRI RAJAH MALRAJU LAKSHMI VENKAYYAMMA RAO BAHADUR v. SRI RAJAH VENKATA NARASIMHA APPA RAO BAHADUR (P. C.) ...1054

——— OF SALE. See Sale ... 159

———, Contract varied—Effect—Specific performance. See Specific Performance 929

CONTRACTS, successive. dealing with same matter—Former if rescinded when later contract invalid—Rescission by renunciation when effective—Rescission after part performance. See Local Self-Government Act, s. 138 (d) 370

CONTRACT ACT (IX of 1872), character and scope of—Interpretation of provisions—Legal reform in India in advance of that in England. See s. 102 1182

———, Draughtsmanship? See ss. 102, 103 1182

———, Rule of Hindu Law if to be considered. See Brokerage ... 708

———, s. 10—Misrepresentation of minor—Estoppel. See Evidence Act, s. 115 418

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———, s. 37—Rule of damdupat if applicable to mortgage decree. See Damdupat 110

———, s. 55—Contract to sell land—Time if of the essence of the contract—Principles of equity applicable to such cases.] Sec. 55 of the Indian Contract Act does not lay down any principle which differs from those which [illegible] under the law [illegible] land [illegible] land. [illegible] that law, equity which governs the rights of the parties in cases of specific performance of contracts to sell real estate looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place really and in substance intended more than that it should take place within a reasonable time. **Lennon** v. **Napper**, 2 Sch. & Lef. 682 (1802), **Roberts** v. **Berry**, 3 DeG. M. & G. 284 at p. 289 (1853), **Tilley** v. **Thomas**, 3 Ch. App. 61 (1867) and **Stickney** v. **Keeble**, [1915] A. C. 386 (1914). The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain and that to disregard them would be to disregard nothing that lay at its foundation. **Prima facie** equity treats the importance of such time limits as being subordinate to the main purposes of the parties and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the Plaintiff as regards the time limit specified. But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into. JAMSHED KHODARAM IRANI v. BURJORJI DHUNJIBHAI (P. C.) 744

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————, s. 68—Infant if may be adjudicated insolvent. See Presidency Towns Insolvency Act 1065

————, ss. 69, 70—Money paid under compulsion of legal process, suit to recover, if lies—Bona fides of party receiving payment. See Civil Procedure Code, Or. 21, r. 46 (3) 188

[illegible] to purchase shares—[illegible] take delivery—Subsequent sale by seller at higher than market price on date of delivery—Buyer's liability—Measure of damages.] The Defendants were purchasers of certain shares from the Plaintiff under a contract note which inter alia provided that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction—any loss arising therefrom to be recoverable from the buyer. On 30th December 1911, the date of delivery, the shares having fallen largely in value, the Defendants failed to take delivery. The seller sold the shares on various dates from 28th February 1912 onwards, the sales fetching in most instances higher prices than the market rate on 30th December 1912. The Plaintiff sued the Defendants for the difference between the contract rate and the market rate on 30th December 1911; but the Appeal Court in India held that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. Held—That, upon a true construction of the contract note, property in the shares never passed to the purchaser and sec. 107 of the Contract Act which deals with cases in which a seller has lien on goods or has stopped them in transitu had no application to the case. That the option to resell was only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale. That the loss to the Plaintiff arising from Defendants' breach of the contract was the loss at the date of breach, viz., the 30th December 1911. If at that date the Plaintiff could do something or did something which mitigated the damage the Defendants would be entitled to the benefit of it, Saaniforth v. Lyall, 7 Bing. 169 (1830), but the fact that by reason of the loss of the contract which the Defendants failed to perform, the Plaintiff obtained the benefit of another contract which was of vaule to him, did not entitle the Defendants to the benefit of the later contract. Yates v. Whyte, 4 Bing. N. C. 272 (1838), Bradburn v. Great Western Railway Co., L. R. 10 Ex. 1 (1874), Jebsen v. East and West India Dock Co, L. R. 10 C. P. 320 (1875), Rodocanachi v. Milburn, 8 Q. B. D. 67 (1886), and Williams v. Agius, [1914] A. C. 510, referred to. A. K. A. S. JAMAL v. MOOLLA DAWOOD SONS, AND COMPANY (P. C.) 105

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————, s. 74—Interest, rate of, excessive—Court's power to declare rate a penalty and award reasonable interest.] The Court is competent to grant relief whenever the rate of interest appears to it to be penal. The fact that the rate of interest is excessive may be sufficient by itself to justify the inference that the rate was penal and unenforcible. Once the stipulated rate of interest is found to be unenforcible, the Plaintiff is in the hands of the Court which will decree such rate of interest as may appear to it to be reasonable. Abdul Majid v. Kherode Chandra Pal, I. L. R. 42 Cal. 690: s. c. 19 C. W. N. 809 (1914) and Khagaram Das v. Ram Sankar Das, I. L. R. 42 Cal. 652: s. c. 21 C. L. J. 79; 19 C. W. N. 775 (1914), referred to. BOUWANG RAJA CHELLAPHROO CHOWDHURI v. BANGA BEHARI SEN 408

————, s. 79. See s. 81 ...1224

————, ss. 81, 82, 83—Usage of jute trade at Chandpur—Jute brought by fariahs and stored in Companies' godowns, burnt before weighment—Jute insured by Company—Incidence of loss—Title, passing of—Unascertained goods—Intention—English law.] Plaintiffs who were fariahs used to purchase loose jute from dealers (beparis) and sell them to, amongst others, Defendants' firm at Chandpur. The jute brought by the fariahs used to be stored in a godown called the "fariahs' godown," and according to the usage of trade at Chandpur sale was not complete until the jute had been examined, selected and weighed by the purchasing firm. The goods were, however, kept subject to the firm's lien for advances to the fariah, and it appeared that, once the goods were stored in the godown, the fariahs were not allowed to remove or sell them to other persons. Some jute which was stored by Plaintiffs in Defendants' godown, and was insured by the latter as belonging to the firm, caught fire before it had been tested, selected and weighed and was burnt, Held—That title in the jute had not passed to the Defendants, and the loss fell on the Plaintiffs. That the contract being one for the sale of unascertained goods, what remained to be done by the buyer to the goods appropriated to the contract by the seller was not merely for the purpose of ascertaining the price but was also for the purpose of placing the buyers in a position to say whether and to what extent they would for their part accept the goods offered to them. That the fact that the seller could not remove or sell the goods from the godown did not show that the property in the jute had passed to the firm. That the Defendants who had an interest in the goods, were justified in insuring them to protect that interest, and were entitled to receive the whole amount of the policies of insurance to indemnify themselves against their loss and were not bound to apply any por-

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tion of it to the Plaintiffs' benefit. When nothing remains to be done to the goods by the seller for the purpose of ascertaining the price, then prima facie the property in them passes although they have not been weighed by the buyer. It would be otherwise in England if the parties intended that property in the goods should not pass until the goods had been weighed. The Indian law is the same and the provisions of sec. 81 do not exclude the question of intention which is laid down in the English cases as the determining factor. ABDUL AZIZ BEPARI v. JOGENDRA KRISHNA RAY 1224

——————, ss. 102, 103, 108, 178—Transfer of Property Act (IV of 1882), ss. 4, 137—Railway receipt if "document of title" or "document showing title" or "instrument of title"—Right of vendor of stoppage in transitu if determines on assignment of railway receipt by way of pledge—Interpretation—Draughtsmanship.] The Indian Contract Act is an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. There is no improbability in the Indian Legislature taking the lead of the English in a legal reform, the call for legislative action in India being so much more numerous. Railway receipts issued to the consignors of goods are documents showing title to goods within secs. 102 and 108 and documents of title to goods within sec. 178 of the Indian Contract Act, and a second buyer in good faith and for consideration who obtains an assignment of such a receipt obtains thereby constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceases under sec. 102 upon such assignment. The expression "instrument of title" in sec. 103 means the same thing as "documents showing title" in secs. 102 and 108 and "documents of title" in sec. 178 of the Contract Act; the use of different expressions to convey the same sense showing merely that the draughtsman of the Act was not very careful in the use of language. Where, therefore, a railway receipt is assigned by way of pledge to secure an advance made specifically upon it in good faith under sec. 103 of the Contract Act, the vendor cannot, except on payment or tender to the pledgee of advance so made stop the goods in transit. RAMDAS VITHALDAS DURBAR v. S. AMERCHAND AND CO. (P. C.) 1182

——————, s. 107. See s. 73 ... 105

——————, s. 108. See s. 102 ...1182

——————, sec. 139—Discharge of surety by act of creditor detrimental to surety—Banker, deposit with—Banker must allow specific direction of depositor even if he be indebted—Debtor, specific appropriation by, to be observed by creditor.] The Defendant's brother had an account at the Plaintiff Bank which being considerably over-drawn the Bank called for additional security and the Defendant gave a guarantee to the Bank agreeing to pay to them on a specified date to the extent of a specified amount all money then due to the Bank from his brother on current account [redacted] ing af[redacted] penses w[redacted] the Bank might cha[redacted] After the date of payment mentioned in the agreement of guarantee and when there remained due to the Bank a large sum so guaranteed the Defendant's brother opened a separate account with the Bank by depositing a certain amount on condition that the Bank would allow him to draw this sum by cheques and not take it in payment of the amount due to them on the guaranteed over-draft account, but that any profits of the business carried on by him with the money deposited on the second account would be paid to credit of the over-drawn account. The Bank did not inform the Defendant of the opening of this new account and certain sums were transferred from this account to the previous over-drawn account purporting to be profits as aforesaid. After this second account came to an end the Bank claimed from the Defendant payment of the balance on the over-drawn account and a copy of the account of the Defendant's brother was supplied to the Defendant showing the amount due to the Bank on account of principal and interest as also the second account opened by the Defendant's brother. The Defendant without disputing his liability assured payments of the money due from his brother, Held—That on the facts of the case the Defendant was not discharged from his liability to the Bank in consequence of the arrangement made by the Bank with his brother in opening the second account. That the Defendant was not entitled to have the account reopened and the Bank entitled to interest after the date mentioned in the agreement of guarantee for payment, at the rate usual on the account but not at any higher rate. Per Sanderson, C. J.—That in opening the second account the Bank did not act inconsistently with the right of the Defendant as surety within the meaning of sec. 139 of the Contract Act under which in order to discharge the surety it must be shown that not only has the creditor omitted to do some act which his duty to the surety required him to do but also that the eventual remedy of the surety himself has thereby been impaired, which was not shown to be the case here. That it was not within the power of the Bank to appropriate the amount in the second account to the previous over-drawn account inasmuch as the depositor deposited that amount on condition that he was allowed to draw against it. That the rule in

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Clayton's case, 1 Mer. 572 (1816), applies only to the items in one current account and when there is no specific appropriation by the debtor; but in the present case there was a specific appropriation by the depositor when he opened the new account and there were in fact two accounts and not one and the rule in Clayton's case, 1 Mer. 572 (1816), did not apply. That it was no duty of [redacted] the Defendant with [redacted] opening the new account which [redacted] not contrary to the nature of the Defendant's engagement but in accordance with the arrangement made by the Defendant with the Bank. Per Mookerjee, J.—That in the absence of special agreement a guarantor has no right to control the appropriation by Customer or Banker of moneys paid in subject to the qualification that the Banker is bound to deal with the accounts in the ordinary way of business. Any specific direction regarding the appropriation of a deposit must be observed by the Bank. In the present case the agreement between the Bank and the depositor made it impossible for the Bank to apply the deposit in reduction of the over-draft on the first account; consequently the fact that the deposit was not so applied did not justify the contention that the Bank were at fault and the surety must be deemed discharged; there was thus no room for the application of the rule in Clayton's case, 1 Mer. 572 (1816). That the Bank did not fail in their duty to the Defendant when they carried on transactions with his brother under the second account without any intimation to him. The true rule is that if there is any agreement between the principal with reference to the contract guaranteed, the surety ought to be consulted and that if there is any alteration which is not obviously either unsubstantial or for the benefit of the surety he is to be the sole judge whether he remains liable. This is substantially in accord with sec. 139 of the Indian Contract Act. A. K. A. A. K. GHUZNAVI v. THE NATIONAL BANK OF INDIA LTD. 562

——————, s. 178. See s. 102 ...1182

——————, ss. 230, 236—Broker liable as principal—Custom of Calcutta Gunny Market. See Arbitration ... 365

——————, s. 247—Infant if may be adjudicated insolvent. See Presidency Towns Insolvency Act 1065

——————, s. 253, cl. 10—Rule of Hindu Law if to be considered. See Brokerage 708

CO-OWNER. See Co-sharer.

CORPORATION, contract of, without seal, if enforceable, when not demanded by statute. See Local Self-Government Act, s. 138 (d) 870

——————, money taken by, by illegal contract—Liability to refund. See Local Self-Government Act, s. 138 (d) ... 870

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CO-SHARER—Suit to recover joint possession, when lies—Ouster by other co-sharer, what amounts to—Claim and exercise of exclusive title under a lease from a stranger—When co-sharer in possession may keep exclusive possession—Change of case in second appeal—Remand, prayer for.] The 5/6ths owners of an estate A sued the remaining 1/6th owners for recovery of joint possession with the latter of certain lands within the estate. The latter in defence stated the lands in suit were part of estate B, which the owners of that estate had given them in lease. This having been found against in the Court of first appeal, the Defendants in second appeal prayed to be allowed to set up the defence that they had been in occupation of the lands as co-sharers and were cultivating the same as such with the consent of the Plaintiffs. The prayer was disallowed, and Held—That this was a case of exclusion of co-sharers by other co-sharers and the Plaintiffs were entitled to a decree for joint possession. Watson & Co. v. Ram Chund Dutt, L. R. 17 I. A. 110: s. c. I. L. R. 18 Cal. 10 (1890), Lachmeswar Singh v. Manowar Hossein, L. R. 19 I. A. 48: s. c. I. L. R. 19 Cal. 253 (1893) and Mohesh Narain v. Nawbut Pathak, I. L. R. 32 Cal. 837: s. c. 1 C. L. J. 437 (1905), distinguished. Mookerjee, J.—The rule laid down in Watson & Co. v. Ram Chund Dutt, L. R. 17 I. A. 110: s. c. I. L. R. 18 Cal. 10 (1890), is a rule of justice, equity and good conscience and must be applied with reference to the circumstances of the individual case before the Court. Prima facie co-owners are entitled to hold joint possession of joint property, and consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession, special circumstances must be alleged and established to justify exclusive occupation by one of them. The principle deducible from the cases is that a co-sharer who has been ousted from joint property is entitled to recover joint possession. To constitute ouster a physical eviction is not essential; if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the rights of the other co-sharers, there is an ouster in law. When one co-owner accepts a deed of the whole property from one who has no title and claims and exercises the rights of sole ownership under a denial of any other person's right in the premises, he is in adverse possession to the exclusion of his co-sharers. BABU NARENDRA BHUSAN ROY v. BABU JOGENDRA NATH ROY ...1258

——————, possession by, when may be adverse. See Partition 91

COSTS—Suit for account—Costs of suit pending reference for account. See Accounts 368

——————, Discretion of appeal Court in modifying order for costs made by the Court of first instance. See Specific Performance 929

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———, decree for, revision under s. 115, C. P. C. See Civil Procedure Code, s. 92 1354

———, Surprise, discovery of new facts—Party at whose instance new issue raised to pay costs. See Remand ...1245

———, **security for—Appeal from an order in insolvency—Jurisdiction of Appellate Court—Or. 41, r. 10, Civil Procedure Code (Act V of 1908)—Secs. 117 and 151, C. P. C.—Sec. 8 (2) (b), Presidency Towns Insolvency Act (III of 1909)—Practice.**] On an application for security for costs in an appeal against a judgment passed by the High Court in its Insolvency Jurisdiction, it was held that in conformity with the previous practice and also under sec. 117, C. P. C., and Or. 41, r. 10, C. P. C., the Appellate Court has power to entertain the application. **Shisha Ayyar** v. **Nagarathua**, I. L. R. 27 Mad. 121 at p. 123 (1903), not followed. SM. LAKHYPRIA DASI v. SM. RAJKISHORI DASI 140

———, Partition suit—Preliminary decree. See Pleading 310

CO-TENANTS, adverse possession as between. See Partition 51

COURT'S POWER of taking notice of facts which have accrued since institution of proceedings. See Execution Sale ... 667

COURT FEES ACT (VII of 1870), **s. 19-C—Double probate, duty if payable on—Fees chargeable raised by Statute in the interval between the two grants—Second applicant if should pay the difference.**] By sec. 19C of the Court Fees Act, the Legislature meant that where the full fee chargeable under the Court Fees Act on a probate at the time it is granted has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate. Where during the minority of the testator's son, G to whom on 29th April 1909 probate **durante minore aetate** was granted died and thereupon on 7th November 1914, a second grant of probate was applied for by S, **Held**—That the Court was wrong in directing S to pay the difference between the fees calculated at the rate of 2 per cent. which was paid, in accordance with the Court Fees Act then in force, by G and fees calculated at 3 per cent. as required by the Amending Act VII of 1910 which was enacted in the interval between the two grants. SWARNAMOYEE DEBI v. SECRETARY OF STATE FOR INDIA IN COUNCIL 472

———, **ss. 19E, 191, 19J—Application for probate—Pending for under-valuation—Suit if lies to recover—Defence, that penalty imposed without compliance with statutory requirements if admissible.**] A suit by the Secretary of State lies for recovery of penalty imposed by a Revenue authority under statutory powers, where there is no statutory provision for recovery of the penalty by summary process; and even where there is such provision, such a suit is maintainable unless there is a statutory bar to its institution. If the action of the Revenue authorities in imposing a penalty is ultra vires, or, if he has not followed the procedure prescribed by the statute which is the source of his authority, there is no enforceable claim which a Civil Court is bound to [redacted] Civil Court has jurisdiction to review the decision of a Revenue authority on the ground that he has exercised his discretion erroneously does not apply to such a case. Where an applicant for probate paid duty upon the estimated value of the estate, and the Court, in the absence of objection by the Collector to whom notice was given to enable him to test the valuation, granted probate, but subsequently the Collector having called upon the Petitioner to amend the valuation and pay additional Court-fee, the latter asserted that his valuation was correct but to avoid litigation agreed to pay the additional Court-fee demanded by the Collector, and the Board of Revenue, thereupon without moving the Court for an enquiry into the true value of the assets under sec. 191, proceeded to impose a penalty upon the Applicant, **Held**—That there was no compliance with the statutory requirements and no suit lay to recover the penalty. Sec. 19E contemplates an application on the part of the person who has taken out probate and produces the same to be duly stamped. In such a case the chief controlling Revenue authority is at liberty to refuse to stamp the probate till the penalty has been paid, and so no occasion can arise in such a case for recovery, by summary process or by suit, of the penalty imposed under sec. 19E. **Manekji** v. **Secretary of State for India**, [1896] Bom. P. J. 751, referred to. NIKUNJA RANI CHOUDHURANI v. SECRETARY OF STATE FOR INDIA IN COUNCIL 504

———, **s. 191, sub-s. 1**—Estate of which gross value over Rs. 1,000, but net value less than that, if chargeable with death duty. See Sch. I, Art. 11 591

———, **Sch. I, Art. 11, Sch. III—Estate of which gross value over Rs. 1,000, but deducting debts, net value less than that, if chargeable with death duty.**] The expression "amount or value of the property" in Art. 11 of Sch. I of the Court Fees Act signifies what is described as the "net total" in Annexure A in Sch. III, obtained by the deduction of the amount shown in Annexure B as not subject to duty from the gross valuation of the moveable and immoveable property left by the deceased. **Held**, therefore, that no fee was leviable under the Article upon the estate of the deceased the gross value of which was shown to be Rs. 1,244-11-0, and the amount of the debts Rs. 522 leaving a net balance of Rs. 722-11-0. **Collector of Maldah** v. **Nerode Kamini**,

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17 C. W. N. 21 (1912), not followed. In the goods of Harriett Teviot Kerr, 18 C. W. N. 121: s. c. 18 C. L. J. 308 (1913), referred to. IN THE GOODS OF GEORGE HENRY QUININGBOROUGH 591

——————, Sch. I, Arts. 11, 12 —Succession certificate—Grant to widow —Death of widow—Fresh certificate, [illegible]plication by daughter for—Court-[illegible]—Ana-[illegible] of administration [illegible]non, if [illegible]pplies—Fiscal statute, [illegible]rpretation of—Succession Certificate Act (VII of 1889), s. 14.] Whenever a fresh succession certificate is taken, even though it is to collect debts for which a succession certificate has already been taken out and the duty paid, the duty prescribed by the Court Fees Act must be paid. R, the widow of a deceased Hindu, took out a succession certificate in respect of certain debts due to the deceased. After her death, S, the daughter of the deceased, applied for a succession certificate in respect of the same debt and urged that stamp duty upon the debts having once been already paid by R, she was not bound to pay duty again: Held—That it was an application for a certificate within the meaning of sec. 14 of the Succession Certificate Act and Court-fee was payable on it as such. One fiscal Act cannot be construed by another fiscal Act. In re SAROJE BASHINI DEBI 1125

——————, Sch. II, Art. 12—Caveat, what is a—Probate proceeding—Persons upon whom citations issued, preferring objections—Objections if must be stamped as caveat.] A petition by which a party upon whom citation has been issued opposes the grant of probate is not a caveat and need not be stamped as such. A caveat, which is in the nature of a precautionary measure intended to assure that there shall be no proceeding in the matter of the estate of the deceased without notice to the person who files a caveat, is not necessary where persons interested in the estate of the deceased appear upon citation. BHABATARINI DEBI v. HARI CHARAN BANERJEE ... 787

——————, Sch. III—Estate of which gross value over Rs. 1,000, but not value less than that, if chargeable with death duty. See Sch. I, Art. 11 ... 591

COURT OF WARDS, contract by disqualified proprietor when property under, if affects property after release. See Oudh Land Revenue Act, s. 173 770

COURT OF WARDS ACT (IX B. C. of 1879), sec. 6 (a)—Debtor's widow made Ward of Court—Suit to recover debt from widow without making manager of Court party as her guardian, if maintainable, when whole estate not taken over.] Where the creditor of a deceased zemindar sued his widow who had been declared a disqualified proprietor under sec. 6 (a) of Act IX of 1879 B. C. (Court of Wards Act) for recovery of the debt from the assets left by her husband,

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COURT OF WARDS ACT—contd.
without describing her as a Ward of the Court or as being represented by the manager of the Court of Wards as her guardian as required by sec. 51 of the Act. Held—That the suit was badly framed even though it appeared that one of her husband's properties had not been taken over by the Court at the date of the suit, and was taken over only after the lower Court had passed a decree against the lady in the suit as framed. Dhanipal Das v. Raja Maneshar Singh, L. R. 33 I. A. 118: s. c. 10 C. W. N. 849 (1906), Dhunput Singh v. Shuvadra Kumari, I. L. R. 8 Cal. 610 (1882) and Krishna Prosad v. Gosta Behary, I. L. R. 28 Cal. 149: s. c. 5 C. W. N. 443 (1900), referred to. ANANDA KUMARI DEBI v. DURGA MOHAN CHUCKERBUTTY 31

——————. ss. 11, 13. See s. 55 852

——————, s. 51. See s. 55 852

——————, s. 51. See s. 6 (a) 31

——————. ss. 55, 11, 13A, 51 —Estate retained by Court, after some co-sharers ceased to be disqualified, on account of unpaid debts—Sale of property in execution—Application to set aside sale by judgment-debtors not acting through Court of Wards if lies—Estate released pending appeal from order dismissing application—Effect.] Some properties of the judgment-debtors whose estate was in charge of the Court of Wards was sold in execution of a decree on 15th April 1912. As the Court of Wards would not apply to set aside the sale, the judgment-debtors themselves applied under sec. 47 and Or. 21, r. 90 of the Civil Procedure Code. The application was rejected on 11th January 1913 and the judgment-debtors applied on 11th April 1913. The estate was released by the Court of Wards on the 18th June 1914, before the appeal was heard. One of the judgment-debtors, B, had ceased to be disqualified before the sale but as there were unpaid debts of the estate, the Court of Wards, under sec. 13A of the Court of Wards Act, was authorised to retain possession of the estate. Held—That under sec. 55 of the Court of Wards Act the application to set aside the sale was incompetent. That the release of the estate did not give a fresh start to limitation, as the judgment-debtor B, not being a minor at the time the right to apply accrued, was not entitled to claim the benefit of sec. 7 of the Limitation Act. UMAKANTA SEN CHOWDHURY v. HIRA LAL RAY 852

CRIMINAL CASE compoundable with leave of Court only, agreement to compound, if opposed to public policy. See Agreement 940

CRIMINAL PROCEDURE CODE, s. 146—Party deprived of possession by order under, if dispossessed—Limitation—Suit if lies against Magistrate. See Limitation Act, Sch. I, Art. 142 ... 481

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CROWN—Island arising in sea within territorial limits—Title in Crown—Crown opposed by squatters claiming title by adverse possession—Onus. See Adverse Possession 1311

————, duty of, to obey the law. See Injunction 457

CUSTOM, lex loci, of Chota Nagpur—Proof of custom, onus of—Grants by the Maharaja of Chota Nagpur—Impartibility of estate. See Grant 876

————, proof of—Onus. See Grant ... 876

————, if may be given effect to, when inconsistent with statute embodying customary law. See Succession Act ...1082

————, **tribal—Marriage-custom, requiring husband to live in wife's parents' household, the children being additions to wife's clan—Custom not immoral or opposed to public policy—Suit for restitution of conjugal rights by husband against wife—Removal of wife from parents' house if may be decreed.**] There is nothing immoral or opposed to public policy in a tribal custom which requires a son-in-law to reside in the family of his father-in-law in order to have access to his wife. **Quære**:—Whether Lalungs are governed by Hindu Law. Assuming that they are Hindus, **Held**—That their marriage relations must be governed by customs which prevail amongst the tribe provided that the customs are neither immoral nor opposed to public policy. Their marriage custom, according to which the parents of the girl find a husband for her and take him to their house—as a member of their family—the offsprings of the marriage entering the clan of their mother—is a valid custom and is a good defence to a suit by the husband for restitution of conjugal rights by removal of the wife from her father's house. It was not injurious to the public interests, that is, to the interests of the tribe to which the parties belonged, nor was it in conflict with any express law of the ruling power. **Tekait Monmohini v. Basanta Kumar Singh**, I. L. R. 28 Cal. 751: s. c. 5 C. W. N. 673 (1901), referred to. LENGA LALUNG v. PENGURI LALUNGNI 406

DAMAGES, **measure of—Contract—Anticipatory breach—Delivery by instalments.**] In a case of an anticipatory breach of contract involving deliveries in several instalments in several months, the true measure of damages would be the sum-total of the differences between the market rates at the appointed times for delivery in each month and the contract price. **Per Sanderson, C. J.**—Where a contract only limited delivery of goods by shipments during certain months and no specific instalments for deilvery were mentioned, **Held**—That the buyer was not bound to accept delivery of the whole lot of the goods either at the beginning or at the end of the period limited in the contract. **Per Woodroffe, J.**—Where a question is one of pure fact and there is evidence to support the

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finding of the Court of first instance, it is incumbent on the Appellant to show that the finding is clearly erroneous for the Appellate Court to reverse that finding. **Per Mookerjee, J.**—Where a contract is for delivery of goods by shipments during several months, in the absence of an express agreement to that effect, an agreement to accept delivery by instalment may be inferred from [redacted] conduct [redacted] stances [redacted] any indic[redacted]Section to the contrary the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of the goods. BILASIRAM THAKURSIDAS v. E. B. GUBBAY, ... 240

————, unliquidated, pleadings and proof as to. See Civil Procedure Code, Or. 9, r. 6 1192

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DAMDUPAT, rule of, if applicable to mortgage decree. See Interest 110

DATTAKA CHANDRIKA, authority of. See Hindu Law—Adoption 901

————————, **s. 5, paras. 24, 25,** interpretation of. See Hindu Law—Partition 702

DEBUTTER. See Hindu Law—Religious Endowment.

DECLARATORY SUIT—Plaintiff's title and previous possession, suit to establish, if suit for mere declaration—Maintainability. See Possession 1274

DECREE—**Suit, decision of, in the absence of Defendant—Summons against one of two Defendants residing outside British India returned unserved—Compromise of suit by the other Defendant both for himself and the absent Defendant acting on power of attorney empowering management of business and institution, conduct and defence of suits—Compromise decree if binding on absent Defendant—Decree set aside even as against Defendant present on the ground of decree being indivisible.**] The Plaintiff and the four Defendants were partners. The first three Defendants brought a suit against the Plaintiff and the fourth Defendant for dissolution of partnership and other incidental reliefs. The Plaintiff was at the time admittedly residing outside British India in Rajputana and the summons which was issued against him was returned by the Political Agent at Rajputana with the remark that it was impossible to serve it upon the Defendant in time as the date fixed for the hearing of the case was too close at hand. Before the summons so returned had reached the Court the suit was compromised by the fourth Defendant both for himself and the Plaintiff. The fourth Defendant professed to represent the Plaintiff on the basis of a

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power of attorney in his favour which authorised him to manage the partnership business, to continue, institute, prosecute, defend or oppose all suits that were or might be brought by or against the executant in respect of his business and property. The Plaintiff sued to have the compromise decree set aside, Held—That the Code contemplates service of summons upon the [redacted] and the action in the present [redacted] being in substance the same as if no summons had ever been issued for service on the Defendant, the decree made against the Plaintiff could not bind him. A judgment made under such circumstances as happened in the present case when the summons issued against the Defendant was returned unserved may be set aside on the ground that the Defendant must in essence be a party to the suit before the Plaintiff can have judgment against him. That the decree was also liable to be set aside on the ground that the power of attorney did not authorise the fourth Defendant to bind the Plaintiff by the compromise. That the decree was liable to be set aside not only in so far as the Plaintiff was concerned but also with regard to the fourth Defendant because the decree on the face of it was indivisible and could not be set aside in part. That the effect of the order of the High Court was to discharge the entire decree in the suit and to revive it for retrial. CHATTERJEE BRAHMIN v. DURGADUTT AGARWALLA 943

——— set aside—Effect on execution sale held in pursuance of such decree. See Sale 665

———, ex parte, set aside—Execution sale if holds good—Decree subsequently passed if validates sale. See Sale ... 667

——— of competent Court, if may be challenged in a fresh suit—Fraud practised on the Court, to be proved—Ex parte mortgage decree set aside against one Defendant—Re-hearing, fresh decree against all—Application for order absolute in respect of later decree, opposed by Defendants against whom previous decree not set aside—Objection overruled and decree absolute made—Suit to set aside decree on same grounds if competent—Merger of first decree in second, whether there is—First decree whether impliedly set aside.] Upon an application to set aside an ex parte mortgage decree passed against P, R and B, it was found that there was no proper service of summons upon B, and upon a re-hearing, a new and comprehensive decree against all three Defendants was passed. The decree-holder's application for an order absolute in respect of this decree was opposed by R on the ground that he was no party at the re-hearing and that the previous decree against him never having been set aside, a second decree in respect of the same matter could not be legally made against him. The objections were overruled and a decree absolute was made against all

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the Defendants. R then brought the present suit for a declaration upon the same grounds that the second decree was ineffectual and void as against him, Held—That the suit was equivalent to a suit for the rescission and destruction of a former decree of a competent Court—a relief which could not be obtained except on the ground of fraud practised upon the Court which made the decree. A challenge of the method of the exercise of the jurisdiction of a Court—a challenge which has reference to the merits of the case—can never in law justify a denial of the existence of such jurisdiction. RAJWANT PRASAD PANDE v. MAHANT RAM RATAN GIR (P. C.) 35

———, suit to set aside, on ground of fraud. See Fraud.

DEED—Interpretation—Conveyancing, device not intended to express true state of executant's mind, if to be given effect to. See Hindu Law—Woman's Estate ... 210

DEVANANDA BHATTA as authority on Hindu Law. See Hindu Law—Sussession 1

DIGWAR of Ghaut Bharra in Bankura—Office remunerated by land—Appointment and dismissal at Government's pleasure—Office, hereditary—Suit for declaration of title to office and recovery of land if entertainable—Power of Court to grant declaratory decree—Specific Relief Act (I of 1877), sec. 42—Civil Procedure Code (Act V of 1903), Or. 7, r. 7—Prayer for general relief—Specific relief other than that prayed for when may be given.] The question being as to the right to succeed to Ghatwali land in Ghaut Bharra in District Bankura, Held (with reference to the evidence)—That Jogendra Nath Singh v. Kali Charan Roy, 9 C. W. N. 663 (1905), had no application to the case as precedent. That the present was a case of an office remunerated by the possession of land and not of land burdened with the service of an office. Per Jenkins, C. J.—The office was hereditary subject to the qualification that the heir's claim and tenure of office were dependent on the approval of the Government. Per Mookerjee, J.—That the office itself was not hereditary, the Digwar being liable to removal for failure to discharge his duties satisfactorily and the Executive Government being free to appoint a qualified stranger as successor. K, a former Digwar having been dismissed 60 years ago, a stranger to the family M was appointed and on his death his son U, the Plaintiff, was appointed by the Magistrate but this appointment was set aside by the Commissioner in the view that the office was hereditary and the appointment was given to H, son of K, and Government to whom U appealed referred him to the Civil Court. U sued H for declaration of title and possession of the land, Held, Per Jenkins, C. J.—That the Commissioner's view of H's title was wrong, as K after his dismissal 60 years ago could not with

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reason be regarded as a stock of descent, Held, per Curiam.—That the Civil Court had no jurisdiction to reinstate a dismissed Ghatwal, but regard being had to the orders of the Commissioner and the Government, the Civil Court could properly make a declaration in favour of U. That though the suit was not framed as one under sec. 42 of the Specific Relief Act, the Court had power under Or. 7, r. 7, to pass a declaratory decree. Cockrell v. Dickins, 2 M. I. A. 389 (1840), Durga Prosad Sureka v. Bhajan Lall, L. R. 31 I. A. 122: s. c. 7 C. W. N. 489 (1904) and Gopi Narain Khanna v. Babu Bansidhar, L. R. 32 I. A. 123: s. c. 9 C. W. N. 577 (1905) relied on. Wallihan v. Joggeswar L. R. 35 I. A. 38: s. c. 12 C. W. N. 227 (1907) referred to. HEMENDRA NATH RAY v. UPENDRA NARAIN RAY ... 446

DISPOSSESSION" and "Discontinuance of possession," meanings of. See Limitation Act, Sch. I, Art. 142 481

————, whether catching fish in a streamlet amounts to. See Possession 1274

DISQUALIFIED PROPRIETOR, contract by—Decree made on such contract if may be executed against property after release from the Court of Wards. See Oudh Land Revenue Act 770

DOCUMENT bearing genuine signature—Burden on signatory to prove falsity of recitals. See Purdanashin Lady ... 638

————, misrepresentation, effect of, on. See Kabuliyat 1067

EASEMENT, creation of, if must be in writing registered—Transfer of Property Act (IV of 1882)—Preamble, ss. 3, 6 (c), 54, 123—Easement, if immoveable property—General Clauses Act (X of 1897), s. 3, cl. (25)—Registration Act (XVI of 1908), s. 2 (6).] The provisions of the Transfer of Property Act have no application to the creation of easements. No writing was necessary for the imposition of an easement before the Transfer of Property Act was passed; and secs. 54 and 123 of that Act were not intended to change and did not change the pre-existing law regarding easements so as to require a writing for their creation or imposition where no writing was previously necessary. Where a right of way is created in writing, sec. 2 (6) of the Registration Act may require registration but not if the value of the right is less than one hundred rupees, Held, therefore that the Courts below were right in decreeing the Plaintiff's claim of a right of way by grant upon parol evidence only. Bhagawan v. Narsingh, I. L. R. 31 All. 612 (1909) referred to. Though a right of way over other lands of the landlord cannot be acquired by prescription under sec. 26, Limitation Act, it can be created by grant. Madan Mohan v. Sashi Bhusan, 19 C. W. N. 1211 at p. 1214 (1915), followed. It is extremely doubtful whether a tenant who uses a pathway by the mere leave and license of the landlord is invested

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with anything in the nature of a right enforcible by suit. SITAL CHANDRA CHOWDHURY v. MRS. A. J. DELANNEY 1158

EJECTMENT—Non-transferable raiyati holding—Transfer. See Non-transferable Holding 610

————. See Estates Partition Act, s. 99 19

[redacted] proved. See Trespass ... ...

————, suit for—Lease of land for residential purposes—Law before the Transfer of Property Act (IV of 1882)—Onus to prove transferability—Presumption of transferability, if arises from long continued possession.] The effect of the recent decisions is that when a landlord sues a person on the allegation that he is a trespasser and that person sets up a transfer from a tenant, it is for the latter to prove, first of all, the tenancy and, secondly, the validity of the transfer. With regard to tenancies of homestead land created before the Transfer of Property Act, the tendency of these decisions has been to establish that in the absence of evidence to the contrary, the burden of proof being upon the tenant, these tenancies are non-transferable. Benee Madhub v. Joykissen 12 W. R. 495 (1869) and Durga Pershad Misser v. Bindaban Sookul 15 W. R. 274 (1871) referred to and doubted. The only exception made to the above rule is when there has been an erection of pucca buildings or a standing by on the part of the landlord while the tenant spends a large sum upon the land. Madhu Sudan Sen v. Kamini Kanta Sen, I. L. R. 32 Cal. 1023: s. c. C. W. N. 895 (1905) and Nabu Mondal v. Cholim Mullik, I. L. R. 25 Cal. 896: s. c. 2 C. W. N. 405 (1898) relied on. Mere long continued possession cannot give rise to a presumption of transferability. AMBICA PROSAD SINGH v. BALDEO LAL (Patna) 1113

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EQUITY, principles of, when and how far applicable. See Contract Act, s. 55 ... 744

————, doctrines of, not to be invoked for benefit of a party who does not come to Court with clean hands. See Acquiescence 657

ESTATES PARTITION ACT (V, B. C., of 1897), s. 99—Section reproducing provision of old Act already interpreted by Courts in a particular sense—Interpretation to be taken as approved by legislature—Lease granted of share held in severalty by private partition if may be avoided by another co-sharer to whom lands allotted on partition by Collector—"Common tenancy," what is—Pleadings and proof, variance between.] Sec. 99 of the Estates Partition Act applies only where the lands are held jointly by the proprietors and not in severalty in pursuance of a private arrangement between the parties. The decision in

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Ahmedoollah v. **Asruff Hossain**, 13 W. R. 447 (1870), which was followed in **Hridoynath** v. **Mahabatanessa**, I. L. R. 20 Cal. 285 (1892), is not, as is assumed in **Jay Sankari Gupta** v. **Bharat Chandra Bardhan**, I. L. R. 26 Cal. 434: s. c. 3 C. W. N. 209 (1899), inconsistent with and has not been overruled in effect by the decision of the Judicial Committee in **Baijnath** v. **Ramoodeen**, L. R. 1 I. A. 106 (1874), as in **Jay Sankari** v. **Bharat Chandra**, I. L. R. 26 Cal. 434: s. c. 3 C. W. N. 209 (1899), were held in common tenancy. Where a section of an Act, which has received a judicial construction, is re-enacted in the same words, such re-enactment must be treated as a legislature recognition of the construction. In **Exp. Campbell**, L. R. 5 Ch. App. 703 (1870), followed. The fact that the allegations of the Defendants in a suit for ejectment were found to be not true does not prevent them from contending that on the facts found, the Plaintiff's claim for ejectment must fail, when it appeared that each party had failed to realise the legal effect of the facts alleged by him. NAGENDRA MOHON ROY v. PYARI MOHON SAHA 319

ESTOPPEL. **See** Evidence Act, s. 115.

————, rules of, Evidence Act, if exhaustive as to. **See** Evidence Act, s. 115 1335

———— **See** Acquiescence 657

————, **Lessee inducted on land by a void lease if may plead lease void and created no rights—Lease registered in contravention of the law—Suit for damages for breach of covenant—Estoppel.**] In a suit for damages by a lessor against a lessee for breach of a covenant contained in a registered lease purporting to have been granted by the lessor as tenure-holder to the lessee as under-tenure-holder, it was found that in fact the lessor was an occupancy raiyat, and the lessee urged that the lease, having been granted and registered in contravention of sec. 85 of the Bengal Tenancy Act, was void and inoperative, **Held**—That the lessee was estopped from showing that the lease was void and that no interest passed to him. **Bhaiganta Bewah** v. **Himmat Badyakar**, 20 C. W. N. 1335 (1916), followed. That the Court was not precluded from so holding by the previous decisions of the High Court. BAMANDAS BHATTACHARYYA v. NILMADHAB SAHA 1340

————, **Mortgage, suit for redemption of—Mortgagee if can deny mortgagor's title.**] A mortgagee cannot resist a claim for redemption on the ground that the mortgagor had no title to the property included in the mortgage although he may establish that the title of the mortgagor has expired since the creation of the mortgage, it not being

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open to him to prove that the mortgagor lost his rights before the mortgage was executed. ABHURAM SIL v. HARA CHANDRA DAS 1231

EVIDENCE—Admission of one Defendant when evidence against others. **See** Evidence Act, ss. 18, 23 1217

EVIDENCE ACT (I of 1872), **s. 13—Previous** judicial proceedings, how far admissible in evidence. **See** Hindu Law—Religious Endowment 802

———— **s. 13—Judgment not inter partes, admissibility of, for proving admission by Defendant—Second appeal—Using document admissible for one purpose as evidence for another.**] The Plaintiff sued for recovery of his share in the land in suit. The Subordinate Judge in appeal admitted a judgment in a previous suit brought by another person against the Defendant and mainly relying on a certain passage therein as proving an admission by the Defendant decided in favour of the Plaintiff: **Held**—That the judgment was inadmissible in evidence for the purpose of proving the alleged admission and the error committed by the Subordinate Judge in using the judgment for a purpose for which it cannot be legitimately used vitiated his decree. That the proper mode of proving any admission made by the Defendant in the previous suit was by producing a copy of the Defendant's deposition or by putting in the witness-box some one who actually heard what the Defendant said. DEBENDRA NATH HALDAR v. BIRESHWAR HALDAR 648

————, **ss. 13, 42, 43—Judgment not inter partes—Admissibility in evidence—Recitals in judgment if admissible.**] It is well settled that although a judgment not **inter partes**, may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact, or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties. KASHI NATH PAL v. JAGAT KISHORE ACHARYA CHOWDHURY 643

————, **ss. 18, 23—Conversation between one of several Defendants and the Plaintiff's pleader about compromise of suit, if admissible in evidence—Admission of one Defendant when evidence against others.**] The Plaintiff sued the Defendants for recovery of arrears of rent due on a lease executed in favour of their father. The substantial defence was a plea of payment which was overruled by the Courts below. The material evidence in the case was that of the Plaintiff's pleader with whom one of the Defendants had two interviews, once about a month before the institution of the suit, when a form of settlement was suggested, namely, diminution of interest, and again on the day the suit was instituted, when the pleader was asked to make a compromise, **Held**—That as there was ad-

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mittedly no express condition that the evidence of the interviews should not be given, and it could not be inferred from the circumstances that the parties had agreed that the evidence should not be given, the evidence could not be excluded under sec. 23 of the Evidence Act. That the evidence of the Plaintiff's pleader as to what had passed between him and the Defendants who interviewed him for the settlement of the case was admissible and could be used even against the Defendants other than the Defendant who made the admission, all of them being jointly liable to the Plaintiff as the representatives in interest of their father. **Per** Sanderson, C. J.—That so far as the first interview was concerned the mere fact that it was contemplated between the parties that the suit was about to be instituted did not prevent the conversation as regards a settlement of the claim from being given in evidence. That the second conversation was a natural consequence of the first conversation and was not privileged. That the question whether the evidence of the interviews could be given against the Defendants other than the Defendant who made the admission depended upon sec. 18 of the Indian Evidence Act, which enacted the principle that for making statements with reference to the joint concern or common subject of interest one partner or co-contractor is considered to be the agent of the other. **Per** Mookerjee, J.—In the absence of any express or strongly implied restriction as to confidence an offer of compromise is clearly admissible and may be material as some evidence of liability although it may not be proper to enquire into the exact terms offered. That under sec. 18 of the Evidence Act an admission by one Defendant may in certain circumstances be admissible in evidence as against another Defendant. The principle is that when several persons are jointly interested in the subject-matter of the suit, an admission by any one of these persons is receivable not only against himself but also against the other Defendants whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. MEAJAN MATABOR v. ALIMUDDIN MEAN 1217

——————, s. 23. See s. 18 ...1217

——————, s. 32 (5)—Existence of relationship, statement relating to—Will not probated if can be used in evidence. See Hindu Law—Religious Endowment ..e 122

——————, s. 40. See s. 13 ... 643

——————, s. 40—Previous judicial proceedings how far admissible in evidence. See Hindu Law—Religious Endowment 802

——————, ss. 40, 42, 43. See s. 13 648

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——————, s. 42. See s. 13 ... 643

——————, s. 43. See s. 13 ... 643

——————, ss. 68, 69. See s. 70 ...1044

——————, s. 70—Suit on a mortgage-bond—Admission of mortgagee if sufficient to make mortgage admissible against other parties not admitting execution, without proof by attesting witnesses—Sec. 70 ... effect of ... Per ... roff and D... J., differing; ... a suit on a mortg... bond the admission ... execution by the sole mortgagor does not under sec. 70 of the Evidence Act dispense with the necessity of complying with the provisions of sec. 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution. The document must be proved as against them in accordance with the provisions of secs. 68, 69 and 70 of the Act. The effect of sec. 70 is that the proof by calling attesting witnesses is dispensed with, when the party executant admits execution, only as against him. **Jogendra Nath Mukhopadhya v. Nitai Churn Bundopadhya**, 7 C. W. N. 384 (1903), commented on. SATISH CHANDRA MITRA v. JOGENDRA NATH MOHALANABIS 1044

——————, s. 90—Sec. 90 of the Indian Evidence Act does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. KASHI NATH PAL v. JAGAT KISHORE ACHARYA CHOWDHURY... 643

——————, s. 92, prov. 1. See Landlord and Tenant ...1067

——————, s. 92, prov. 4—Registered kabuliyat—Acceptance by landlord for a long time of reduced rent, if precludes suit at kabuliyat rate—Admissibility of evidence of conduct to prove agreement to take rent at reduced rate or to prove that kabuliyat originally not intended to be acted upon.] The mere fact that the landlord accepted rent at a reduced rate from that stipulated for in the kabuliyat for some time does not bind the lessor to accept rent at that rate in future, as the reduced rent might have been accepted as a matter of indulgence which might be put an end to at any time. **Durga Prosad Singh v. Rajendra Narain Bagchi**, I. L. R. 37 Cal. 293: on P. C. I. L. R. 41 Cal. 493: s. c. C. W. N. 66 (1913), referred to. Under sec. 92, prov. 4 of the Evidence Act any variation of rent reserved by a registered lease must be made by a registered instrument and oral evidence is inadmissible to prove such variation, and an agreement is none the less oral because it is inferred from the conduct of the parties. Evidence that since the execution of the kabuliyat the tenant paid rent at a lower rate than that stated in the kabuliyat is admissible to show that the intention of the

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parties was that the kabuliyat from the very first was not intended to be acted upon or that there had been a waiver of the strict terms of the lease. **Benimadhub Gorain v. Lalmoti Dasi**, 6 C. W. N. 242 (1898) followed. MANINDRA CHANDRA NANDI v. SRIMATI DURGA SUNDARI DASSYA ... 680

——————, s. 92, prov. 5—Evi[redacted] incidental to [redacted] Arbitration 865

——————, s. 114, Ill. (d)—Ex parte decree for rent, value of, for determining question of relationship of landlord and tenant in a subsequent suit—Presumption of continuance of relationship. See Landlord and Tenant ... 48

——————, s. 115—Estoppel—Minor if may be estopped from repudiating contract induced by representation that he was sui juris—Misrepresentation, not fraudulent—Contract Act (IX of 1872), sec. 10.] The law of estoppel must be read subject to other laws such as the Indian Contract Act and a minor cannot be made liable upon a contract by means of an estoppel under sec. 115 of the Indian Evidence Act. **Dhurmadas v. Brohmo Dutt**, I. L. R. 25 Cal. 616: s. c. 2 C. W. N. 330 (1898), followed. **Surendra Nath Roy v. Krishna Sakhi Dasi**, 15 C. W. N. 299 (1911), where there was fraudulent misrepresentation, distinguished. GOLAM ABDIN SARKAR v. HEM CHANDRA MAJUMDAR ... 418

——————, ss. 115, 116 and 117—Lessee if may deny lessor's title after expiry of term—Possession given by lessor and retained after expiry of term—Estoppel, rules of—Evidence Act, if exhaustive as to.] A lessee, so long as he retains the possession he obtained from the lessor, cannot, even after his term has expired, set up in the lessor's suit for ejectment the defence that the lessor had no title at the time the lease was granted. This rule has not been affected by sec. 116 of the Indian Evidence Act. Secs. 115 to 117 of the Evidence Act are not exhaustive as to the rules of estoppel in force in British India. SM. BHAIGANTA BEWAH v. HIMMAT BADYAKAR 1335

EX PARTE decree and sale thereunder—Suit to set aside decree and sale on the ground that processes suppressed in collusion with officers of Court—Suit if maintainable. See Fraud 819

—————— decree—Application to set aside refused—Suit to set aside decree on ground of fraud if lies. See Fraud ... 845

—————— decree for rent, value of, for determining question of relationship of landlord and tenant in a subsequent suit. See Landlord and Tenant ... 48

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——, Trial Judge's finding on question of, value of. See Hindu Law—Religious Endowment 802

——, finding of, by trial Judge, weight to be attached to. See Admiralty Jurisdiction 1022

——, concurrent findings of, by lower Courts, dismissal of appeal for. See Bengal Tenancy Act, s. 153 1353

——, findings of fact, reversal of, on appeal.] Sanderson, C. J.—When the trial Judge has had to deal with conflicting verbal evidence on a question of fact and after seeing and hearing the witnesses has come to the conclusion that the truth lies on one side and not on the other, the Court of Appeal should not interfere unless it is clear that the Court below has come to a wrong conclusion, which in this case, his Lordship was not prepared to hold that the Court below had. Woodroffe, J.—If after argument, the Court of Appeal has a conviction that the judgment under appeal is erroneous it should not be affirmed and this is not the less so because the judgment raised a question of fact. Mookerjee, J., on review of authorities, held that the Appellate Court was entitled to reverse the findings of fact and allow an appeal if it was convinced that the trial Judge came to an erroneous conclusion on the evidence, the burden lying on the Appellant to satisfy the Court that the finding he assails is not supported by the evidence. LALLJEE MAHOMED v. DADABHAI JIVANJI GUZDAR ... 935

FIDUCIARY RELATIONSHIP—Betrayal of trust—Fraud by fiduciary, when may be condoned—Limitation, if applies to defence—Time for recovery runs from when. See Purdanashin Lady ... 957

FOREIGN COURT, suit in, on cause of action tried, and determined between the parties in a British Indian Court—Latter Court if may issue perpetual injunction to restrain proceeding in Foreign Court—Res judicata—Civil Procedure Code (Act V of 1908), secs. 11, 13—Specific Relief Act (I of 1877), sec. 56 (B).] A A, a Mahomedan, died leaving estates situate partly within British India and partly within the ceded district of the Feudatory State of Rampur, and leaving him surviving a widow, a daughter and her children. The daughter and her children alleging that A A was a Shia and that therefore the daughter excluded the residuary heirs from inheritance instituted a suit against the latter in a British Indian Court, (viz., the Court of the Subordinate Judge at Bareilly), where their

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claim was opposed by the residuaries, and finally obtained an ex parte decree upholding their claim, the Defendants having failed to obtain an adjournment which they said was necessary to enable them to call witnesses. This decree was affirmed by the High Court at Allahabad. Meanwhile the residuaries instituted against the daughter and her children a suit in a Court of the Rampur State for possession of a moiety of the estate of A A situate in the ceded district of Rampur State, claiming, as they had done in their defence in the other suit, that A A was a Sunni. The daughter and her children thereupon instituted another suit in the Court of the Subordinate Judge at Bareilly praying for a declaration that the previous decree of that Court was binding between the parties and operated as **res judicata** and that the Defendants (the residuaries) be restrained by a perpetual injunction from continuing their suit in the Court of the Rampur State. The Subordinate Judge as well as the High Court at Allahabad on appeal having held that they had no jurisdiction to grant the injunction and dismissed the suit, the Privy Council on the appeal of the Plaintiffs affirmed that decision and dismissed their appeal. **Maqbul Fatima v. Amir Hasan Khan**, I. L. R. 37 All. 1 (1914), affirmed. MUSSAMMAT MAQBUL FATIMA v. AMIR HASAN KHAN (P. C.) 1213

FOREST ACT (Madras) (V of 1882)—Decision of District Court if final. See Adverse Possession 1311

FRAUD—**Suit to set aside ex parte decree on ground of fraud if lies, when application to set aside refused.**] A suit by the Defendant to set aside an ex parte decree as fraudulent does not lie after an infructuous application to set it aside under sec. 108 of the Civil Procedure Code of 1882, if the fraud in respect of which the decree is sought to be set aside was properly in issue in the application under sec. 108 and was determined upon such application. **Radha Raman Saha v. Pran Nath Roy**, I. L. R. 28 Cal. 475: s. c. 5 C. W. N. 756 (1901), **Khagendra Nath Mahata v. Pran Nath Roy**, I. L. R. 29 Cal. 395: s. c. 6 C. W. N. 473 (1902), **Bal Kishan Lal v. Topeswar Singh**, 15 C. L. J. 446, 448 (1911), **Mussummat Gulab Koer v. Badshah Bahadur**, 10 C. L. J. 428 (1909), **Puran Chand v. Sheodat Rai**, I. L. R. 29 All. 212 (1906) and **Naidar Mal v. Ranuak Husain**, I. L. R. 29 All. 608 (1907), referred to. KHIRODE CHANDRA ROY v. SRIMATI ASHTULLABU 845

——— Execution sale if void or voidable when decree fraudulent. See Sale 659

———, **Ex parte decree and sale thereunder—Suit to set aside decree and sale on the ground that processes in suit and execution suppressed in collusion with officers of Court—Suit if maintainable—Case of fraud, pleading and proof in.**] Where the Plaintiff in a suit to set aside an ex parte rent decree and sale

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held thereunder alleged that the Defendants had in collusion with the officers of the Court, caused a suppression of the processes in the suit as also in the execution proceedings, **Held**—That if this allegation had been established, the Plaintiff would have been entitled to succeed. The mere circumstance that a Defendant had failed to have [redacted] ex parte decree [redacted] knowledge of the fact [redacted] P. C. (ying [redacted] aside on the ground of material [redacted] gularity does not debar him from seeking relief in a suit properly framed for the purpose on the ground that the suit itself was a fraudulent suit and that the proceedings therein were vitiated by fraud. But to enable the Plaintiff to succeed in a suit so framed, he must specifically allege the circumstances of fraud and he must prove the fraud as laid in the plaint. Fraud how to be pleaded and in what manner established discussed. NAGENDRA NATH BOSE v. PARBATI CHARAN 819

——— **different from that alleged in plaint if can be relied on—Duty of Plaintiff to state facts constituting alleged fraud—Document bearing genuine signature—Burden on signatory to prove falsity of recitals.**] When a Plaintiff impeaches a transaction on the ground of fraud the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated. That a charge of fraud must be substantially proved or laid and when one kind of fraud is charged, another kind of fraud cannot upon failure of proof be substituted for it. That the rule that the Court will grant only such relief as the Plaintiff is entitled to upon the case made by his pleadings is strictly enforced when the Plaintiff relies on fraud. That when a party seeks to avoid the Statute of Limitation on the ground of fraud the statement of claim should set forth specifically the particular acts which constitute the fraud as well as the time when it was discovered in order to enable the Defendant to meet the fraud and the alleged time of its discovery so that the Court may see whether by the exercise of ordinary diligence the discovery might not have been made before. BANSIRAM v. PANCHAMI DASI 628

———, suit to challenge decree of competent Court on the ground of. See Decree 35

FULL BENCH, **when a reference should be made to.**] Advantage of referring matters upon which a difference of opinion has arisen in the High Court to a Full Bench adverted to. BUDDHA SINGH v. LALTU SINGH (P. C.) ... 1

GENERAL CLAUSES ACT (X of 1897), s. 6—Rights and remedies under a repealed Act. See Civil Procedure Code, s. 48 ... 952

GOVERNMENT, duty of, to ascertain and obey law. See Injunction 457

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——————, right of, to assess land revenue if may be time-barred. See Reg. (Bengal) of 1805, II, s. 2 ... 576

——————, Order granting injunction binding on party though it prohibits receiving payment from Government and Government authorised to pay by statute Government's duty. See In-ju[redacted] 457

GO[redacted] of 1915, [redacted] High Court's power [redacted] interference with order of Small Cause Court returning plaint. See Small Cause Courts Act, s. 23 (1) 1080

GRANT—**Presumption of lost grant, in absence of proof of legal title, on the basis of user exercised and enjoyed.**] Where a Court is asked to presume a grant in favour of a party in the nature of a lost grant, i.e., a lawful origin of a long and continuous user and enjoyment of property in the absence of legal proof of title, it should presume a grant on the basis of the user exercised and enjoyed by that party. NAWAGARH COAL COMPANY, LIMITED v. BEHARILAL TRIGUNAIT (Patna) 1135

——— **by the Maharaja of Chota Nagpur—Custom of primogeniture—Impartibility of the estate—Proof of custom, onus of**—Lex loci **custom of Chota Nagpur—Meaning** of putra pautradi.] Certain grants of **jaigirs** by the Maharaja of Chota Nagpur to a person related to him or to his descendants dating from 1768 to 1786 were in terms to the grantee and his sons and grandsons **(putra pautradi)**. The family of the grantee had for several generations interpreted the words "**putra pautradi**" in the literal sense, namely, to mean, son and son's son. **Held**—That at the time of these grants the words had not acquired in Chota Nagpur the technical meaning which according to the Privy Council in **Lalit Mohun** v. **Chukkun Lal**, L. R. 24 I. A. 76: s. c. 1 C. W. N. 387 (1897), they came to have by 1868 when used in Wills executed in Bengal, and the grants in this case did not convey an absolute estate unconditioned and unlimited. **Per** Atkinson, J.—That although as held by the Privy Council the words convey an absolute estate in lands descendable from generation to generation coupled with full power of alienation, these words of limitation may be controlled by custom limiting their scope and operation. **Perkash Lal** v. **Rameswar Nath Singh** I. L. R. 31 Cal. 561, 569 (1904), relied on. Up to 1862, the lands granted descended regularly according to the rule of primogeniture to the eldest lineal descendant of the eldest son, when the last male descendant of that line dying leaving a widow, the Maharaja proceeded to resume the property whilst two brothers, the descendants of a younger son, claimed to succeed to the property. The disputes terminated in two deeds, one executed by the brothers agreeing that the widow should hold

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possession of the property as long as she lived upon payment of rent to the Maharaja and that they should take possession after her death, and the other by the Maharaja purporting on receipt of consideration to release the lands to the brothers in equal shares. **Held**—That as there was no failure of heir in the line of the grantee, the Maharaja had no right to resume and the **sanad** to the brothers was a nullity. **Per** Chapman, J.—That as the younger of the brothers had the right to succeed on the death of the elder without male issue, his concurrence to the deed in favour of the widow might have been taken to avoid future trouble. **Per Atkinson**, J.—That the agreement was ineffective to alter or vary the impartible character of the property or to change its method of devolution. **Per** Atkinson, J.—The custom of primogeniture which prevails in Chota Nagpur in the case of grants made by the Maharaja whereby the property so granted is deemed impartible and descends to the eldest male heir by lineal descent applies with greater force in the case of grants of property made between the Maharaja and his relations. **Kopilnauth** v. **Government**, 22 W. R. 17 (1874), referred to. Where a custom prevails in one branch of a family it is strong evidence to be relied on that it applies with equal force to another branch of the same family. **Garuradhwaja Prasad** v. **Superunshwaja Prasad**, 5 C. W. N. 33: s. c. I. L. R. 23 All. 37 (P. C.) (1900), relied on. The custom is recognised, not only as a family custom prevailing in the Maharaja's family, but also as the **lex loci** custom of Chota Nagpur. LAL GAJENDRA NATH SAHI DEO v. LAL MATHURA NATH SAHI DEO (Patna) 876

GUARDIAN. See Minor 201

GUARDIANSHIP—Mother of Hindu infants charged with bad character and found to have expressed intention to become and make her boys Christian—Fitness for guardianship. See Hindu Law—Guardianship 608

GUARDIANS AND WARDS ACT (**VIII of 1890**), **s. 34 (d), 45 (b)—Guardian failing to pay full amount of purchase-money of property sold with permission, because purchaser retained a portion in discharge of old debt—Daily fine, order to pay, if legal.**] Where a certificated guardian of minors obtained permission to sell a portion of their estate on the representation that the money (about Rs. 3,000) was wanted to repair their house, and submitted accounts showing that out of Rs. 5,000 obtained by the sale, Rs. 4,000 had been retained by the purchaser in payment of a sum of Rs. 4,000 which the guardian had borrowed from her to give the minors in marriage, and the Judge thereupon called upon the guardian to pay the said amount of Rs. 4,000 in Court within a specified time and directed that on failure to do so the guardian was to pay a fine of Rs. 5

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per diem, Held—That the amount the guardian was called upon to pay was not an amount of balance due from the guardian as the same had not been paid to her, nor was it a balance due on accounts filed in compliance with a requisition under cl. (d) of sec. 34 of the Guardians and Wards Act and the order imposing a daily fine was ultra vires. NIKHRANNESSA BIBI ... 663

GUNNY MARKET, Calcutta, usage of—Broker liable as undisclosed principal. See Arbitration 365

HIGH COURT—Decree of Division Bench of two Judges found erroneous—Jurisdiction of single Judge to amend decree—Re-hearing of case by single Judge without authority from Chief Justice—Jurisdiction. See Civil Procedure Code, Or. 47, r. 8 1165

———— General Rules and Circular Orders, Ch. XI, r. 45 (c), Vol. I., p. 301, interpretation of. See Vakalatnama 287

———— RULES, Appellate Side, Chap. XI, r. 4, applicability of. See Review 967

HINDU LAW, progressive character of. See Hindu Law—Partition 702

————, Aparārka, Nanda Pandita Devananda Bhatta, Visweswara Bhatta, as authorities. See Hindu Law—Succession 1

————, "Putra," "Santana," "Sunu," meaning of. See Hindu Law—Succession 1

————, rules of, if to be considered in determining rights and liabilities arising under contract between Hindus. See Brokerage 708

————, ADOPTION—Adopted son and natural born son—Change of adopted son's position in Hindu society. See Hindu Law—Partition 702

————, ADOPTION—Dayabhaga—Kayasthas, in Bengal, Sudras—Adoption, amongst Kayasthas, religious ceremonies if essential—Religious ceremonies postponed after actual giving and taking—Adoption during pollution through birth of agnate—Validity—Afterborn natural son of Sudra, and adopted son, shares of, if equal—Agreement by adoptive father to give equal share, if valid—Properties held by adoptive father as shebait, adopted son if may claim to hold as shebait jointly with afterborn son—Pittrikrityas, and Debakrittas—Proof that property has been endowed as debutter—Dattaka Chandrika, authority of.] Kayasthas, according to the law prevalent in Bengal, are considered as Sudras. No religious ceremony is necessary for an adoption amongst Kayasthas, mere giving and taking of a son being sufficient to give it validity. The putresthi jag and namkaran not being essential ceremonies in an adoption between Sudras, the fact that they took place subsequently to the giving and taking

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did not affect the validity of the adoption. Pollution on account of the birth of a relative does not vitiate an adoption. It is only a bar to religious acts and renders religious ceremonies inefficacious; but gift and acceptance of a son are secular acts. Santappayya v. Rangappayya, I. L. R. 18 Mad. 397, 398 (1894), followed. Such pollution results from the knowledge of the fact of birth. In laying [redacted] ed son [redacted] equally with the afterborn natural son, the Dattaka Chandrika has in no way deviated from the smritis, and the rule, which has been accepted as correct by both the Madras and Calcutta High Courts, should not be departed from. An ekrar-patra of the adoptive father covenanting that an afterborn natural son of his shall not be entitled to claim a larger share but will divide the inheritance equally with the son he was adopting, is valid and operative. Surendra Keshab Roy v. Doorga Soondary Dassee, I. L. R. 19 Cal. 513, 536 (1892) and Bhala Nahana v. Prabhu Hari, I. L. R. 2 Bom. 67 (1877), referred to. It is now settled law that, as regards inheritance, the adopted son holds in all respects the same position as an aurasa son except in some special matters. An aurasa son has a superior right in respect of pitri-matri krityas but there is no such preference in respect of shevas or deva krityas, Held—Therefore, that an adopted son of a Sudra was entitled to inherit debutter properties in the right of shebaitship, jointly with an afterborn natural son. ASITA MOHON GHOSH MOULIK v. NIRODE MOHON GHOSH MOULIK ... 901

————, ADOPTION—Authority to adopt, verbally given, before death—Proof—Relevancy of Will, which contained no directions for adoption, made two months before death, in estimating probabilities—Probable change of intentions—Witnesses, testimony of, opinion of Trial Judge, value of Discrepancy in witnesses' statements, consideration of—Non-citation by either side of witness who went over from one side to the other—Case raised in first Court, not urged in appeal, if should be allowed to be raised on further appeal.] R, a Hindu mahajan of means, died on 11th February 1896, leaving him surviving a widow and a daughter. He had been suffering from phthisis for some time. Two months before his death he executed a Will, by which he made a very modest provision for his daughter, and gave his wife a life-interest in the bulk of his properties (which, however, she was liable to forfeit if she behaved contrary to the injunctions of the Will). The testator had been hopeful that a son might be born to him, and the son, if born, was, under the Will, to be the "sole executor, donee and owner." The Will contained no power to adopt a son. Seven years after the death of R, his widow adopted an infant son of R's

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nephew J, born after R's death. By his Will R had expressly excluded J, on account of his profligacy and irreligion, from participation in his funeral ceremonies, preferring for that purpose his sister's son B, in whom he had confidence and who lived in the same house with him and whom he appointed one of his executors. The authority for the adoption was given [illegible] (when he appeared to have become aware of the serious nature of his illness) verbally to his wife, in the presence of several respectable witnesses, most of whom deposed that R had expressly directed a son of J (should one be born) to be taken in adoption. The Trial Judge had held the alleged authority to adopt to have been proved. But the High Court on appeal reversed that finding, relying chiefly upon the contrary inferences regarding probabilities arising from the language of the Will and discrepancies in the depositions of the several witnesses who spoke to R's giving the authority to adopt, **Held**—By the Judicial Committee, that the probabilities were not adverse to the view that the testator might have modified his original intentions as expressed in his Will which was executed before he came to realise how short his life was, and the balance of testimony being distinctly in favour of the story that the authority to adopt had been given, not only had the Trial Court not approached the case with bias but had taken a fairer and less one-sided view of the facts than that which prevailed in the High Court. That the view of the Judge who tried the case and saw nearly all the witnesses on a question of evidence such as this was obviously entitled to great weight. That such discrepancies as there were might well be accounted for by the fact that the conversation which the witnesses described had taken place some 13 years previously. At the trial, the widow of R, who first came forward to support the adoption, appeared later on to have gone over to the opposite camp, viz., of B, who was opposing the adoption. **Held**—That the omission by both parties to cite her as a witness was in the circumstances justifiable. The question whether assuming authority to adopt to have been given, the adoption of J's son would make him a son of the testator capable of taking under the terms of the Will was raised in the Trial Court and decided in favour of the adopted son and it was not argued in the Appeal Court. The Judicial Committee in the circumstances did not allow the question to be raised before them. ADWAITYA PRASAD v. BALDEO DASS (P. C.) 650

——————, **ADOPTION by Brahmin—Dattahoma ceremony not performed—Adoption if valid—Adopter and adoptee of same gotra.**] **Held**, on a review of authorities, that the **dattahoma** ceremony is not essential when the adopted boy is of the same **gotra** as the

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adopter, even amongst the twice-born classes. RETKI v. LAK PATI PUJARI 19

——————, **DEBUTTER.** See Hindu Law—Religious Endowment.

——————— **EMIGRATION—Memons of Cutch—Settlement in East Africa amongst Mohamedans—Hindu law rules of succession, if continues to apply to emigrants—Presumption—Domicile.**] Where a Hindu family migrate from one part of India to another, **primâ facie**, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country and being themselves Mohamedans settle among Mohamedans, the presumption that they have accepted the law of the people whom they have joined is the one that should be much more readily made. Where certain members of the Memon community at Cutch (who, being originally a sect of Hindus, upon conversion to Mohamedanism, did not adopt the Mohamedan law as to succession but retained the Hindu law of succession as a customary law binding upon the entire community) about half a century ago emigrated to Mombasa in East Africa where they settled down among people who professed the Mohamedan religion, **Held**—That in order to raise the presumption that the emigrants accepted the Mohamedan law of succession, all that had to be shown was that they had so acted as to raise the inference that they had cut themselves off from their old environments. That the analogy here was that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India. **Held**—That the Mohamedan law of inheritance governed the devolution of property left by a deceased Memon settler in Mombasa when it did not appear from the evidence that the Memons in Mombasa had at any time established any distinctive political or social organisation for themselves or ever as a body claimed to be outside the system of law which prevailed among the Mohamedans of Mombasa. ABDURAHIM HAJI ISMAIL MITHU v. HALIMABAI (P. C.) 362

——————, **GUARDIANSHIP—Mother of infants intending to become and make her boys Christian—Fitness to be Guardian—Bad character not proved—Undertaking not to baptise children—Associating Hindu uncle in guardianship.**] D, the uncle of two fatherless Hindu boys aged 7 and 5 years respectively, applied to be appointed their guardian, alleging that their Mother S, was a woman of bad moral character and had made up her mind to adopt the Christain religion and to get her sons baptised. The first allegation was not established. **Held**—That the charge of immorality, though not proved, made it impossible for S to live with the family who made the charge

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must be taken into consideration in passing orders on the petition. That S's expressing a desire to become a Christian or even becoming one would in itself be no ground for removing her from the guardianship, provided she was in a position to satisfy the Court that she was able to carry out the obligations which the law imposed upon her of bringing up her children in the faith of her husband, whatever the faith she herself might adopt. It was proved that she had expressed her intention to convert her sons to Christainity, but her counsel having given an undertaking that she would not baptise her children, the Court passed order appointing her guardian of the minors' person and property, associating in the guardianship the uncle D, who would as such guardian be in a position to set that S's undertaking to bring up the children in the Hindu faith was properly carried out. The older boy was ordered to be placed at once as a boarder in a Hindu hostel which though attached to the Church Missonary Society was conducted in conformity with Hindu religious views, the younger boy being also ordered to be similarly placed when he should attain the age of 7 years until which time he was to live with S, liberty being given to D to apply to the District Judge whenever a breach of the undertaking was apprehended. DWIJAPADA KARMAKAR v. MISS BAILEAU 608

——————, **INFANT—Power of manager to alienate property—"Benefit" of estate as justifying alienation—Speculative development of minor's estate, if for benefit.**] The rule laid down by the **Judicial Commitee in Hanooman Pershad Pandey** v. **Munraj Koonwar**, 5 M. I. A. 373 at p. 423 (1856), is not restricted to cases of mortgage or other forms of partial alienation, nor is it restricted in its application to cases of necessity alone, for a "benefit" of the estate is there differentiated from the "need" of the estate as a circumstance justifying alienation. But mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is for the benefit of the estate within the meaning of the rule which could not have been intended to include cases of speculative development of estates of minors. KRISHNA CHANDRA CHOUDHURY v. RATAN RAM PAL 645

——————, **JOINT FAMILY—Father's debt, liability of son to pay—Mortgage by father, not proved immoral—Decree against father and sons, form of—Consideration proved—Lender if bound to prove application of money as stated in bond.**] If the consideration for the mortgage was received by the mortgagor, the mortgage cannot be held inoperative merely because the mortgagee has failed to prove that the money was applied as stated in the mortgage bond.

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Kishun Pershad Choudhury v. **Tipan Pershad Singh**, I. L. R. 34 Cal. 735: s. c. 11 C. W. N. 613 (1907), followed. The mortgage being one executed by a Mitakshara father, and the sons having failed to show that the loan was taken for immoral purposes, a decree was passed in the form it was made in **Kishun Pershad** v. **Tipan Pershad**, I. L. R. Cal. 735: s. c. [illegible] e.g., mortgage [illegible] of the father, and [illegible] the sale of that share was insufficient to satisfy the debt, interest and costs, balance to be realised by sale of the son's shares and interest in the ancestral property so far as necessary—six months' time being allowed for redemption. BABU KRISHNA PRASAD v. BABU RAMPERSHAD SING 508

——————, **JOINT FAMILY—Son's liability to pay father's debt—Mortgage by Mitakshara father—Son, though of age, not a party to the deed—His liability—Moral obligation to pay father's debts, unless incurred for immoral purposes—Legal proof of immoral purposes.**] Liability on the part of a son to pay a father's debt arises from moral and religious duty and obligation and this is so even though the debt is not incurred for the benefit of the individual or for the estate. A son can only exempt himself from liability if he can establish that the father was guilty of applying the money for some immoral purpose. Although there need not be any direct proof that the money was raised to be spent on any particular person, yet one must be reasonably satisfied that the father was a man of vicious, extravagant and lustful habits and that he raised the money for the purpose of applying it for the immoral purpose. In some way by reasonable legal proof it must be shewn that there is a connection with the debt and the immoral purpose. **Chintamanrav Mehendale** v. **Kashinath**, I. L. R. 14 Bom. 320 (1889) and **Dattatraya Vishnu** v. **Vishnu Narayan**, I. L. R. 36 Bom. 68 (1911), referred to. To be liable on a mortgage executed by the father for a purpose not proved to be immoral, it is not necessary for the adult sons to be parties to the bond. The case of **Upooroop Tewary** v. **Lalla Bandhjee Sahay**, I. L. R. 6 Cal. 749 (1881), seems to have been overruled if not distinctly qualified by the later case **Baso Kooer** v. **Hurry Das**, I. L. R. 9 Cal. 495 (1882). BHAGAT MAL SAHU v. SK. ABDUL KARIM (Patna) 797

——————, **JOINT FAMILY—Mortgage by two out of three brothers—Death of one executant—Suit against other executant and the non-executing brother only as representing the deceased executant—Ex parte decree and sale—Non-executing brother's original share if passed by the sale. See Mortgage** 675

——————, **JOINT FAMILY—Mitakshara School—Suit for partition—Karta**

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if accountable and to what extent—Account of property as they exist—Karta's statement if conclusive.] In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the karta is liable for is as to the existing state of the property divisible. The parties have no right to [illegible] relief against [illegible] ment of the [illegible] ons. But this does not mean that the parties are bound to accept the statement of the karta as to what the properties consist of, for that would not be an account at all. The karta is the accountable party and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property consists of. PORMESHWAR DUBEY v. GOBIND DUBEY ... 2

——— JOINT FAMILY—Joint partnership business—Contract by family if terminates with death of a coparcener—Rights and liabilities of coparceners if can be determined by exclusive reference to Indian Contract Act. See Brokerage Contract 708

———, **PARTITION—Adopted son of one brother if may share equally with natural-born son of another—Position of adopted son, where no legitimate son subsequently born to adoptive father—Hindu Law, progressive character of—Change in adopted son's position in Hindu society.**] In cases of distribution of family property by partition, an adopted son (according to paragraphs 24 and 25 of sec. 5 of the Dattaka Chandrika) stands exactly in the same position as he would stand if he were a naturally-born son of his adoptive father, subject to this qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son. Upon this interpretation, paragraphs 24 and 25 of sec. 5 of the Dattaka Chandrika are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha and they are consistent with the reference to the text of Vasistha in paragraph 1 of sec. 10 of the Dattaka Mimansa. Where of two brothers, B and H, who were members of a joint Hindu family, B left a widow who adopted the Plaintiff as B's son, and H left Defendant, his natural-born son, **Held**—That in a suit for partition Plaintiff was entitled to an equal share of the coparcenary property with the Defendant. Markby and Prinsep, JJ.'s interpretation of paras. 24 and 25 of sec. 5 of the Dattaka Chandrika in **Raghubanund Doss v. Sadhu Churn Doss**, I. L. R. 4 Cal. 425 (1878), overruled. **Tara Mohun Bhuttacharjee v. Kripa Moyee Debia**, 9 W. R. 423 (1868), and statement as to adopted son's status in Mitter, J.'s, judgment in **Kali Komul Mozoomdar v. Uma Shunkur Moitra**, L. R. 10 I. A. 138 (1883), approved. NAGINDAS BHUG-

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———, **PARTITION—Mitakshara—Joint family property, partition of—Individual if may sever himself from family by his own act and how—Division into metes and bounds, if essential—Agreement by all members to divide, if essential—Distinction between severance of status and division of property—Suit for partition by co-sharer—Plaintiff's death pending suit—Widow if may continue suit.**] Under Hindu Law, "separation," *i.e.*, severance of the status of jointness is a matter of individual volition, and agreement between all the coparceners is not, still less is actual division and distribution of the property held jointly, essential to the disruption of the joint status. Once an individual cosharer has unequivocally expressed and clearly intimated to his cosharers his decision to sever himself from the joint family, his right to obtain and possess the share to which he admittedly has a title is unimpeachable. Neither the cosharers can question it, nor can the C[illegible]mine his conscience to find out whether his reasons for separation were well-founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others. The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit. H, one of the members of a joint Mitakshara Hindu family, served on his coparceners a registered notice in which he affirmed in explicit terms his desire to get partitioned his one-third share and then instituted a suit for partition. The Defendants, somewhat unwillingly, agreed to the demand and admitted the Plaintiff's share in the joint property and the extent thereof; and all that remained for the Court to determine was the best mode of effecting the division; but before this could be done, H died leaving him surviving his widow who applied for substitution of herself on the records in the place of the Plaintiff: **Held**—That H had indicated his intention to separate himself most unequivocally by the registered notice, coupled with the suit, and that these acts amounted to a separation with all its legal consequences. That on the facts there was no disagreement or averseness on the part of the Defendants to the Plaintiff's demand for separation. That the widow of H was entitled to have H's one-third share separated and given to her. **Suraj Narain v. Ikbal Narain**, L. R. 40 I. A. 40: s. c. 17 C. W. N. 333 (1912), **Madho Pershad v. Mehrban Sing**, L. R. 17 I. A. 194, 196: s. c. I. L. R. 18 Cal. 157 (1890), **Deo Bunsee Kooer v. Dwarka Nath**, 10 W. R. 273 (1868), **Joy Narain Giri v. Grish Chunder Mytee**, L. R. 5 I. A. 228

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(1878) and Vato Koer v. Rowshun Singh, 8 W. R. 82 (1867), referred to. Dictum of Lord Westbury in Appovier v. Rama Subha Aiyan, 11 M. I. A. 75 (1866), explained. MUSSAMMAT GIRJA BAI v. SADASHIV DHUNDIRAJ (P. C.) ...1085

————, RELIGIOUS ENDOWMENT—Proof that property has been endowed as debutter—Permanent image if essential to valid dedication.] A permanent image is not absolutely essential for dedication to a Thakur. Where the intention of the donor appeared to have been to dedicate the property absolutely to deva sheba, the fact that the income of the property exceeded the expenses of the sheba and the shebaits frequently dealt with the property or the income as personal property would not make the property secular subject to a charge for the deva sheva. ASITA MOHON GHOSE MOULIK v. NIRODE MOHON GHOSE MOULIK 901

————, RELIGIOUS ENDOWMENT—Muth or asthal, position of mahant, that of trustee—Appointment by reigning mahant of a married relation as successor in violation of the vows of the order and abdication in his favour, a breach of trust—Mahant if entitled to continue in office—Succession—No general customary law—Usage of each muth to be proved and applied—Previous judicial proceedings, how far admissible in evidence—Trial Judge's finding on question of fact, value of.] Property of a muth or asthal is held by the mahant as its owner in trust for the institution, and succession to him in such property follows with the succession to the office. Although large administrative powers are undoubtedly vested in the reigning mahant the trust exists and must be respected. As the mahant is not only a spiritual preceptor but also a trustee in respect of the asthal over which he presides, a Court will be justified on proper grounds in removing him from office. The reigning mahant A of an asthal having by a series of deeds appointed his nephew as his successor in office and abdicated in his favour, Plaintiff claiming to be the senior chela of A challenged the Defendant's title, first, on the allegation of a custom of the asthal by which the senior chela alone succeeded and secondly, on the allegation that the Defendant being a married man with children was disqualified from holding the office of mahant. By the custom of the asthal, the mahant had to be a bairagi or celibate chela. The Defendant denied that he was married and alleged a custom of succession by appointment from amongst the chelas by the regning mahant. Held—That questions of succession to the mahantship in India are not settled by an appeal to general customary law. It must depend upon the custom and usage of the particular muth or asthal. That neither party had proved the custom alleged by him. A note in the Magistrate's judgment of an admission made by a witness in a criminal case or a copy of recorded evidence of the witness was not by itself admissible as evidence in a later civil suit between the parties, and was rightly rejected by the Trial Judge, though the fact that the witness (who was acting in the civil suit as the legal representative of the party affected by such admission and was present in Court when the note was produced) was not called by him into the box to clear up the matter or deny that he made the statement or explain it. The note made a deep impression regarding the allegation that the Defendant was a married man, the Trial Judge found upon the evidence adduced that the allegation had been established. Held—That upon such a question of fact, the verdict given by the Trial Judge who had the advantage of seeing and hearing the witnesses, could not be lightly set aside, specially as that Judge was also presumably acquainted with the manners and customs of the people among whom the transaction was alleged to have occurred. The High Court which reversed the Trial Judge not having stated sufficient grounds for disturbing his verdict, and upon an examination of the evidence, Held—further, that this rule could not be safely departed from in the present instance. As part of his case Plaintiff alleged that in 1904 the mahant had asked his signature on one of the documents by which he wanted to set up the Defendant as his successor, and that on his refusal he had been assaulted and expelled from the muth. Plaintiff sought to prove proceedings in the Criminal Court taken by him about the time showing that a conviction for assault had been obtained by him and that in these proceedings Plaintiff had assigned his failure to execute such a document as the reason therefor. The conviction had been quashed on appeal. Held—That these proceedings were not relevant to the case, the one important fact being that they were taken on a ground which was referable to the execution of the document, and were taken by the Plaintiff as claiming to be a resident as of right in the asthal from which he had been expelled. Held (on the evidence), that Plaintiff had established that he was a bairagi chela, and (on admission) that if not the only chela, he was the senior chela of the mahant. That, by conferring the mahantship upon a relation who was a married man, A had consented to a violation of the vows and practices of asceticism and celibacy which it was his duty as a trustee to maintain and protect. That his installation of the Defendant as mahant and retirement from mahantship amounted to an abdication of his office, which in the circumstances the Court should accept, and in the absence of just cause disqualifying the Plaintiff for appointment as mahant, the Plaintiff as the senior chela and (even on the Defendant's case) the next in succession in

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default of appointment, was properly declared by the Trial Judge as the person entitled to the office of **mahant**. MAHANT RAM PARKASH DAS v. MAHANT ANAND DAS (P. C.) ... 802

——————. **RELIGIOUS ENDOWMENT**—Shebaitship, **devolution of, to heirs in the absence of directions by founder, on the death of last** shebait **duly appointed by him—Will giving estate to idol and appointing successive** [redacted] **appointment of** [redacted] **principle of**— [redacted] **nature of.**] A Hindu testator had two sons by his first wife and [redacted] sons by his second wife. In his Will he provided that all his properties would devolve on his family Deity and his second wife and two of her sons J and B would successively be executrix and executors and that his two sons by his first wife would not be appointed executors. After the death of the second wife and her sons J and B, her other two sons died, one leaving a widow Defendant No. 1. Of the two sons of the testator by his first wife one (Defendant No. 2) was living and the other had died leaving a son the Plaintiff who brought the present action for a declaration that he had a four annas share in the **shebaitship** of the Deity, **Held**—That the effect of the Will was to constitute the second wife and her sons J and B successive **shebaits** of the endowments though they were described as executors in respect of the endowed property. That the testator did not prescribe how the **shebaitship** would devolve after the death of his son B. In the circumstances the devolution of the office of **shebait** follows the line of inheritance from the founder, in other words, it passes to his heirs unless there has been some usage or course of dealing which points to a different mode of devolution. That on the death of B the last **shebait** named by the founder the office vested in the four sons of the founder then alive, namely, the two uterine brothers of B and the two sons of the founder by his first wife; and this notwithstanding the fact that the founder intended to exclude his sons by his first wife, for the heir-at-law though in terms excluded from benefit under the Will cannot be excluded from his general right of inheritance without a valid devise to some other person. **Tagore** v. **Tagore**, L. R. I. A. (Sup. Vol.) 47 (66) (1872). That the Plaintiff had a four annas share in the **shebaitship**. That the principle of vested interest while the actual enjoyment of the expected interest is postponed till the termination of the life-estate has no application to cases of the present description. That a **shebait** holds his office for life but this does not signify that he has a life-interest in the office with the remainder presently vested in the next taker. The entire office is vested in him, though his powers of alienation are qualified and restricted. The position of a **shebait** is analogous

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to that of a Hindu female in possession of the estate of the last full owner rather than to that of the holder of a life-estate and when a founder has given valid directions as to the devolution of the shebaitship as in the present case upon the death of the last **shebait** the office vests in persons who at the time constituted the heirs of the founder provided the last **shebait** has not taken it absolutely; when the office has so vested in them upon the death of each member of the group it passes by succession to his heir, subject to the important qualification that the rule—that when a worship of **thakoor** has been founded the **shebaitship is** vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing or some circumstances to show a different mode of devolution—cannot be applied so as to vest the **shebaitship** in persons who according to the usages of the worship cannot perform the rights of the office. KUNJAMANI DASSI v. NIKUNJA BIHARI DAS 314

——————, **RELIGIOUS ENDOWMENT—Mourashi Muth, succession to—Onus of proof—Indian Succession Act (X of 1865), s. 187—Will not probated if can be used in evidence and for what purpose—Indian Evidence Act (I of 1872), s. 32, (5)—Relationship between Mohunt and Chela if relationship by adoption—Existence of relationship, statement relating to.**] One R was the Mohunt of a **muth** known as the Khumbakul Muth. He was succeeded by his **chela** S. After the death of S the Plaintiff claimed to be his lawful successor as his **gurubhai**. The Defendant resisted the claim on the allegation that he had been adopted by S as a **chela**. The **muth** in question was admittedly a **maurasi muth**, and the Court found that in **maurasi muth** the **chela** succeeds and in default of a **chela** the **gurubhai** succeeds and when there are more **chelas** than one the eldest generally succeeds but a junior **chela** may succeed if he be found more capable and if he be selected by the last Mohunt as his successor. **Held**—That it was for the Plaintiff to prove that he was the **chela** of R and that the Defendant was not the **chela** of S, as he must succeed on the strength of his own title and not on the infirmity, if any, in the title of the Defendant. In the course of the evidence in the case two Wills alleged to have been executed by R and S respectively neither of which was proved in the Probate Court were produced, the former of which only was found to be genuine. **Held**—That notwithstanding sec. 187 of the Indian Succession Act which is incorporated in the Hindu Wills Act, a Will not proved in the Probate Court may be used in evidence for a purpose other than the establishment of a right as executor or legatee and in the present case the recital in the Will of R, which was found to be genuine, that he had no one else as his **chela** except

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S was admissible in evidence under sec. 32, cl. (5), of the Evidence Act inasmuch as the relationship between a Mohunt and his chela is a relationship by adoption and a statement that A has one chela B and has no other chela is a statement relating to the existence of a relationship. ACHYUTANANDA DAS v. JAGANNATH DAS 122

———, RELIGIOUS ENDOWMENT—Proof that property has been endowed as debutter.] Where the intention of the donor appeared to have been to dedicate the property absolutely to deva sheba, the fact that the income of the property exceeded the expenses of the sheba and the shebaits frequently dealt with the property or the income as personal property would not make the property secular subject to a charge for the deva sheba. ASITA MOHAN GHOSH MOULIK v. NIRODE MOHAN GHOSH MOULIK 901

———, RELIGIOUS ENDOWMENT—Permanent image if essential to valid dedication.] A permanent image is not absolutely essential for dedication to a Thakur. ASITA MOHAN GHOSH MOULIK v. NIRODE MOHAN GHOSH MOULIK 901

———, SON, who is. See Hindu Law—Stridhan 489

———. See Hindu Law—Succession 1

———, STRIDHAN—SUCCESSION—Dayabhaga—Daughter's daughter if may succeed—Daughter succeeding to mother's stridhan whether takes it as stridhan.] The general principle in Bengal is that women can only inherit under some express text, and a daughter's daughter is not included in the text-books in the special line of heirs to stridhan, whether the stridhan is of the class known as yautaka or ayautaka. A woman inheriting stridhan property takes only the limited estate of a Hindu woman in such property and on her death it passes to the heir of the woman whose stridhan it was. SRIMATI MADHUMALA DASSI v. LAKSHAN CHANDRA PAL ... 627

———, STRIDHAN—SUCCESSION—Mitakshara—Son adopted by husband in conjunction with another wife and after-born natural son by a third—Rival wife's son, if "son"—Adopted son and son of rival wife, co-heirs, as sapindas of husband—Shares—Construction of texts—Atideca upon atideca, fallacy of.] B, a Hindu governed by the Mitakshara, adopted, in conjunction with his then wife by whom he had no issue, a son H. By a second wife whom B subsequently married, B had a natural born son G. Another wife M whom B married having died leaving no issue of her own the question arose as to the respective rights of H and G in certain jewellery alleged to have left by M. Held—That G was not entitled to succeed to M's estate as her "son" in accordance with the rules of inheritance of stridhan property laid down in Chap. II, sec. XI, paras. 9, etc., of the

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Mitakshara. That both H and G were entitled to succeed as sapindas of her husband in accordance with para. 25 read with paras. 9 and 11 of Chap. II, sec. XI of the Mitakshara. That in the absence of express texts cutting down his share H was entitled to share equally with G in the inheritance. Joykishore v. Panchoo Baboo, 4 C. L. R. 538 (1897), and Padma Coomari Dabee v. Court of Wards, L. R. 8 I. A. 229, 246; s. c. I. L. R. 8. Cal. [illegible] Bhugwandas, [illegible] Decided by [illegible] November [illegible] referred to. That [illegible] text of Manu, IX, 183: "If among all the wives of one husband, one has a son, Manu declares them all to be mothers of male children through that son" cannot be applied so as to constitute G, a son of M. The operation of the text examined. Annapurni Nachiar v. Forbes, L. R. 26 I. A. 246, 253; s. c. 3 C. W. N. 730 (1899) and Anandi v. Hari Suba, I. L. R. 33 Bom. 404 (1909), referred to. Anandi v. Hari Suba, I. L. R. 33 Bom. 404 (1909) approved by Mookerjee, J. Ch. II, sec. XI of the Mitakshara refers to the case of a woman dying "without issue" in the ordinary sense of the words. Quære: per Mookerjee, J.—Whether the term "son" includes a son taken by the woman in adoption in conjunction with or under an authority conferred by her husband. Per Curiam.—Unless curtailed by express texts the rights of an adopted son are similar in every respect to those of a natural son. KUMAR GANGADHUR BOGLA v. KUMAR HIRA LAL BOGLA 489

———, SUCCESSION—Memons of Cutch—Settlement in East Africa amongst Mahomedans—Hindu law of succession if applies. See Hindu Law—Emigration 362

———, SUCCESSION—Mourashi Muth, succession to. See Hindu Law—Religious Endowment 122

———, SUCCESSION—Mitakshara—Uncle's grandson to be preferred to grand-uncle's son—Collaterals, inheritance by, not limited to two degrees below common ancestor—Whether descent continues to the third or the seventh degree—"Putra," "santana," "sunu," meaning of—Sapinda relationship, under Mitakshara—Principle of propinquity does not exclude principle of spiritual benefit—Place in order of succession determined by latter principle—Apararka, Nanda Pandita, Devananda Bhatta, Visweswara Bhatta, as authorities—Propriety of relying on opinion of Judge not a party to judgment.] Under Mitakshara, whilst the right of inheritance arises from sapinda-relationship, or community of blood (in contradistinction to the Dayabhaga notion of community in the offering of religious oblations), judging of the nearness of blood-relationship or propinquity among the gotraja the test to be applied to discover the preferential heir is the capacity to offer

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oblations. Between the grandfather's great-grandson (uncle's grandson) and the greatgrandfather's grandson (granduncle's son), the former is, under the Mitakshara, the preferential heir. The following construction of the provisions of the Mitakshara relating to inheritance of property left by a deceased was approved by the Privy Council. "According to the scheme of succession propounded by the Mittakshara, the lineal [illegible] deceased owner down [illegible] degree, who [illegible] propinquous [illegible] sapindas), inherit in succession in [illegible] first instance. In their default the widow and daughter take by express provision of the law. The daughter's son comes in similarly. In their absence the inheritance ascends; each ascending line begins with a female and each has to be exhausted in accordance with the rule of propinquous sapinda-relationship before the next in order can take; so that the parents and 'their three successive descendants' take first, then the paternal grandmother and the paternal grandfather and their three successive descendants come next and so on." Quære: Whether Mr. Harrington's view with regard to the continuation of each line of heirs to the seventh degree does not contravene the limitation thereof by Manu to three descendants. Rutcheputt Dutt Jha v. Rajunder Narain Rae, 2 M. I. A. 132 at p. 158 (1839) referred to. Meanings of the words "putra" "santana" and "sunu" as used by Vijnaneswara in this connection explained. Buddha Singh v. Laltu Singh, I. L. R. 34 All. 663 (1912) affirmed. Suraya Bhukta v. Lakshmi Narasamma, I. L. R. 5 Mad. 291 (1882) and Chinnasami Pillai v. Kunju Pillai, I. L. R. 35 Mad. 152 (1911), overruled. The opinions of Devananda Bhatta and Visweswara Bhatta in the Smriti Chandrika and Subodhini respectively that the Mitakshara must be taken to limit collateral descent to two degrees in each line disapproved. BUDDHA SINGH v. LALTU SINGH (P. C.) 1

——————, SUCCESSION—Properties held by adoptive father as shebait—Adopted son if may claim to hold as shebait jointly with after-born son. See Hindu Law—Adoption 901

——————, SUCCESSION—After-born natural son of Sudra and adopted son, shares of, if equal. See Hindu Law—Adoption 901

——————, SUCCESSION to stridhan property. See Hindu Law—Stridhan.

——————, WOMAN'S ESTATE—Alienation by limited owner—Propriety, test of—"Legal necessity" if only test—Consent of reversioner—Attestation of deed followed by subsequent ratification—Retrospective operation—Compromise and family arrangement, compromise by limited owner—Bona fides of claim—Admission in compromise of futility

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of claim, if negatives bona fides—Conveyancing device not intended to express true state of executant's mind, effect if to be given to—Compromise which affirms previous executed registered lease, if requires registration.] The test to be applied in determining the validity of an alienation by a limited owner is whether the purpose for which the alienation was made was in the circumstances of the case proper and legitimate, and the existence of "legal necessity" in the narrow sense of actual pressure on the estate or the danger to be averted is not the only test. Held—That in this case a permanent mokurari lease granted by the daughter of a deceased Hindu of some properties belonging to his estate in settlement of a bona fide dispute was binding on the reversioner. Khunni Lal v. Gobind Krishna Narain, L. R. 38 I. A. 87: s. c. I. L. R. 33 All. 356; C. W. N. 545 (1911), applied. Where it appeared that the permanent lease was not only attested by the reversioner but that he later on set up the lease in answer to a suit of the grantee claiming the entire estate by survivorship as the undivided coparcener of the last male owner and ultimately joined in a compromise by which the Plaintiff in the suit admitted that he had no title to the estate and the reversioner affirmed the mokurari potta, Held—That if there was doubt as to the efficacy of consent as evidenced by the attestation, there was no question as to his subsequent ratification of the lease which operated retrospectively. That the compromise was not inadmissible in evidence for want of registration as it did not purport to convey, release or otherwise deal with immoveable property. Per Mookerjee, J.—It only recorded the approval of the transaction by the reversionary heir and (per Curiam) afforded cogent evidence of its propriety. Collector of Masulipatam v. Cavaly Venkata Narrainapah, 8 M. I. A. 523 at p. 551 (1861), Shamsundar v. Achhan Koer, L. R. 25 I. A. 183: s. c. I. L. R. 25 All. 71; 2 C. W. N. 729 (1898) and Bejoy Gopal Mukerjee v. Girindranath, I. L. R. 41 Cal. 793, 805: s. c. 18 C. W. N. 673 (1914) referred to. That the recitals in the mokurari potta depreciatory of the grantee's claim should not be regarded as a correct description of his mind, being only a conveyancing device expressive of his abandonment of the claim for a consideration. Hanooman Prosad v. Babooee Moneraj Kooeri, 6 M. I. A. 393 (1856) and Lal Achal Ram v. Raja Kazim Hossain, L. R. 32 I. A. 113: s. c. I. L. R. 27 All. 271: 9 C. W. N. 477 (1904), referred to. Authorities dealing with the validity of compromises in settlement of disputed claims and of family arrangements with reference to the question of consideration examined by Mookerjee, J. Per Mookerjee, J.—A qualified owner like a Hindu widow, daughter, or mother is not bound at her peril to pursue a litigation in respect of the estate in her hands unremittingly to the ultimate Court of

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Appeal. UPENDRA NATH BOSE v. BINDESRI PROSAD 210

——————, WOMAN'S ESTATE—Widow, alienation by, when binds reversioner—Relinquishment for a consideration—Relinquishment of whole estate necessary—Widow retaining moveables and getting back some land to hold as life estate—Mithila law—Family arrangement.] It may be taken as established without doubt that a Hindu widow may relinquish her estate and this will have the effect of accelerating the estate of the next reversioner. Further, an alienation by a Hindu widow will be valid where there was consent of the next heirs and the alienation is capable of being supported by reference to the theory of relinquishment and consequent accelaration of the interest of the consenting heirs. But the alienation in such a case must be of the whole of the estate. **Debi Prosad Chowdhury** v. **Gopal Bhagat**, I. L. R. 40 Cal. 721: s. c. 17 C. W. N. 721 (1913), referred to. The widow is not precluded from obtaining a benefit for relinquishing her estate. **Nobokishore** v. **Hari Nath**, I. L. R. 10 Cal. 1102, 1108 (1884), followed. **Bajrangi** v. **Manokarnika**, L. R. 35 I. A. 1: s. c. I. L. R. 30 All. 1 (8): 12 C. W. N. 74 (1907), referred to. Where under a compromise made between the mother, the sisters and M the immediate male reversionary heir of a deceased Hindu infant governed by the Mithila school, the whole of the immoveable property of the deceased was relinquished by the mother M, and the mother herself was given the whole of the movable property inclusive of certain mortgage bonds, and M gave half of the immoveable properties to the deceased's sisters, and the latter and M respectively gave 50 bighas of land to the deceased's mother with remainder to the respective donors and their heirs. **Held**: That, under Mithila law, the moveable properties (including the mortgage bonds) had passed by inheritance to the deceased's mother on his father's death. That the life estate in 100 bighas which the deceased's mother got back was essentially different from the widow's estate which she formerly enjoyed and could in no way be regarded as a reservation or restoration of the widow's estate. That under the terms of the compromise the lady had effectively relinquished and destroyed her estate as a Hindu widow and accelerated that of M. **Semble**:—The compromise might be supported as a family arrangement between all the parties competent to deal with the whole of the property (the daughters having claimed under a will of their father which had been probated). CHOUDHURY SURESSUR MISSER v. MUSSTT. MOHESH RANI MESRAIN 142

——————, WOMAN'S ESTATE—Suit by presumptive reversioner to restrain waste by widow, really suit for proper administration brought in a representative capacity—Failure to substantiate allegations of waste and mismanagement—Decree declaring Plaintiff's right as next reversionary heir if can be made—"Further relief," prayer for.] When a Hindu dies leaving female heirs, the question as to who is the nearest reversionary heir or what is the class of reversionary heirs falling to be settled at th[illegible] ownership f[illegible] then it is [illegible] is to be reve[illegible] decree can therefore be passed during the lifetime of such female heirs declaring the Plaintiff's individual right as reversionary heir. Courts of law have recognised the right of a reversionary heir having such contingent interests only (which are differentiated little, if at all, from a **spes successionis**) a right to demand that the estate be kept from waste and free from danger during its enjoyment by the widow or other owner for life. But a reversionary heir thus appealing to the Court for the conservation and just administration of the property does so in a representative capacity so that the corpus of the estate may pass unimpaired to those entitled to the reversion. But where such a suit to restrain waste by the widow fails by reason of the Plaintiff's failure to prove his allegations of waste and mismanagement, the Court cannot properly grant him a decree declaring him to be "the next reversionary heir" under cover of a prayer for "further relief" contained in the plaint. JANAKI AMMAL v. NARAYANASAMI AIYER (P. C.) .. 1323

——————, WOMAN'S ESTATE—Legal necessity—Marriage of daughter's daughter when son-in-law gharjamai, if legal necessity—Construction—Mortgage of widow's "right and interest" if covers more than life-interest.] Where A, a Zemindar's widow, married her only daughter S to a cultivator in order that the son-in-law may come and live in the mother-in-law's house, and the issue of the marriage was a daughter, **Held**—That though A might be under a moral duty to see that the girl was properly married, the expenses of the marriage could not be charged on her husband's estate as a legal necessity. The fact that a Hindu widow says she is mortgaging "her right and interest" in her husband's estate does not necessarily indicate that she was mortgaging only a life-interest. NARAINBATI v. RAMDHARI SINGH (Patna) 784

——————, WOMAN'S ESTATE—Hindu widow—Gift of property with consent of reversionary heir expectant—Donee given possession—Suit for declaration of proprietary title in widow's life-time against strangers—Decree if may be made apart from proof of necessity.] The widow of P, the former owner of an impartible estate, with the consent of the reversionary heir expectant on the death of the widow and his brother, made a gift of the estate to

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C. C's application for mutation of names was successfully opposed by I. B, who claimed the estate under an alleged Will of P, and further denied that the persons who consented to the gift were related to P, and suggested two other persons as the reversionary heirs, whereupon C sued [redacted] declaration of [redacted] of the estate. [redacted] had made [redacted] persons set up by [redacted] reversionary heirs were fictitious persons and that the estate passed by the gift by P's widow with the consent of persons who were related to P in the manner alleged by the Plaintiff and accordingly decreed the suit. I B on appeal did not challenge these findings, but urged that the deed of gift did not represent a genuine transaction, and that the widow (who was a party to the suit and had died pending the appeal, the consenting reversionary heirs being substituted in her place in the records) had remained in possession and had no power to confer any valid title to C. **Held**—That the suit not being a suit for ejectment of a Defendant who was in possession, but a suit for declaration of title by a Plaintiff who was in possession, it was not incumbent on the Plaintiff to prove a better title in himself to possession of the property than the title of the Defendant. That on the findings I B was a mere impertinent intervener in another person's affair and had no right to contest the declaration of title which was obtained by C. CHANDRIKA BAKHSH SINGH v. RAJA INDAR BIKRAM SINGH (P. C.) 1149

———, WILL. See Will.

HISTORICAL WORKS, reference to in appeal—Propriety.] References to works of history (not given in evidence or referred to in the Court of first instance) at the Appellate stage are irregular and to be avoided **Vallabha** v. **Madusidanan**, I. L. R. 12 Mad. 495 (1889). TUNI ORAIN v. LEDA ORAON (Patna) 1082

HOMESTEAD LAND, tenancy of Transferability—Onus to prove—Long continued possession. See Ejectment ...1113

———, lease of, from year to year—Transferability. See Transfer of property Act, s. 108 (j) 322

HUSBAND'S PROPERTY sold by wife—Rights of **bonâ fide** purchaser for value. See Transfer of Property Act, s. 41 ... 103

IMPARTIBILITY OF ESTATE. See Chotanagpur ... s. ... 876

INDIAN CONTRACT ACT. See Contract Act.

——— EVIDENCE ACT. See Evidence Act.

——— LIMITATION ACT. See Limitation Act.

——— PENAL CODE. See Penal Code.

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INDIAN REGISTRATION ACT. See Registration Act.

——— STAMP ACT. See Stamp Act.

——— SUCCESSION ACT. See Succession Act.

INFANT it may be sued and personal decree made against him. See Attorney ... 537

———, it may be adjudicated insolvent. See Presidency Towns Insolvency Act 1065

———, Hindu Law—Power of manager to alienate property. See Hindu Law—Infant 645

———. See Minor.

INJUNCTION, TEMPORARY, subsequently dissolved—Order to be obeyed while it lasts—Order binding on party though it prohibits receiving payment from Government and Government authorised to pay by statute—Order operates in personam—Government's duty to ascertain and obey law—Question of construction, question for Courts.] Where in a suit for dissolution of partnership and accounts a Receiver of the partnership assets was appointed and a temporary injunction was granted restraining the Defendants **inter alia** from receiving certain payments from Government and the Government which was no party to the suit made payments to one of the Defendants in alleged exercise of power reserved to it by statute, and subsequently the injunction was dissolved, the Plaintiff's case having failed, **Held**—That an injunction although subsequently discharged because the Plaintiff's case failed, must be obeyed while it lasts. That although the injunction could not bind the Government not to pay or make the Government responsible for that obedience to the law which the Court was entitled to expect, the man who received in breach of the order was guilty of a contempt in no way cured by the payment by Government. The non-existence of any right to bring the Crown into Court such as exists in England by petition of right, and in many of the Colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition or right will lie, under which the Crown can be sued by the Attorney-General. **Dyson** v. **Attorney-General**, [1911] 1 K. B. 410 (1910), and **Burghes** v. **Attorney-General**, [1912] 1 Ch. 173 (1911), referred to. It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue and it is the duty of the Executive in cases of doubt to ascertain the law in order to obey it, not to disregard it. The Government in this case having made the payment with notice of the Court's order, **Held**—That although with regard to the payments made under statutory

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powers, the action of the Executive might be justifiable, the question whether any particular sum mentioned in the contract in suit was payable as for "labour and supply" (so as to be within the Government's power to pay under the statute) was a question of construction and therefore of law for the Courts. That the proper course in the present case for the Executive would have been either to apply to the Court to determine the question of construction of the contract and to pay accordingly or to pay the whole amount over to the Receiver and to obtain an order from the Court on the Receiver to pay the sums properly payable according to the true construction of the contract. THE EASTERN TRUST COMPANY v. MCKENZIE MANN & CO., LD., (P. C.) 457

INTEREST, excessive when not penal. See Mortgage 689

————, **in excess of principal sum in mortgage decree if should be allowed. Rule of Damdupat, if applicable to mortgage decree—Sec. 4, Transfer of Property Act (IV of 1882)—Sec. 37, Contract Act (IX of 1872).**] In the taking of accounts of a mortgage decree in a Presidency town, all interests exceeding the amount of the principal sum secured by the mortgage should be disallowed according to the rule of **Damdupat. Madhwa Sidhanta Onahini Nidhi v. Venkataramanjulu Naidu**, I. L. R. 26 Mad. 662 (1903), dissented from. **Jeewanbai v. Manordas Lachmondas**, I. L. R. 35 Bom. 199 at p. 203 (1910), followed. KUNJA LAL BANERJEE v. NARSAMBA DEBI 110

————, excessive rate of—Court's power to declare rate a penalty and award reasonable interest. See Contract Act, s. 74.

————, suspension of, by act of creditor. See Mortgage 689

ISLAND arising in Sea within territorial limits—Title in Crown—Adverse possession. See Adverse Possession 1311

ISSUE—Judge if may refuse to frame an issue on adoption whilst admitting evidence thereon when the question is one of genunineness of a Will. See Will ... 617

———— High Court in second appeal allowing Respondent to raise a fresh issue and remitting case for re-hearing —Legality. See Remand 1245

"JETH RAIYAT," meaning of. See Bengal Tenancy Act, s. 153 1207

JOINT PROMISORS, one of whom is a minor—The other if shares minor's immunity. See Minor 840

JUDGE not a party to judgment, propriety of relying on opinion of.] It is undesirable to introduce the opinion of another judge not a party to the judgment for the purpose of enforcing the conclusion arrived at. BUDDHA SINGH v. LALTU SINGH (P. C.) 1

"JUDGMENT," what is. See Letters Patent, s. 15 ... ... 210, 594

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JUDGMENT—contd.
————, suit upon, if lies. See C. P. C., s. 47 58

JUTE TRADE, usage of, at Chandpur. See Contract Act, s. 81 1224

KABULIYAT. See Landlord and Tenant.

KAYASTHAS if Sudras. See Hindu Law—Adoption 901

LAKHIRAJ—Estate sold for arrears of revenue—Suit by purchaser to recover land claimed by Dar-der as Lakhiraj —Onus. See Lan... ...10...

————, land... with land revenue—... to assess if may be barred by limitation. See Reg. (Bengal) of 1805, II, sec. 2 ... 576

LAND ACQUISITION by Government—**Right to compensation—Possession for 12 years by non-payment of rent—Title by adverse possession.**] On the acquisition of a piece of land under the Land Acquisition Act it was found that the person in possession had taken possession of it on the death of the last male owner and held possession for more than 12 years without payment of rent. He asserted that he held the land under another person and not under the rival claimant who was the reversionary heir of the last male owner. **Held**—That the person in such possession was entitled to the full compensation paid for its compulsory acquisition, having acquired the right to hold the land rent-free by twelve years' adverse possession. RAJBANS SAHAY v. RAI MAHABIR PRASAD (Patna) 828

———— ACT (I of 1894), sec. 30—**Reference to Civil Court if lies after payment of compensation to one party by Collector—Order by Civil Court directing Government to pay compensation to party found entitled to it and to realise the amount wrongly paid from the other party, propriety of—Facts to be proved by claimant in order to be entitled to compensation—Road-cess return, value of, to show status as lakherajdar.**] The Appellant who was the first party claimed that he had a **lakheraj** title to a land acquired under the Land Acquisition Act. The second party claimed as **putnidars** and **darputnidars.** The Collector made an award in favour of the first party and the amount of compensation was actually paid to him. On a reference to the Civil Court under sec. 30 of the Act the Subordinate Judge found in favour of the second party and directed the Government to pay the compensation to them and to realise the amount previously paid to the first party from him. **Held**—That though the Land Acquisition Act clearly contemplates that when there is a dispute as to apportionment the reference to the Civil Court under sec. 30 should be made before any payment has been made, still there is nothing in the Act that prohibits the Land Acquisition Collector from making the reference after payment of compensation to

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one of the parties. When such a reference has been made, it is undesirable that the party who succeeds in showing that the Collector's order was wrong should have to resort to a regular suit to compel the Opposite Party to refund the compensation to which he has been held not to be entitled, nor can the rights of the Opposite Party be in any way prejudiced by the reduction of litigation at the omission of the Collector to [illegible] any road-cess return [illegible] and went strongly [illegible] have asserted a [illegible] The High Court [illegible] of the Subordinate Judge and ordered the first party to pay the amount of compensation received by him to the second party with interest at 6 per cent. per annum from the date of withdrawal, **Held**, further, that a claimant in a Land Acquisition proceeding can get no share of the compensation without establishing either title to or possession of the land acquired. SATISH CHANDRA SINGHA v. ANANDA GOPAL DAS ... 816

——————, **s. 53**—Power of Land Acquisition Court to call for records. **See** Calcutta Improvement Act, sec. 71 360

—————— COURT, **if may determine question of title—Claims to compensation by Zemindar as against person holding under a** lakhiraj **title —Onus of proof.**] A purchaser of an entire estate sold for arrears of revenue suing to recover land claimed by the Defendant as **lakhiraj** must prove a **primâ facie** case that his **mal** land has, since 1790, been converted into **lakhiraj**. The fact that the lands are within the ambit of the estate is not sufficient to meet this burden. Whether in a particular case, the Plaintiff has been able to prove such a **primâ facie** case would depend upon its own circumstances. Where the question of title to a plot of land arose between claimants to compensation money paid by Government on acquisition thereof under the Land Acquisition Act, one being the purchaser of the estate at a sale for arrears of land revenue, whilst the other was holding it as **lakhiraj**, **Held**—That the former was in the position of the Plaintiff and the burden of proof as stated above was on him **Harihar Mookerjee v. Madab Chandra Babu**, 14 M. I. A. 152 (1871), relied on. A Land Acquisition Court has jurisdiction to determine a conflict of title between rival claimants. SM. KRISHNA KALYANI DASI v. MR. R. BRAUNFIELD 1028

—————— COURT, **if may** refuse to pay guardian of lunatic obtaining District Judge's permission to take out compensation money in deposit. **See** Lunacy Act, s. 56 975

LAND REGISTRATION ACT (VII, B. C., of 1876), registration of name under, if necessarily implies possession. **See** Partition 51

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LAND REVENUE, Government's right to assess, if may be time-barred. **See** Reg. (Bengal) of 1805, II, s. 2 57

LAND REVENUE SALES ACT (XI of 1859). **See** Revenue Sales Act.

LANDLORD AND TENANT—Ex parte **decree for rent—Value of, for determining question of relationship of landlord and tenant in a subsequent suit—Presumption of continuance of relationship conclusively established by decree—** Res judicata.] A decree for rent passed **ex parte** is not merely an item of evidence but is conclusive as to the relationship between the parties at the time to which the suit referred. Under illustration (d) to sec. 114 of the Evidence Act, it is open to the Court in a subsequent suit between the parties to presume that that state of things has continued. HIRANMOY KUMAR SHAHA v. RAMJAN ALI DEWAN 4

—————— Kabuliyat **containing stipulation to pay excessive rate of interest—Assurance by landlord at the time of execution of** kabuliyat **that covenant will not be enforced, effect of, on the document—Indian Evidence Act (I of 1872), sec. 92, prov. 1.**] A **kabuliyat** for a period of one year provided that on default of payment of rent the arrears would carry interest at 75 per cent. per annum. The tenant held over after one year. On a suit for rent on the basis of the **kabuliyat** the tenant pleaded that before the **kabuliyat** was executed by him, the landlord assured him that the covenant for payment of interest at 75 per cent. would not be enforced. This allegation was found to be true, **Held**—That under the circumstances the **kabuliyat** was not the real agreement between the parties, having been induced by fraudulent misrepresentation, and the tenant was not liable to pay interest claimed on the basis of the **kabuliyat**. Sec. 92, Prov. 1 of the Evidence Act referred to. NADIA CHAND SAHA v. BIRENDRA CHANDRA DUTT 106

——————. **Suit for rent —Non-occupancy raiyat—Lease for a term—Suspension of portion of rent during the term—Stipulation for payment of rent at full rate after expiry of term—Agreement, if invalid—Acceptance of rent at reduced rate after expiry of the term, if deprives landlord of his right to claim rent at the stipulated rate—Waiver—Intention of parties.**] Where in a **kabuliyat** for a term executed by a non-occupancy raiyat a certain rent was settled out of which a portion was kept in suspension and the balance was stated to be the rent payable for the term, and it was further stipulated that if after expiry of the term the raiyat continued in occupation without taking a fresh settlement he would be liable to pay rent at the full rate; and after the expiry of the term the raiyat

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remained in occupation without taking a fresh settlement and rent was then realised from the tenant at the reduced rate for a few years and thereupon the landlord sued for rent at the full rate, **Held**—That the agreement did not contravene the provisions relating to non-occupancy raiyats and was not invalid. **Held** also, that the landlord by accepting rent at the reduced rate was not deprived of his right to claim rent at the rate stipulated in the **kabuliyat** and was entitled to receive rent at the full rate. **Durga Prasad Singh** v. **Rajendra Narayan Bagchi**, I. L. R. 41 Cal. 493: s. c. 18 C. W. N. 66 (1913) and **Baijnath Prosad** v. **Raghunath Rai**, 16 C. W. N. 496 (1911), followed. **Held** further, that evidence that since the execution of the **kabuliyat** the tenant paid rent at a lower rate than that stated in the **kabuliyat** was admissible to shew the intention of the parties that the **kabuliyat** was not intended to be acted upon or that there had been a waiver of the terms of the lease. **Beni Madhab Gorani** v. **Lalmoti Dasi**, 6 C. W. N. 242 (1898), followed. KAILASH CHANDRA SAHA v. DARBARIA SHEIKH ... 347

——————— Registered kabuliyat—Acceptance by landlord for a long time of reduced rent, if precludes suit at kabuliyat rate. **See** Evidence Act, s. 92, prov. 4 680

———————, Lease from year to year in existence from before 1882—Transferability—Transfer by way of sub-lease—Landlord if may recover **khas** possession. **See** Transfer of Property Act, s. 108 (J) 322

——————— Action for trespass—Who may sue—Tenant or landlord. **See** Trespass 773

LEASE Agricultural purposes if necessary for lease to come under Bengal Tenancy Act. **See** Bengal Tenancy Act, Sch. III, Art. 2 485

———, Transferability. **See** Transfer of Property Act, s. 108 (j) 922

LEGAL PRACTITIONERS ACT. **See** Criminal Index.

LETTERS PATENT, 1865, **s. 15, order by Judge on the Original Side refusing to restore case dismissed for default if a judgment and if appealable—Civil Procedure Code (Act V of 1908), Or. XLIII, r. 1, if applies to appeal from one Judge of the High Court to others—Sec. 104, scope and effect of—"Judgment," what is.**] An order by a Judge on the Original Side of the High Court under r. 9, Or. IX of the Civil Procedure Code refusing to set aside an order of dismissal of a suit under r. 8 is a judgment within the meaning of sec. 15 of the Letters Patent and is appealable thereunder. **Per** Sanderson, C. J., and Mookerjee, J.—Such an order is also appealable under cl. (c), r. 1, Or. XLIII of the Code of Civil Procedure which applies to an appeal from the decision of one Judge of the High Court to other

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Judges of the Court. **Per** Mookerjee, J.—The law has been substantially altered since the decision of the Judicial Committee in **Hurrish Chandra Chowdhry** v. **Kali Sundari Debia**, I. R. 10 I. A. 4: s. c. I. L. R. 9 Cal. 482 (1882), was pronounced. The effect of sec. 104 of the Civil Procedure Code of 1908 which is materially different from sec. 588 of the Code of 1882 [illegible] to take away a right of appeal [illegible] of the Letters Patent [illegible] right of appeal [illegible] 15 of the Letters Patent [illegible] claim[illegible]ble. **Gobind Lal** v. **Shiba**[illegible] (appeal[illegible] 3 Cal. 1323: s. c. 10 C. W. N. [illegible]06), doubted by Mookerjee, J. SM. MATHURA SUNDARI DASSI v. HARAN CHANDRA SAHA 594

———————, **cl. 15—Appeal from judgment of Judge of High Court affirming that of lower Court and dissented from by his colleague—Appeal Court, if bound by findings on which differing Judges agreed—"Judgment," meaning of.**] Where a Bench of two Judges of the High Court having differed as to the disposal of an appeal, the judgment of the lower Court was confirmed, on a further appeal under cl. 15 of the Letters Patent, **Held**—That the Appeal Court was not precluded from reviewing points on which the two Judges were agreed though due regard would be paid to the concurrent findings of the two Judges and of the trial Court. "Judgment" in cl. 15 of the Letters Patent means the "sentence of law pronounced by the Court" upon the matter contained in the record and not the statement of the grounds thereof. **Nandeeput Mahta** v. **Urguhart**, 13 W. R. 209 (1879), commented on. UPENDRA NATH BOSE v. BINDESRI PROSAD ... 210

——————— **(Patna) cl. 10—Point not argued before single Judge if may be urged in appeal.**] The conduct of a case before a single Judge of High Court must not be regarded as a preliminary canter in which the parties and their legal advisers are not called upon to exert themselves. Orinarily a point which had not been taken before a single Judge would not be allowed to be taken in appeal under cl. 10 of the Letters Patent. **Saminatha Ayyar** v. **Venkatasuba Ayyar**, I. L. R. 27 Mad. 21 (1903), and **Khub Chand** v. **Harmukh Rai**, I. L. R. 34 All. 41 (1911), referred to. **The Tanjore Palace Estate** v. **Andi Ranniah**, 11 I. C. 339 (1911), dissented from. **Bani Madhab** v. **Matungini**, I. L. R. 13 Cal. 104 (1886), and **Bechi** v. **Ahsanullah Khan**, I. L. R. 12 All. 461 (1890), referred to. DEBI CHARAN LAL v. SHEIKH MEHDI HUSSAIN **(Patna)** 1303

LIMITATION—Gold deposited with goldsmith to be made into ornaments—Suit to recover—Limitation. **See** Limitation Act, Sch. 1, Art. 145 232

LIMITATION ACT, if can give rise to cause of action independently of its provisions. **See** Civil Procedure Code, s. 47 58

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——— (IX of 1908), ss. 5, 12—**Sufficient cause—Interference by High Court in second appeal—The time requisite for obtaining a copy of the decree, what is.**] It is now settled by a long string of authorities that where a Court after considering all the circumstances of the case has come to the conclusion that sufficient cause [illegible] has not been established [illegible] meaning of sec. 5 of [illegible] not filing an [illegible] High Court will [illegible] second appeal. Where a [illegible] passed on 27th September [illegible] and the decree was prepared and signed on the same day and the annual vacation began on the following day and the Court reopened on 1st November and the Appellants applied for a copy of the judgment on 3rd November and for a copy of the decree on 13th November and both copies were ready and were delivered on 21st November and the appeal was filed on 28th November in the lower Appellate Court, **Held**—That the whole of the time which elapsed from the delivery of the judgment to the reopening of the Court on November 1st, 1913, was part of the time requisite for obtaining copies of the judgment and decree, and that this must be so whether the Appellant applied for copies on the day on which the Court reopened or on some later date. The words of sec. 12, Limitation Act, do not appear to lay down any rule that the time requisite for obtaining a copy must be continuous. DEBI CHARAN LAL v. SHEIK MEHDI HUSSAIN (Patna) 1303

———, s. 7, benefit of, where may be claimed. See Court of Wards Act, s. 55 852

———, s. 12—The time requisite for obtaining a copy of decree, what is. See s. 5 1303

——— s. 12—**High Court judgment—Application for review—Limitation if runs from before the signing of decree.**] In computing the period of limitation for an application for review of a judgment of the High Court, the party applying for review is entitled to have excluded, under sec. 12 of the Limitation Act, the time requisite for taking a copy of the decree, and the period of limitation cannot in such a case commence to run until, at all events, the day the decree was signed by the Judges. GANGADHAR KARMAKAR v. SEKHAR BASINI DASYA 967

———, s. 14—**Suit for recovery of possession by part owner—Other co-owners made Defendants, setting up their own title—Decree made in their favour by first Court, set aside on appeal—Fresh suit—Suspension of limitation pending prosecution of claim in previous suit—Power of Appeal Court to transfer Defendants to category of Plaintiffs.**] Where the sons (B and M) and grandsons by a predeceased son (C) of a deceased Hindu (G), being members of a joint Dayabhaga Hindu family, with a view to deceive the creditors of B and M, in 1891, executed a document whereby they purported to acknowledge that G's widow S was the real owner of properties which in fact they had inherited as G's heirs; and S having begun to deal with the properties adversely to the real owners from January 1892, C's branch of the family in 1896 sued for a declaration of their own title and the title of M's representatives (whom they joined as Defendants) to shares in the properties, and the latter associated themselves with the Plaintiffs and asked for an adjudication of their right to a one-third share and a distinct issue in respect of their claim was without objection raised and decided and the Court made a decree on 20th April 1903 in favour of both the Plaintiffs and M's representatives; but on appeal the decree so far as it was in favour of the latter was set aside on 22nd February 1904 on the ground that not being Plaintiffs they could not be given any relief in that suit, and M's representatives thereupon on 14th November 1904 instituted a fresh suit for recovery of their share, **Held**—That though limitation began to run against them from 1892, it remained in suspense, whilst they were **bonâ fide** litigating their rights in the previous suit and this suit was therefore not time-barred. **Lakhan Chunder Sen v. Modhu Sudan Sen, 12** C. W. N. 326: s. c. I. L. R. 35 Cal. 209 (1907), affirmed. That in the previous suit the Appeal Court should, in exercise of power possessed under the Civil Procedure Code, have transferred M's representatives from the category of Defendants to that of Plaintiffs and maintained the decree passed in their favour by the Original Court. SRIMATI NRITYAMONI DASSI v. LAKHAN CHUNDER SEN (P. C.) 522

———, s. 19—Acknowledgment—"A fresh period of limitation," meaning of. See Civil Procedure Code, s. 48 952

———, ss. 19, 20—Payment extending limitation—Certification of payment by decree-holders—Statement of payment in application for execution of decree if sufficient. See Civil Procedure Code, Or. 21, r. 2 272

———, s. 22—**Substitution of beneficiaries for administratrix after time—New Plaintiff.**] Where the widow of a deceased person G was appointed administratrix of his estate until G's eldest son should attain majority, and a suit was instituted by the widow after the eldest son of G had attained majority under a **bonâ fide** belief that she was competent to sue as administratrix, but on discovering her mistake, she prayed that the three sons of G, for whose benefit she had been appointed administratrix, be substituted as Plain-

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tiffs and the substitution was made at a time when the suit if instituted would have been time-barred, **Held**—That this was not the addition of a new Plaintiff within the meaning of sec. 22 of the Limitation Act. **Dhurm Das** v. **Shama Sundari**, 3 M. I. A. 229 (1843), **Hari Saran** v. **Bhubaneswari**, I. L. R. 16 Cal. 40 (1868) and **Peary Mohan** v. **Narendra Nath**, 9 C. W. N. 421 (1905), referred to. NISTARINI DASYA v. SARAT CHANDRA MAZUMDAR ... 49

——————, s. 22—Suit by administrator **pendente lite** if may be brought more than 3 years after testator's death—Substitution of executor in place of administrator **pendente lite**—Suit if to be regarded as instituted on date of substitution. **See** Limitation Ordinance, ss. 17 (1), 22 833

——————, s. 23—Continuing wrong. **See** Art. 142 481

——————, s. 26, right of way if can be acquired by prescription under. **See** Easement. 1158

——————, Sch. I, Arts. 30, 31. **See** Railways Act, s. 77 790

——————, Sch. I, Art. 30—Suit against Railway for compensation for loss of goods—Limitation. **See** Railways Act, s. 77 696

——————, **Sch. I, Arts. 32, 143—Bengal Tenancy Act (VIII of 1885), sec. 155—Suit to eject tenant under—Limitation.**] Art. 32 and not 143 of the first schedule to the Limitation Act governed a suit by a landlord brought under sec. 155 of the Bengal Tenancy Act to eject a tenant who had allowed a portion of his holding to be encroached upon by a stranger and had exchanged another plot of land of the tenancy with the stranger in contravention of the terms of his **kabuliyat**. **Sharoop Dass Mondal** v. **Joggassur Roy Chowdhry**, I. L. R. 26 Cal. 564: s. c. 3 C. W. N. 464 (1899), relied on. TAHER MONDAL v. TARAFDI GHARAMI 661

——————, Sch. I, Art. 49. **See** Art. 145 232

——————, **Sch. I, Arts. 62, 120—Civil Procedure Code (Act V of 1908), Or. XXII, rr. 11 and 9—Withdrawal of surplus sale-proceeds belonging to the Plaintiff by Defendant—Suit instituted more than three years from date of withdrawal.**] Where an application for substitution was made more than six months after the Appellant's death before the Registrar and the Respondents did not put in any objection before the Registrar to the hearing of the appeal, the application for substitution was treated as an application for the restoration of the appeal after abatement. The Plaintiff, a purchaser at auction sale of a revenue-paying estate, made default in the payment of Government revenue and the estate was sold and the surplus sale-proceeds were withdrawn by the Defendants, the original proprietors whose names still remained in the register, and a suit was instituted by the Plaintiff, for the recovery of the money so withdrawn, more than three years after the date of withdrawal, **Held**—That Art. 62 of the Limitation Act applied and the suit was barred by limitation. **Muhammad Wahib** v. **Muhammad Ameer**, I. L. R. 32 Cal. 527 (1905) and **Lachmi Narain Singh** v. **Dhanukdar Prasad Singh**, 17 Ind. Cas. 351 ([illegible] to MO[illegible] paid to one [illegible] in tention t[illegible] the hands of [illegible] claim[illegible] tually belongs, is [illegible]apped[illegible] the meaning of Art. 62, pa[illegible]at party for the use of the actual person in whom the right to receive it vests. HARIHAR MISSER v. SYED MOHAMED (Patna) 9

——————, **Sch. I, Art. 89**—Suit by principal against agent for accounts—Limitation. **See** Principal and Agent 3

——————, **Sch. I, Art. 115. See** Art. 145 2

——————, **Sch. I, Art. 115. See** Railways Act, s. 77 7

——————, **Sch. I, Art. 116—Bond executed by Defendant alone and accepted by Plaintiff and subsequently registered, suit upon—Limitation.**] Art. 116 of the Limitation Act applies to a suit brought by the Plaintiff to enforce a debt due upon a bond executed by the Defendant alone and accepted by the Plaintiff and subsequently registered. BOUWANG RAJA CHELLAPHROO CHOWDHURI v. BANGA BEHARI SEN 4

——————, **Sch. I, Art. 120. See** Art. 62 9

——————, **Sch. I, Art. 122,** judgment, suit upon, if lies. **See** Civil Procedure Code, s. 47 ... ...

——————, **Sch. I, Arts. 142, 120—"Dispossession" and "discontinuance of possession," meaning of—Suit to determine rights of parties to order under sec. 146, Cr. P. C., period of limitation for—Suit, if lies against Magistrate—Magistrate a stake-holder—Declaratory suit against rival claimant—Continuing wrong.**] The Defendants attempted to interfere with the Plaintiff's possession of the disputed property and a breach of the peace becoming imminent proceedings under sec. 145, Cr. P. C., were instituted and resulted in an order of attachment under sec. 146, Cr. P. C. The Plaintiff sued for declaration of his title and for recovery of possession, **Held**—That though deprived of possession, the Plaintiff was not dispossessed or had discontinued possession within the meaning of Art. 142 of the Limitation Act. Meaning of "dispossession" and "discontinuance of possession" explained. That as there was no cause of action against the Magistrate, the suit could be brought only against the Defendants. **Goswami**

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v. Giridhari, I. L. R. 20 All. 120 (1897), dissented from. **Raja of Venkatagiri v. Isakapali**, I. L. R. 26 Mad. 410 (1902), followed on this point. **Khagendra Narain v. Matangini**, I. L. R. 17 Cal. 814 (819) (1890) and **Rama Swamy v. Muthu Swamy**, I. L. R. 30 Mad. 12 (1906), referred to. That Plaintiff having proved his title, the suit must be treated as a suit for declaration of title under sec. [illegible] Specific Relief Act. Th[illegible] case of continuing [illegible] of contract, [illegible] 23 of the [illegible] period of limitation [illegible] began to run at every m[illegible] and the time the wrong continued. "Continuing wrong" defined. **Raja of Venkatagiri v. Isakapali**, I. L. R. 26 Mad. 410 (1902), dissented from. **Mahabharat v. Abdul Hamid**, 1 C. L. J. 73 (1904), **Binda v. Kaunsila**, I. L. R. 13 All. 126 (1890), **Ananda v. Veyyanna**, I. L. R. 15 Mad. 492 (1892), and **Jugal Kishore v. Lakshman Das**, I. L. R. 23 Bom. 659 (1899), referred to. BROJENDRA KISHORE ROY CHOUDHURY v. SAROJINI RAY ... 481

——————, **Sch. I, Art. 143**—Suit for ejectment—Limitation. **See** Art. 32 661

——————, **Sch. I, Art. 144**—Title by adverse possession against Crown—Limitation. **See** Adverse Possession ...1311

——————, **Sch. I, Arts. 145, 49, 115—Gold deposited with goldsmith to be made into ornaments—Suit to recover—Limitation.**] Where the allegation was that nearly 11 years ago the Plaintiff had made over a **tola** of gold to Defendant to be made into ornaments, but no time was fixed and the latter put him off from time to time until being pressed by Plaintiff on 24th March 1914, he promised to make and deliver the ornaments within 15 days, but failed to do so, **Held**—That Art. 145 of Sch. I to the Limitation Act applied to a suit for recovery of the gold deposited. Art. 145 applies even when the property is not recoverable in specie and does not cease to be applicable merely because the Defendant refuses to return the property. Such refusal does not bring into operation Art. 48 or 49. Even if Art. 49 applied limitation would begin running from 8th April 1914 before which there was no refusal. If Art. 115 applied limitation would run from the same date, when the contract was broken. GANGAHARI CHAKRAVARTI v. NABIN CHANDRA BANIKYA 232

——————, **Sch. I, Art. 149**—Title claimed by adverse possession against Crown—Limitation. **See** Adverse Possession 1311

——————, **Sch. I, Art. 166**—Mortgage decree—Execution sale—Purchase by decree-holder—Application by judgment-debtor to set aside sale—Limitation. **See** Chota Nagpur Tenancy Act, s. 231 1243

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——————, **Sch. I, Art. 182—Execution opposed by judgment-debtor alleging payment and asking for certification thereof—Plea successful in first Court, but reversed on appeal—Second appeal by judgment-debtor—Limitation, if suspended during pendency of second appeal.**] When a decree-holder is obstructed by violence or fraud and litigation is necessary to get rid of such obstruction, the execution is suspended during such litigation. But the mere pendency of an appeal from a decision which has removed all obstacles from the decree-holder's way cannot give him a right to defer execution until the disposal of such appeal. **Ashrafuddin Ahmed v. Bepin Behari Mullick**, I. L. R. 30 Cal. 407, 413 (1902), and **Madhab Mani Dasi v. Lambert**, I. L. R. 37 Cal. 796: s. c. 15 C. W. N. 337; 12 C. L. J. 328 (1910), relied on. KARTICK CHANDRA MONDAL v. NILMANI MONDAL 686

——————, **Sch. I, Art. 182, col. 3, cl. (2)—Suit for ejectment—Decree against some Defendants on consent and against others on contest—Appeal by contesting Defendants—Dismissal of appeal—Execution of decree, application for, within three years of dismissal of appeal but more than three years after the first Court's decree, if barred as against consenting Defendants.**] A suit for ejectment brought against two sets of Defendants, A and B, was decreed on 17th September 1903 against set A upon consent and against set B upon contest, the result being embodied in one decree which did not define the respective shares of the two sets of Defendants. An appeal preferred by set B alone in which they did not make set A parties was not disposed of until 8th May 1908. On 7th May 1910 application was made for execution of the decree against both sets of Defendants. **Held**—That the application was not time-barred as against set A, even though set A did not and could not appeal against the decree of 17th September 1903, inasmuch as the appeal of set B was of necessity against the entire decree—there being a chance or risk of the Appellate Court modifying the decree even as against set A. That on appeal by the contesting Defendants the whole matter was reopened and the decree-holders were entitled to the benefit of Art. 182, col. 3, cl. (2) of Sch. I to the Limitation Act. **Batuk Nath v. Munni Dei**, I. L. R. 36 All. 350: s. c. 18 C. W. N. 740 (1914), **Ashfak Hossein v. Gouri Sahai**, L. R. 38 I. A. 37: s. c. 15 C. W. N. 370 (1911), and **Law v. Benarashi Proshad**, 19 C. W. N. 287 (1914), referred to. **Quære.**—Whether time runs against the decree-holder from the date of the final decree in the appeal irrespective of the question whether the appeal did or did not imperil the decree whereof execution was ultimately sought. LOKENATH SINGH v. GUJU SINGH 178

——————, **Art. 182 (5)—Application for execution—Limitation—Step in aid of execution—Application**

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by decree-holder certifying portion of payment with a prayer to strike off execution on satisfaction.] An application by the decree-holder certifying payment of a portion of the decretal amount out of Court is a step in aid of execution of the decree within the meaning of Art. 182 (5) of the Limitation Act, provided the payment asserted has actually been made. The fact that there is in the application a prayer that the execution case might be struck off after satisfaction does not take it out of the operation of the above rule. Where an application for execution filed within time which had been returned for amendment of certain formal defects was re-filed after the period of limitation had expired and after the time allowed by the Court for the purpose, with an application explaining the delay and the petition was accepted, **Held**—That the Court had in fact in exercise of its discretion enlarged the time under sec. 148, C. P. C., though there was no express order to that effect. GOPAL PROSHAD BHAGAT v. RAJENDRA LAL PANJA 615

——————, **Sch. I, Art. 182, cls. (5), (6). See** Art. 183 889

——————, **Sch. I, Art. 183—"Revivor," meaning of—If covers every one of the matters in Art. 182, cls. (5) and (6)—Application for transmission of decree and order permitting same, if revivor—Issue of notice under s. 248, Civil Procedure Code (Act XIV of 1882), if proper—Application for execution if to follow or precede transmission and to be made to which Court.**] The word "revivor" in Art. 183 to Sch. I of the Limitation Act does not mean the same thing as one or more of the matters which are mentioned in Art. 182, cls. (5) and (6) to Sch. I of the Act. To constitute a "revivor" of a decree within the meaning of Art. 183 of Sch. I of the Limitation Act, there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it; and such determination must be by a Court or person duly qualified to make it. An application for transmission of a decree is not an application for execution. No notice under sec. 248 of the Civil Procedure Code of 1882 can be properly issued upon such an application. The notice required by that section must, when the decree has been transmitted, be issued by the Court to which the decree has been sent for execution and which is the Court to decide whether the application is capable of execution. R. 370 of Mr. Belchamber's Rules of the Original Side was not consistent with the Code of 1882. Where on an application being made for the transmission of a decree of the Original Side of the High Court, the Registrar issued notice under sec. 248, C. P. C., on the judgment-debtor to show cause why the decree should not be executed against him and, the judgment-debtor not appearing, ordered execution to issue as prayed, **Held**—That the application and the order did not operate as a revivor of the decree. That looking into the substance of the matter there was no determination that the decree was capable of execution. CHUTTERPAT SINGH v. RAI BAHADUR SATTA SOOMARIMULL (F. B.) 889

——————, **Sch. I, Art. 183. Application to enforce Privy Council order—Revivor, [illegible] of.**] On 2nd January 1915 a decree-holder [illegible] for execution of an [illegible] Council dated [illegible] was made [illegible] whom the execution [illegible] were transferred, **Held**, that the application was governed by Art. 183 of the 1st Schedule of the Limitation Act, 1908, according to which an application to enforce an Order of the Sovereign in Council must be made within 12 years from the date on which a present right to enforce the order accrued to some person capable of releasing the right, provided **inter alia** that where the Order has been revived, 12 years shall be computed from the date of such revivor. Where on an application for execution notice is issued under sec. 216 of the Code of Civil Procedure, 1877, or sec. 248 of the Code of Civil Procedure, 1882, and the Court has decided that the decree is still capable of execution and makes an order for execution, there has been a revivor within the meaning of the article. Where an Order in Council is transmitted to a subordinate Court for execution without any notice being given to the judgment-debtors, it would not be a revivor of the Order. TRIBIKRAM DEO NARAYAN SINGH v. BADRI MISSER **(Patna)** 1051

LIMITATION, ORDINANCE **(Straits Settlements), ss. 17 (1), 22—Death of partner leaving Will—Executor, if competent to sue for dissolution before probate obtained—Probate applied for in Court of domicile in India—Suit by administrator pendente lite, if may be brought more than three years after testator's death—Substitution of executor in place of administrator pendente lite—Suit if to be regarded as instituted on date of substitution—Civil Procedure Code, secs. 133, 169—Order competent only under latter section, drawn up erroneously, if may enable Defendant to escape liability.**] S, one of two executors named in a Will left by a person who was a native of and domiciled in British India (his co-executor having renounced probate), applied in August 1907 in the Court of the District Judge of Madura in the Madras Presidency for proof of the Will in solemn form (in view of caveats entered against the proof of the Will) and probate was not granted till 10th March 1912. Meanwhile on the 7th March 1910, letters of administration **pendente lite** were granted to P by the Supreme Court of the Straits Settlements to the estate of the testator situate within the jurisdiction of that Court, and on 23rd October 1911, P instituted a suit for dissolution of partnership against S. N.

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with whom the testator for some years prior to his death (which took place on 11th November 1904) carried on a money-lending business in Singapur. The defence was that the suit was time-barred, having been instituted more than three years from the date of the dissolution. Pending the suit, letters of administration **pendente lite** granted to P were cancelled and [illegible] thereof letters of administration [illegible] Will annexed were granted [illegible] on 14th April 1913 [illegible] the suit striking [illegible] S as the Plaintiff [illegible] was further contended [illegible] that the suit must be deemed to have been instituted on 14th April 1913 under sec. 22 of the Limitation Ordinance and so was time-barred. **Held**—That the suit was time-barred when it was instituted by P on 23rd October 1911, sec. 17 (1) of the Ordinance not being applicable to the case to save limitation. That if it had been within time when instituted by P on 23rd October 1911, the suit would not have been barred by reason of the substitution made on 14th April 1913 and necessitated by a change or devolution of interest pending the suit. An executor derives his title and authority from the Will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action vest in him before the testator's death and the consequence is that he can institute an action in the character of executor before he proves the Will. He cannot obtain a decree before probate, not because his title depends upon the probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant and cannot institute an action as administrator before he gets his grant. In the case of a cause of action arising in favour of the estate of a deceased person at or after his death, time will at once begin to run, if there be an executor, even though probate has not been obtained; but if there be no executor, time will run only from the actual grant of letters of administration. Sec. 17 (1) of the Limitation Ordinance was probably intended to apply this rule. There is nothing in the ordinance to confine "legal representative" to a person to whom the Court has actually made a grant. But the words "capable of instituting an action" mean capable of instituting an action in which a decree might be obtained. The Will under which the executor claims must be capable of probate. According to English practice (which, in the absence of local law, was to be followed and adopted in the Straits Settlement) probate may be granted of a Will of a person domiciled abroad upon proof that it is a valid Will according to the law of the domicile that there are assets within the jurisdiction. It is not necessary that

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it should be first proved in the Courts of the domicile. That in this case, probate could be granted since August 1907 to S alone (his co-executor having renounced at some time before August 1907) and the suit instituted more than three years after August 1907 was time-barred. **Quære**:—Whether one of two joint executors can properly institute proceedings on behalf of the estate. Sec. 22 contemplates cases in which action is defective by reason of the person or one of the persons in whom the right of action is vested not being before the Court. It has no application to cases in which the action was originally properly constituted as to parties, but has become defective because there has been a change or devolution of interest. Such cases do not fall within sec. 133 of the Civil Procedure Code (which provides against the defect of an action on the ground of a defect of the first sort and enables the proper party to be added or substituted) but within sec. 169 of the Code, and the proper remedy is by way of an order to carry on proceedings, and not of an order adding or substituting parties. The proviso to sec. 22 of the Ordinance may have been inserted **per cautelam** and cannot be relied on as controlling the operative words. The fact that the order was not drawn up in accordance with sec. 169 of the Civil Procedure Code, the only section under which the order was competent, could not be taken advantage of by the Defendant to escape a liability to which he would have been subject, if the order had been made in proper form. SOONA MAYNA KENA ROONA MEYAPPA v. SOONA NAVENA SUPPRAMANIAN (P. C.) 833

LOCAL SELF-GOVERNMENT ACT (III B. C., of 1885), sec. 138 (d), rules under —Rr. 93, 98, if ultra vires and directory —Power to make rules to regulate exercise of statutory authority, scope of—Release, if may operate as conveyance—Plaintiff if and when should be allowed to complete his title pending suit—Contract of Corporation without seal if enforceable, when not demanded by statute—Part-performance, as a ground for specific enforcement of unsealed contract—Successive contracts dealing with same matter—Former if rescinded when later contract invalid—Rescission by renunciation, when effective—Rescission after part-performance—Money taken by Corporation under illegal contract—Liability to refund—Civil Procedure Code (Act V of 1908), Or. 41, rr. 22 (3), 33—Cross-objection where may be urged against co-Respondent—Court's power to permit when justice requires—Change of law.] The effect of rr. 98 and 93 of the Rules made by the Lieutenant-Governor on the 15th December 1885 under sec. 138 (d) of Act III of 1885 B. C. (Bengal Local Self-Government Act) is that no immoveable property vested in a District Board can be sold, except with

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the previous approval of the Local Government (sec. 93) and except by an instrument under the Common Seal signed by the Chairman and by two members of the Board. These rules are not **ultra vires** being rules made for the purpose of "regulating the powers" of District Boards to transfer property, within the meaning of sec. 138 (d) of the Act. The requirement as to signature by two members of the Board in r. 98 is mandatory and not merely directory, for read (as it must be) with r. 96, it implies a prohibition on the Board to effect transfers otherwise than in the manner laid down by it. The authority to "regulate" does not include a power to prevent or prohibit, but, subject to this qualification, a rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power. **Municipal Corporation of Toronto** v. **Virgo**, [1896] App. Cas 88 and **Attorney-General** v. **Advocate-General**, [1896] App. Cas. 348, referred to. Where a District Board having sold some land by auction to the highest bidder for Rs. 1,280 granted to the latter a certificate, and then as the certificate did not specifically describe the property sold executed a deed of release in favour of the purchaser: **Held**—That the sale was ineffective as there was no compliance with the provisions of either sec 54 of the Transfer of Property Act or rr. 93 and 98 aforesaid. The release did not operate as a conveyance, as title to land cannot pass by a mere admission when the statute requires a deed. **Hemendranath** v. **Kumar Nath**, I. L. R. 32 Cal. 169: s. c. 9 C. W. N. 96 (1904) and **Hemendranath** v. **Kumar Nath**, 12 C. W. N. 478 (1908), distinguished. That the release and the certificate not being in compliance with r. 103 did not constitute even a valid contract for sale, **Held**, in a suit by the purchasers to recover possession from a person other than the District Board, that coming into Court as Plaintiffs they could succeed only on proof of a valid title. That not having had any title on the date of the institution of the suit, the trial could not have been postponed to enable them to complete their title by securing a duly executed instrument from the District Board, the principle of **Gunpat** v. **Adharji**, I. L. R. 3 Bom. 312 (1877), discussed with reference to cases in **Sarat Chandra** v. **Apurba Krishna**, 14 C. L. J. 53 (1911), being inapplicable to such a case. Where the original contract by which a District Board agreed to transfer land for a consideration of Rs. 25 was not forthcoming, **Held**—That if the seal of the Board was necessary to give validity to it, it should be presumed against the Board that everything had been done that was necessary to make it a binding contract upon both parties. **Doed Pennington** v. **Tanniere**, 12 Q. B. 998, 1013 (1848), referred to. **Semble**: The strict rule of ancient Common Law

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that a Corporation could only act under its seal and was not bound by written contracts not under seal should be relaxed where there is no statutory requirement of a contract being under seal and the benefit of the contract has been enjoyed by the Corporation. That in any case part-performance such as will prevent an ordinary Defendant from setting up the defence of the Statute of Frauds will prevent a [redacted] from setting up that [redacted] grounded on the [redacted] tion seal; [Fry on Specific Performance (1911), sec. 648 and cases cited] though where the statute [redacted] quires the contract to be under seal, the exception based upon the doctrine of part-performance cannot be applied. Where therefore the District Board having acquired property belonging to A under the Land Acquisition Act agree to restore the property to A, on the latter paying Rs. 25 being the costs of the acquisition and A deposited the money, and was allowed to remain in occupation of the land and to incur expenditure thereon for many years on the basis of the contract, **Held**—That the contract itself not being **ultra vires** of the District Board, in the sense that it was beyond the scope of the authority of the District Board as a Corporate Body under any circumstances, was specifically enforceable even though not sealed. One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former, but if though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless and until it is performed. Where parties enter into a contract which if valid would have the effect by implication of rescinding a former contract and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect of the former transaction, **Held**, that a later agreement of A with the District Board to purchase for Rs. 957 odd, a larger area including the subject-matter of the previous agreement, which did not fulfil the requirements of r. 103 and was thus inoperative, did not make the pervious contract inoperative. A who duly deposited the latter sum also, failed to obtain a conveyance and subsequently applied for refund of Rs. 992 odd being the amount of both deposits. The refund was not made and both parties continued to conduct themselves as if there was no rescission, and when the District Board proceeded to dispose of the land, A protested. **Held**—That there was no abandonment of the whole agreement clearly made out, such as is necessary to establish a renunciation of the contract by A. That there could not be

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such rescision after the contract had, as in this case been half performed. A Corporation like a natural person is not entitled to retain money or property which it has received under an agreement which turns out to be ultra vires or illegal. The law, independently of express contract, will compel restitution or [illegible]. As an ordinary rule, a [illegible] granted in an appeal is not entitled [illegible] there cross-objections except [illegible] Warrant but under r. [illegible] on 41 of the Civil [illegible] the Appellate Court can [illegible] case allow cross-objections [illegible] against a co-Respondent. In the peculiar circumstances of the present case in which the co-Respondent supported the Appellant and there was no question of surprise, the Court permitted this to be done. MATHURA-MOHAN SAHA v. RAM KUMAR SAHA 370
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LUNACY ACT (IV of 1912), s. 56—Guardian of lunatic obtaining District Judge's permission to take out compensation money in deposit with Land Acquisition Judge—Latter if may refuse to pay.] Where the natural guardian of a lunatic, in whose name a sum of money representing his share of compensation money paid by the Land Acquisition Collector was in deposit in the Court of the Land Acquisition Judge, obtained an order from the District Judge under sec. 56 of Act IV of 1912 for payment to him of a portion thereof for the maintenance of the lunatic, the Land Acquisition Judge had no jurisdiction to refuse the guardian's application for withdrawing the money. SATYENDRA NATH DEY v. THE SECRETARY OF STATE FOR INDIA 975
"MAFI," meaning of. See Bengal Tenancy Act, s. 185 1207
MAHOMEDAN LAW—Public trust—Court's functions in settling a scheme for carrying on the trust. See Civil Procedure Code (XIV of 1882), s. 539 1118
——— Pre-emption. See Pre-emption.
——— Wakf—Founder herself mutwalli, if may renounce office and appoint another—Right of next in order of succession under original wakf to sue if arises immediately or on death of predecessor—Limitation.] A mutwalli cannot renounce his office except in the presence of the founder or the cadi: but whether the founder is herself the mutwalli, a renouncement by her to herself would be valid, and the appointment by her of another mutwalli would be valid at least during her lifetime, and limitation would not begin running against the person next entitled to succeed to the office under the original endowment until her death ABDUL GHAFOOR MIAN v. HAJI KHUNDKAR ALTAF HOSAIN 605
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ship—Appointment of Mutwalli if must be made by Quadi—Judicial Officer in British India corresponding to Quadi—Jurisdiction of Subordinate Judge to exercise functions of a Quadi—Jurisdiction of District Judge.] The mutwalli of a wakf died without appointing a successor. Two persons took possession of the wakf properties and after administering them for some time executed a deed of relinquishment in favour of the Plaintiff, the sole surviving descendant of the founder of the trust. A suit under sec. 539, C. P. C., was then instituted by persons claiming to be interested in the due administration of the trust. In this suit the Defendants did not deny that the trust was a public one and the Plaintiff who alleged that the wakf was private applied but was not allowed to be made a party. After trial of the suit the District Judge appointed the Defendant mutwalli. The Plaintiff thereupon instituted a suit in the Court of the Snbordinate Judge for declaration of her title as mutwalli of the wakf which according to her case was a private wakf. The Subordinate Judge decreed the suit holding that the wakf was a public one but that the Plaintiff as the sole surviving descendant of the founder had established a claim to the office of mutwalli superior to that of any stranger. The finding as to the public nature of the wakf was affirmed in appeal by the District Judge who however dismissed the suit on the ground that so long as the decree in the suit under sec. 539, C. P. C., was in force, no relief could be granted to the Plaintiff. Held—That in the suit as framed the Plaintiff could not be appointed mutwalli and the suit was rightly dismissed. That the Plaintiff did not as the sole surviving descendant of the founder become by operation of law the mutwalli by right of inheritance on the death of the last mutwalli, for a descendant of the mutwalli though he has a preferential claim to the office of mutwalli does not become mutwalli by right of inheritance but has to be appointed such by the quadi who may supersede him if he is not qualified. That it is clear from an examination of the texts that under the Mahomedan law the quadi alone was competent to exercise authority in respect of wakf, who was so expressly authorised in his Letters Patent. There was some difference of opinion upon the question whether such express authority was needed when a person was explicitly appointed the chief quadi, but the balance of opinion of Jurists favoured the view that power should be expressly conferred on the chief quadi to vaildate the administration of wakf by him. There is also authority to show that the supreme authority in the State by whom the quadi is appointed need not be a Mahomedan and there is also authority to show that this office of quadi may be held by a non-Moslem for the decision of disputes between non-Moslems under

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Mahomedan protection. That as this was a matter regarding religious usages and institutions within the meaning of sec. 15 of Reg. IV of 1793, the rights of the parties must be determined with regard to the provisions of the Mahomedan law on the subject and it followed accordingly that a Subordinate Judge who has not been expressly authorised by the Government to exercise functions in connection with the administration of **wakfs** is not competent to act in that behalf. In respect of **wakfs** which may be described as trusts for public purposes of a religious nature within the meaning of sub-sec. (1) of sec. 92, C. P. C., the District Judge may be assumed to have been authorised to discharge the functions of a **quadi**. **Per** Mookerjee, J.—With regard to private **wakfs** it is desirable that to cover such cases the Local Government should authorise either District Judges or Subordinate Judges or even Judicial Officers of a lower grade, if it be thought desirable, to exercise the function of a **quadi**. **Per** Curiam.—That in the present case, it being found that the **wakf** is a public one, the District Judge had jurisdiction under sec. 539, C. P. C., to appoint the Defendant as **mutwalli** and the Subordinate Judge had no authority to recall that order and to appoint the Plaintiff as **mutwalli**. That the remedy of the Plaintiff was to proceed under sec. 92, C. P. C., and to get herself appointed **mutwalli** on the ground that she had the preferential right to the office as the sole surviving descendant of the founder at the time of the death of the last **mutwalli** and it would be open to the Plaintiff to accept the decision in this suit that the **wakf** is public and to proceed on that basis under sec. 92. ATIMANNESSA BIBI v. ABDUL SOBAN 113

MEASURE OF DAMAGES. **See** Brokerage 708

———. **See** Damages.

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MEMONS of Cutch—Emigration to East Africa—Hindu Law of succession if applies. **See** Hindu Law—Emigration ... 362

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——— **Thicca** taken by cultivating raiyat—Conversion into tenure-holder. **See** Bengal Tenancy Act, sec. 22 ... 800

MINERALS, right to—Surface rights and subsoil mineral rights—Distinction between copyholders and tenants of freehold land in England—Construction of the terms "Restrictions and conditions as to the exercise of the power" in mining lease—Limitation—Adverse possession. Where the mineral rights were never in contemplation of the parties when the lease was granted in 1830 and the dessees never exercised any mineral rights whatsoever barring taking small

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quantities of coal from the outcrop for domestic purposes and burning lime and the zemindar by the lease granted a village containing 380 bighas at the abnormally low rent of Rs. 17 per annum, the presumption made, in the absence of the original document, was that only the surface rights were conveyed to the grantees. In such a case the mines and minerals and the property in the subsoil under the property and in the [illegible] the zemindar. The su[illegible] incidents became [illegible] as tenure-holders. **Rani [illegible] Deo Bahadur** v. **Sriram [illegible]** L. R. 37 I. A. 136; s. c. I. L. R. [illegible] 723; 14 C. W. N. 746 (1910), and **Durga Prasad Singh** v. **Braja Nath Bose**, I. L. R. 39 Cal. 696; s. c. 16 C. W. N. 482 (1912), relied on. **Kunja Behari Seal** v. **Durga Prasad Singh**, I. L. R. 42 Cal. 346; s. c. 19 C. W. N. 203 (1914), referred to. If the mines are presumed to be vested in, and to be the property of, the zemindar, his rights must be just the same as those of a fee-simple freehold owner of land according to English Law, who makes a grant with an express reservation of the mines to himself together with the incidents that follow therefrom. By reason of that presumption and by reason of the severance of the tenement and the reservation that must be deemed to arise in favour of the Raja, the latter has as incident to his right of property and ownership in the mines the right by implication of law to enter upon the surface of the tenure-holder's mouzah for all reasonable and necessary purposes to enable him to work the mines and exercise his mineral rights. The case of **Prince Mahomed Buktyar Shah** v. **Rani Dhajamoni**, 2 C. L. J. 20 (1905), in so far as it decided that the owner of a limited estate in possession can prevent the grantor or his lessee to work and appropriate the mineral during the existence of such limited estate unless the grantor had expressly reserved the mineral right in his own favour, was wrongly decided by the misapplication of the English Law of copy-holds to the case of owners and tenants of freehold land. The distinction between freehold and copyhold law is that under the latter there is no division into strata and the tenant obtains possession of the entire surface and subsoil to the centre of the earth, so that the lord of the manor cannot work the mines unless he proves a right or custom to that effect. It is only under the copyhold law and where there is no reservation of custom proved that a deadlock occurs and neither landlord or tenant can work the mines. Under the law applicable to freehold land there can be no deadlock, for if the mines be excepted the grantor has an implied right to work them incidental to such exception; if there be no exception then that right is with the grantee as owner of the surface and subsoil. Where a tenement is severed the person in whose favour

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the reservation is made is the absolute owner of the subsoil and the rights of such a person are that he has by implication of law the power to go upon the surface and do all things reasonably necessary in order to exercise the enjoyment of his property. **Batten Pooll** v. **Kennedy**, [1907] 1 Ch. 256 (1906), and **Ramsay** v. **Blair**, L. R. 1 A. C. 701 (1876), referred to. **Held**, on the construction of a [illegible] grant, that under cl. (3) of Part [illegible] the lease, the lessees had [illegible] liberty to enter upon [illegible] possession of the Raja [illegible] exercise the mineral [illegible] in them. The implied liberty to enter and work the mines subject to reasonable restrictions is not to be curtailed by the express conditions of the lease unless the intention is apparent. Part III of the lease headed "Restrictions and conditions as to the exercise of the above liberties, powers and privileges" must be construed as only restricting the liberties and privileges expressly conferred by Part II and not as any restriction upon the general right of access which is implied by law. **Earl of Cardigan** v. **Armitage**, 2 B. & C. 197; 107 Eng. Rep. 361 (1823), referred to. **Held** also—That the Defendant acquired no title by adverse possession to the mines and minerals of the land in question. NAWAGARH COAL COMPANY, LIMITED v. BEHARILAL TRIGUNAIT **(Patna)** 1135

MINERALS AND MINES, partition of, if possible. **See** Partition 1306

MINOR. **See** Infant.

———, **Joint promisors, one of whom is a minor—The other if shares minor's immunity—Agreement by guardian on behalf of minor with Court's sanction if binds minor personally.**] One of two promisors cannot plead the minority and the consequent immunity of the other as a bar to the promisee's claim against him. JAMNA BAI SAHEB MOHITAI v. VASANTA RAO **(P. C.)** 840

———, compromise by Guardian **ad litem** of, without Court's sanction—Validity. **See** Trustee 207

———, if may be estopped from repudiating contract induced by representation that he was **sui juris**. **See** Evidence Act, sec. 115 418

"MOGULI" RENT, meaning of.] "Moguli" is a word of doubtful meaning and at the best imports no more than that the rent assessed represents a proportion of the Government revenue. NAWAGARH COAL COMPANY, LIMITED v. BERARILAL TRIGUNAIT **(Patna)** 1135

MOHUNT, position of, that of a trustee. **See** Hindu Law—Religious Endowment 802

MORTGAGE, **not validly executed, if creates a charge—Personal liability to repay if to be implied from fact that document mentioned advance of money—Transfer of Property Act (IV of 1882), secs. 59, 67, 100.**] **Held**, on the construction of a document which purported to be a usufructuary mortgage, but was not enforceable as such by reason of its not being attested as required by sec. 59 of the Transfer of Property Act, that the mortgagor did not intend that he should be personally liable to repay the advance and the Trial Court and the High Court erred in assuming from the mention in the document that a certain sum had been advanced that it might be inferred that it was the intention of the parties that the mortgagor should be personally liable. That the document did not create a charge within the meaning of sec. 100, Transfer of Property Act. MAHARAJA RAM NARAYAN SINGH v. ADHINDRA NATH MUKHURJI **(P. C.)** 989

———, **simple—Mortgagor's power to create leases binding on mortgagee.**] A simple mortgage in India, unlike a legal mortgage in England, does not arrest the mortgagor's power of leasing in the ordinary course of management and the mortgagor acts within his powers in creating a temporary lease which does not impair the value or impede the operation of the mortgage. **Banee Pershad** v. **Reet Bhunjun Singh**, 10 W. R. 325 (1888), referred to. **Keech** v. **Hall**, 1 Douglas 21 (1778), not applied. BALMUKUND RUYIA v. MOTI LAL BARMAN 350

——— — —, **equitable, by deposit of title deeds—All the properties referred to in document of title if subject to mortgage—Bargain restricting scope of security—Written bargain.**] Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. Where, however, titles are handed over accompanied by a bargain, that bargain must rule. Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. **Shaw** v. **Foster**, L. R. 5 Eng. & Ir. App. 321 at p. 340 (1872), referred to. PRANJIVANDAS JAGJIVANDAS MEHTA v. CHAN MAH PHEE **(P. C.)** 925

———, **mortgagor and mortgagee—Mortgagor prevented from paying off debt by wrongful act of mortgagee—Interest, suspension of—Excessive interest when not penal.**] If a creditor by his own act puts it out of the power of the debtor to make payment, no interest should be recoverable for the period during which the debtor was thus prevented from paying the creditor. Where a mortgagor who had entered into a contract with a stranger for sale of the property with a view to paying off the mortgagee out of the proceeds, was induced by the mortgagee to resile therefrom, with the result that the purchaser sued for specific performance—the suit being defended by the mortgagee in the mortgagor's name—and got a decree: **Held**, in the mortgagee's suit to enforce his security, that the latter was not entitled to interest for the period between

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the contract and the completion of the sale. GOPESWAR SAHA v. JADAB CHANDRA CHAUDARAY 689

———, alteration. See Transfer of Property Act, s. 59 699

——— by mitakshara father—Son's liability. See Hindu Law—Joint family 508, 797

——— by two out of three brothers, members of joint Hindu family—Death of one executant—Suit against other executant and the non-executing brother only as representing the deceased executant—Ex parte decree and sale in execution and purchase by mortgagee—Non-executing brother's original share if passed by the sale—Decree for joint possession if can be made—Transfer of Property Act (IV of 1882), sec. 44.] Delivery of symbolical possession is operative against the judgment-debtor who from that date becomes a trespasser, and the remedy of the decree-holder who has failed to get actual possession is by suit. Where A and B, two out of three brothers, A, B and C, members of a joint mitakshara family, executed a mortgage of their whole property, and the mortgagee on the death of A sued to enforce the mortgage against B as mortgagor and also as the legal representative of A and against C, describing him only as A's legal representative: Held—That the decree and the sale could not affect C's original one-third share in the mortgaged property, since the question of the validity of the mortgage as against C who was not a party thereto could not be raised and decided in the mortgage suit. That in a suit by the purchaser to recover the property, C was not barred from raising the question by the doctrine of constructive res judicata. That the Plaintiff as purchaser of an undivided two-thirds share in huts used as residence by a joint Hindu family could not be given a decree for joint possession, regard being had to sec. 44 of the Transfer of Property Act. That the proper course to follow is either to direct delivery of possession by partition in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition. GIRIJA KANTA CHAKRABARTY v. MOHIM CHANDRA ACHARJYA 675

———, redemption, suit for—Limitation, application for execution—Time, if runs from date of decree or date of ascertainment of exact amount.] Where in a suit for redemption a certain decree was passed on 27th July 1909 and it was directed therein "that it will be necessary to have fresh accounts taken to determine the amount due to the Appellants," and the amount was not definitely ascertained till the 23rd February 1910 and the application for execution was filed on 29th January 1913: Held, that the judgment of the District Judge, dated 27th July 1909, sets forth clearly the exact method of ascertaining the sum to be paid in redemption and the calculation of that sum was a matter purely of office routine and that the application for execution was barred by limitation. Golam Gaffer Mondal v. Goljan Bibi, I. L. R. 25 Cal. 109 (1897), followed. BABU SURAJDEO NARAYAN SINGH v. MUSHAROO RAUT (Patna) 950

———, Redemption, suit for—Mortgagee if can deny mortgagor's title. See Estoppel 1231

———, Re[illegible]'s auction, decree for, against mortg[illegible] def[illegible] session—Mortgagee's app[illegible] for recovery of mesne pro[illegible] in execu[illegible] Jurisdiction. See [illegible] claim[illegible] Code (1882), sec. 583 [illegible] appeal[illegible] ... 425

———, Subrogation—Purchaser retaining money to pay off later mortgage, on paying off earlier mortgage, when may use latter as a shield—Equitable grounds, application of doctrine of subrogation on—Contract, stranger when may take benefits of.] The Respondent sued to enforce mortgage executed in his favour in 1897. The property in dispute was the subject of two previous mortgages executed in 1888 and 1895. Subsequent to the three mortgages the mortgagors transferred the equity of redemption to the Appellant who was allowed to retain in his hands the entire consideration for the satisfaction of the dues on the two mortgages of 1895 and 1897 which only were recited in the deed of conveyance. In the mortgage of 1897, there was a false recital that the mortgagor had paid off the mortgage of 1888 and that the mortgage-instrument of 1888 had been made over to the mortgagee. The Appellant on discovering the prior mortgage of 1888 satisfied that as also the mortgage of 1895. The Respondent, the mortgagee of 1897, then commenced the present action which the Appellant contested on the ground that he was entitled to priority to the extent of the mortgages of 1888 and 1895, Held—That the doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays a charge which he has undertaken or is bound to satisfy. If a person purchases a property subject to two mortgages, retains a portion of the purchase money for payment to the mortgagees but pays the first incumbrancer alone and not the second he cannot treat the first mortgage as kept alive for use as a shield against the second. That the Appellant was not entitled to priority on the basis of the payment made by him to satisfy the mortgage of 1895. That if nothing else was known in the case except that there were the three mortgages of 1888, 1895 and 1897, and that the Appellant had undertaken to pay the charges of 1895 and 1897 with money placed at his disposal by the mortgagor, the mere fact that he had satisfied the prior charge of 1888 would not entitle him to use that as a shield against the

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mortgagee of 1897. But in this case as the acceptance of an instrument with an untrue recital by the mortgagee of 1897 enabled the mortgagor to commit a fraud upon the purchaser, the latter was entitled to priority in respect of the payment made by him to satisfy this mortgage. That the mortgagee of 1897 had also no claim as against the purchaser on any contractual basis. He was in no sense privy to the agreement between the grantee-appellant and his vendor and [illegible] ther, stranger to a contract [illegible] who entitled to claim [illegible] performance [illegible] cannot be allowed to [illegible] defeat the ends of justice [illegible] RAM CHOUDHURY v. SH[illegible]AL SAHU 601

———— BOND—Attestation—Person subscribing as scribe if attesting witness. See Transfer of Property Act, s. 59 ... 699

———— DEBT if moveable or immoveable property.] Under the Hindu, as under English law, a mortgagee is treated as personal or moveable property, the land being considered as merely a pledge or security for the money lent. CHOUDHURY SURESSUR MISSER v. MUSSTT. MOHESH RANI MESRAIN 142

———— DECREE, rule of damdupat if applicable to—Interest in excess of principal if should be allowed. See Interest 110

———— DECREE passed when the previous Code (1882) was in force, application for execution of, sec. 48 of the Code of Civil Procedure (1908) if would govern See Civil Procedure Code, s. 48 ... 952

———— DECREE—Execution sale Purchase by decree-holder Application by judgment-debtor to set aside sale—Limitation. See Chota Nagpur Tenancy Act, s. 231 1243

———— SUIT—Joinder of party claiming adversely to mortgagor, irregular.] In a suit by a mortgagee to enforce his mortgage, it is irregular to join as parties persons who set up adverse claims to the mortgaged property. MUSAMMAT RADHA KUNWAR v. THAKUR REOTI SINGH (P. C.) ...1279

———— SUIT—Admission of mortgagor if sufficient to make mortgage admissible against other parties not admitting execution, without proof of attesting witnesses. See Evidence Act, s. 70 ...1044

MOVEABLE or immoveable property, mortgage-debt if. See Mortgage Debt ... 142

MUSTAGIRI lease relating to agricultural land—Agricultural purposes if necessary for lease to come under Bengal Tenancy Act. See Bengal Tenancy Act, Sch. III, Art. 2 485

MUTH, succession to. See Hindu Law—Religious Endowment 122

NANDA PANDIT as authority on Hindu Law. See Hindu Law—Succession ... 1

NOABAD TALUK—Khas mehal—Taluk, a tenure—Non-permanent taluk—Sale for

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NOABAD TALUK—contd.
arrears of revenue—Purchaser's title—Act VII of 1868, B. C., sec. 12—Cause of action.] A Noabad taluk is a tenure, the land being khas mehal land of Government. Where it was found that the tenure in question was not a permanent tenure, the purchaser thereof at sale under Act XI of 1859 acquired it in the same estate in which it was held at the time of the last settlement as provided by sec. 12 of Bengal Tenancy Act VII of 1868. GANGADAS SIL v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL 636

NON-OCCUPANCY RAIYAT, holding over after term, if holds on from year to year—Ejectment.] Under the Bengal Tenancy Act there is no raiyat who holds from year to year and if the tenant is a non-occupancy raiyat who does not hold under a lease for a term, he cannot be ejected under the provisions of cl. (c) of sec. 44. JOTIRAM KHAN v. JONAKI NATH GHOSE 258

————, Agreement—Validity. See Landlord and Tenant ... 347

NON-TRANSFERABLE raiyati holding—Sale in execution of money decree—Purchaser allowed by raiyat to take a portion of the holding—Surrender by raiyat of whole holding—Raiyat continuing in occupation—Purchaser if may be ejected.] Where a purchaser (in execution of a money decree) of a non-transferable raiyati holding being resisted by the raiyat, by arrangement with the latter, was given a portion of the holding, the raiyat retaining the rest; and subsequently the raiyat expressly surrendered the whole holding to his landlord, though it appeared that even after such surrender he went on occupying the portion retained by him under the arrangement. That the surrender being obviously illusory, the original tenancy subsisted and protected the purchaser from ejectment by the landlord. NOBO KISHORE SAHA v. DHANANJOY SAHA 610

NORTH-WESTERN PROVINCES LAND REVENUE ACT, s. 205 (B). See Oudh Land Revenue Act, ss 173, 174 ... 770

OCCUPANCY-HOLDING, non-transferable—Purchaser of share, rights of, as to possession against landlord.] Plaintiffs Nos. 2 and 3 were tenants in respect of one-half only of an occupancy-holding which was not transferable and the Plaintiff No. 1 purchased their interest, Held—That the Plaintiff as purchaser of a share of an occupancy-holding was entitled to possession even as against the landlord who had no right to take possession of the property. PURNA CHANDRA TRIVEDI v. CHANDRA MOHINI DASSI (F. B.) 586

————, non-transferable—Sale by landlord in execution of rent-decree, under Civil Procedure Code, prevented by deposit by purchaser from registered tenant—Withdrawal of deposit by landlord, if amounts to recognition of purchaser as tenant.] Prior to the passing of the Bengal Tenancy

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OCCUPANCY-HOLDING—contd.
(Amending) Act of 1907, a co-sharer landlord obtained a decree for rent against the registered tenant of a non-transferable occupancy-holding in favour of himself and his other co-sharer. He took out execution under the Civil Procedure Code and not under the provisions of the Bengal Tenancy Act. The Plaintiff who had purchased the holding in execution of a money-decree against the registered tenant deposited the decretal amount in Court for payment to the decree-holder landlord, alleging in his petition that he had acquired a right to the holding by purchase and that he made the deposit to protect his right and reserved his right to realise the amount deposited by him from the former tenant or his heir as the tenants of the holding. The decree was thereupon treated as satisfied and the attachment was withdrawn, and the amount deposited was withdrawn by the landlord, **Held**—That, upon such deposit, the landlord could not, as in a case under the Bengal Tenancy Act, contest the right of the purchaser to make the deposit, and the withdrawal of the deposit did not amount to a recognition of the purchaser by the landlord. **Thomas Barclay** v. **Syed Hossein Ali Khan**, 6 C. L. J. 601 (1907) and **Nalini Behary Ray** v. **Fulmani Dasi**, 15 C. L. J. 398 at p. 391 (1912), distinguished. SURENDRA NARAIN MAHATA v. JUGAL KISHORE GHOSH 849

——, Right of purchaser of occupancy-holding to set aside sale by deposit. See Bengal Tenancy Act, s. 170 (3) 39
See also Civil Procedure Code, Or. 21, s. 89 40

——, purchaser of, if may deposit, when holding put up to sale in execution of rent decree against his vendor. See Bengal Tenancy Act, s. 170 (3) 39

——. See Non-transferable Raiyati Holding.

"OCCUPANCY-RAIYAT" and "raiyat at fixed rent," meaning of. See Revenue Sales Act, s. 37 185

OFFICIAL ASSIGNEE if may examine petitioning creditor's claim and remove his name. See Presidency Towns Insolvency Act 995

ONUS—Suit by purchaser under registered **kobala** against Defendant in possession—Plaintiff if has to prove passing of consideration. See Sale ... 254

——, Burden on signatory to prove falsity of recitals. See Purdanashin Lady ... 638

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OPINION OF JUDGE not a party to judgment, propriety of relying on. See Judge 1

ORIGINAL SIDE, order by Judge on, refusing to restore case dismissed for default if a judgment and if appealable. See [illegible] ... cl. 15 594

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OUDH LAND REVENUE ACT, ss. 173, 174—Disqualified proprietor, contract by—Decree made on such contract if may be executed against property after release from superintendence by the Court of Wards—Oudh Land Revenue Act (XVII of 1876), secs. 173, 174—North-Western Provinces Land Revenue Act (XIX of 1873), s. 205 (B).] Under sec. 174 of the Oudh Land Revenue Act, a decree made in respect of a contract entered into by a proprietor during [illegible] under the superintendence of the Court of Wards cannot be executed against such property, [illegible] the property has been released from superintendence. The dictum to the contrary in **Rameshar Bakhsh Singh** v. **Dhanpal Das**, 14 Oudh Cases 6 (1910), is unsound in law. RAJA DEBI BAKHSH SINGH v. SHADI LAL (P. C.) 770

PART PERFORMANCE. See Contract.

——, equitable doctrine of, if may be invoked by stranger to contract. See Contract 119

PARTITION, suit for, by co-sharer—Suit if maintainable without proof of actual or constructive possession—Possession by co-sharer if and when may be adverse—Evidence necessary to establish adverse possession by co-tenant—Ouster of co-tenant how may be effected to create adverse possession—Land Registration Act, registration of name under, effect of, if necessarily implies possession—Partition as distinguished from ejectment—Costs in partition suit before preliminary decree when Defendant successfully contests Plaintiff's claim for partition.] The Plaintiff sought partition of an estate of which he claimed to own an one anna share by purchase. He alleged that after his purchase he had his name registered under the Land Acquisition Act in place of his vendor and was in possession since the date of his purchase. The lower Court found that the Plaintiff was in possession of his share and made a preliminary decree for partition. The Defendants appealed, **Held**—That although as a general rule the possession of one co-tenant is not deemed adverse to the other co-tenants the existence of the relation of co-tenancy does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants; and though the co-tenant enters in the first instance without claiming adversely his possession afterwards may become adverse. In order to render the possession of one co-tenant adverse to the others not only must the occupancy be under an exclusive claim of ownership in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants either by express notice or by such open and notorious acts as must have brought home to the other co-tenants knowledge of the denial of their rights. The evidence to show adverse possession by one co-tenant must be [illegible]

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clearer than between strangers to the title and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct. The ouster of the other co-tenants in order to render the possession adverse need not be by violent or intimidating expulsion or repulsion: nor need notice of the adverse holding be actually brought home to the other co-tenant by [illegible] ther or formal communication. [illegible] Wufficient, if the [illegible] on [illegible] that the circumstances [illegible] but such knowledge may [illegible] presumed. Held—That [illegible]ious [illegible]ation of the name of a person [illegible] the Land Registration Act is some evidence of possession but the weight to be attached to this fact must depend upon the circumstances of each case. The fact that the Plaintiff was able to get his name substituted in the place of his vendor does not necessarily show that he is in possession of any share of the estate. That the Plaintiff having failed to prove that he had possession actual or constructive of any share of the disputed property was not entitled to maintain a suit for partition. That the remedy of the Plaintiff was by a suit for joint possession and partition and on the plaint in a suit so framed court-fees must be paid **ad valorem**. That partition is not a substitute for ejectment because partition implies an existing joint possession and enjoyment to be converted into possession in severalty. That although ordinarily in a suit for partition pure and simple the parties have to bear their own costs of the suit up to the stage of the preliminary decree the Plaintiff must in this case pay the costs of the Defendants who have successfully contested his claim for partition. LOKE NATH PROSAD NARAYAN SINGH ... 51

——— ———, **suit for, if maintainable by a lessee of mining rights for a term against lessor's co-owners—Partition of underground mines and minerals, if possible—Sec. 2, Partition Act (IV of 1893).**] According to the English authorities, it is clear that a lessee for a term of years must maintain a claim for partition. There is no reason for holding that a different rule prevails in India. The authority of **Mukunda Lal Pal Chaudhuri v. Lehuraux**, I. L. R. 20 Cal. 379 (1892), has been much shaken by the decision of the Full Bench in **Hemadri Nath Khan v. Ramani Kanta Roy**, I. L. R. 24 Cal. 575 at p. 581: s. c. 1 C. W. N. 406 (1897). **Heaton v. Dearden**, 16 Beav. 147 (1852), **Bhagwat Sahai v. Bepin Behari Mitter**, I. L. R. 37 Cal. 918: s. c. 14 C. W. N. 962 (1910), and **Baring v. Nash**, 1 V. & B. 551 (1813), referred to. There may be no special difficulty in effecting a partition of the underground mines and minerals, but in case any such difficulty arises, the power to order a sale under sec. 2 of the Partition Act of 1893 may be exercised. LALIT KISHORE MITRA v. THAKUR GIRDHARI SINGH (Patna) ...1906

——— **of joint Hindu family property. See Hindu Law—Partition.**

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——— ——— **suit—Preliminary decree, appeal preferred against, after final decree passed, if lies.**] Where a preliminary decree for partition passed by a Munsif was affirmed by the Subordinate Judge, and a second appeal therefrom was not filed until after the first Court had passed the final decree for partition, and no appeal was preferred against this latter decree. **Held**—That the preliminary decree having been affirmed by the final decree and the final decree itself not being the subject of any appeal, no second appeal lay against the preliminary decree. **Khirodamoyi Dasi v. Adhar Chandra Ghose**, 18 C. L. J. 321 (1912), followed. **Ram Nath Singh v. Basanta Narain Singh**, 17 C. W. N. 868 (1913), distinguished. SADHU CHARAN DUTTA v. HARANATH DUTTA ... 231

——— ——— **suit—Preliminary decree, appeal against—Final decree passed pending the appeal against preliminary decree—No appeal filed against final decree—Whether appeal against preliminary decree can proceed.**] Where in a partition suit a preliminary decree was passed on 29th May 1913 and an appeal was filed against it on 3rd July 1913, but a final decree was passed on 27th September 1913 despite the objection of the Appellant that the final decree should not be passed until the appeal has been disposed of, and no appeal was filed against the final decree, and the hearing of the appeal against the preliminary decree was objected to on the ground that the appeal could not proceed inasmuch as a final decree had been passed in the case and no appeal had been preferred against that decree. **Held, on a review of authorities, that** the preliminary objection should be overruled. The appeal could be heard although a final decree had been passed in the case and no appeal had been filed against that decree. **Kanhaiya Lal v. Tirbeni Sahai**, I. L. R. 36 All. 532 (1914), **Ram Nath Singh v. Basanta Narain Singh**, 17 C. W. N. 868: s. c. 18 C. L. J. 209 (1913), **Nistarini Debi v. Rai Mohan Biswas**, 18 C. L. J. 214 (1913), **Abdul Jalil v. Amar Chand Paul**, 18 C. L. J. 223 (1913), **Atul Chandra Singha v. Kunja Behari Singha**, 22 C. L. J. 90 (1915), and **Lakshmi v. Maru Devi**, I. L. R. 37 Mad. 29 (1911), followed. **Khirodamoyi Dasi, v. Adhar Chandra Ghose**, 18 C. L. J. 321 (1912), **Sadhu Charan Dutta v. Hara Nath Dutta**, 27 I. C. 135 (1914). **Bulwant Singh Ram Chandra v. Sakharam Mancharam**, 33 I. C. 137 (1915), and **Dattatraya Ramchandra Savale v. Ajmuddin Fakruddin**, 33 I. C. 146 (1915), were distinguishable, because in those cases the final decree had been passed before the appeal against the preliminary decree was filed. **Per** Sharfuddin, J.—A preliminary decree in a partition suit has existence independent of the final decree and the final decree really is dependent upon and subordinate to the preliminary decree, and instead of extinguishing a preliminary decree gives effect to

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it. Chamier, C. J.—A Defendant cannot resist partition of a **mehal** on the ground that by an agreement the members of the family agreed to keep it **ijmali** when the Defendant claimed partition of it in a previous suit and succeeded in effecting partition. MUSAMAT BIBI WAHID-UNNISA v. BABU DEEP NARAIN PRASAD (Patna) (F. B.) 1174

————, **suit—Issue between co-Defendants—Previous partition suit instituted by third parties against present Defendants and the vendor of the Plaintiff—Issue regarding the share of the Plaintiff's vendor being subject to other Defendants' mokurari raised but expunged—Final decree in the previous partition suit passed on the basis of the mokurari interest and allocation made thereunder—Bar of res judicata, to present suit—Explanation IV of sec. 11, Civil Prccedure Code (Act V of 1908)].** In a previous partition suit instituted by Y against the present Plaintiff's vendor T and the present Defendants, an issue was raised as to the share of T being subject to the **mokurari** interest of the other Defendants but was expunged by the order of the Court. But when the partition was actually carried into effect the present Defendants were allotted possession not only of their proprietory share but also the **mokurari** of the share which they claimed to hold under the daughter of T. In a subsequent partition suit instituted by the vendees of T against the Defendants for a declaration that T's share was not subject to any **mokurari** and for allotting to the Plaintiffs a separate **takhta** out of the **takhta** which was allotted to the Defendants in the previous suit, **Held**—That the question was not expressly decided in the previous suit and it was impossible to hold that a decision might and ought to have been obtained in the previous partition suit by T or the present Plaintiffs, and that the Defendants failed to make out that the Plaintiffs were barred by the rule of **res judicata.** SYED LATIF HUSSAIN v. BASDEO SINGH (Patna) ...1177

————, **suit—Omission by Plaintiff to put in some properties in the list of joint properties in plaint—Dismissal of suit—Power of amendment by original as well as Appellate Court.** See Civil Procedure Code, sec. 153 1276

———— **suit—Plaint, facts to be stated in—Preliminary decree—Costs.** See Pleading 310

———— **suit, costs in, before preliminary decree when Defendant successfully contests Plaintiff's claim for partition.**] That although ordinarily in a suit for partition pure and simple the parties have to bear their own costs of the suit up to the stage of the preliminary decree the Plaintiff must in this case pay the costs of the Defendants who have successfully contested his claim for partition. LOKE NATH SINGHA v.

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PARTITION ACT (IV of 1893), sec. 2. See Partition 1306

PARTNERSHIP—**Partner if entitled to interest on advance made.**] The Appellant and the Respondent were partners who agreed to contribute an equal amount of capital but in fact the Appellant contributed under the head larger amount than the Respondent. **Held** (in a suit for dissolution and adjustment of accounts) that the general rule that the claimant partners is not allowed to appear express stipulation or course of dealing between the as shown by the partnership books or a trade custom to the contrary, has been engrafted an important qualification, namely, that an advance by a partner to the firm is treated not as an increase of its capital but rather as a loan on which interest should be paid and that subject to any agreement between the parties interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital which he had agreed to subscribe. That the Respondent who claimed the benefit of the profits which accrued from the sums advanced to the partnership business by the Defendant was bound in justice to make an allowance for interest on those sums to the partner. GOBINDA CHANDRA BASAK v. HARIDAS BASAK ... 634

———— Death of partner leaving Will—Executor if competent to sue for dissolution before probate obtained. See Limitation Ordinance 833

————, Hindu joint family carrying on business in. Contract by family if terminates with death of coparcener. See Brokerage Contract 708

PARTY, power of Court to strike off and add to. See Civil Procedure Code, Or. 1, r. 10, cl. (2) 752

———— Power of appeal Court to transfer Defendants to category of Plaintiffs. See Limitation Act. s. 14 522

PATNA HIGH COURT—**Calcutta High Court, decision of, binding upon Patna High Court, until dissented from by Full Bench.**] The decision by a Divisional Bench of the Calcutta High Court is binding upon the Patna High Court until dissented from by a Full Bench. HARIHAR MISSER v. SYED MOHAMED 983

———— should ordinarily follow decisions of the Calcutta High Court. See Civil Procedure Code, Or. 21, r. 95 829

PENAL CODE, sec. 191—Verification if evidence. See Civil Procedure Code, Or. 9, r. 66 1182

PENALTY imposed by Revenue authority under Statutory powers, suit to recover by Secretary of State if lies where no

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provision for recovery by summary process. See Court Fess Act, s. 19E ... 501

PLEADER, acceptance by, of Vakalatnama—Endorsement of acceptance in writing if necessary. See Vakalatnama 287

————, admission by, if binds client. See Attorney 995

———— Professional misconduct. See Legal Practitioners Act.

———— [illegible] agreement between one of several [illegible] and Plaintiff's pleader [illegible] compromise of suit, if [illegible] See Evidence [illegible] 1217

PL[illegible]**plaint what should state—Object [illegible] to state facts necessary for Defendants to meet at the trial, effect of—Reliance by Plaintiff on inconsistent rights alternately—Plaintiff if can allege facts destructive of each other—Partition suit—Preliminary decree—Costs.**] The Plaintiff commenced an action for partition on the allegation that he was entitled to fourteen and a half annas share of the property in suit while the Defendants contended that they had acquired a good title to a two annas share. The plaint did not narrate the history of the title of the Plaintiff nor did it mention the deeds whereby the title had devolved on him. The Plaintiff did not make a definite case in the plaint but sought at the trial to develop two inconsistent cases on the testimony of two different sets of witnesses. Objection was taken by the Defendants on the ground of defect in the plaint but the Subordinate Judge proceeded with the trial. He found in favour of the Defendants and allowed them the full amount of costs on the value of the suit. Against the preliminary decree the Plaintiff appealed. **Held**—That in the plaint the Plaintiff was bound to state the nature of the deeds on which he relied in deducing his title from the person under whom he claimed and to show the devolution of the estate to himself. **Philipps** v. **Philipps**, 4 Q. B. D. 127 (1878). **Derbyshire** v. **Leigh**, [1896] 1 Q. B. 554 and **Davis** v. **James**, 26 Ch. D. 778 (1884). It is absolutely essential that the pleading, not to be embarrassing to the Defendants, should state those facts which will put the Defendants on their guard and tell them what they will have to meet when the case comes on for trial. This much the Plaintiff is bound to do though he need not set out the evidence whereby he proposes to prove the facts which give him the title. **Williams** v **Wilcox**, 8 A. & E. 331 (1838) and **Gautret** v. **Egerton**, L. R. 2 C. P. 371 (1867). A Plaintiff may in certain circumstances rely upon several different rights alternately though they may be inconsistent. **Narendra Nath** v. **Abhoy Churn**, I. L. R. 34 Cal. 51: s. c. 11 C. W. N. 20; 4 C. L. J. 437 (1906), **Phillips** v. **Phillips**, 4 Q. B. D. 127 (1878), **Berdan** v. **Greenwood**, 3 Ex. D. 255 (1878), **Hawkesley** v. **Bradshaw**, 5 Q. B. D. 303 (1880)

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and **In re Morgan**, 35 Ch. D. 496 (1887). But the Plaintiff cannot be permitted to allege two absolutely inconsistent state of facts each of which is destructive of the other. **Mahamud Bux** v. **Hossein Bibi**, I. L. R. 15 Cal. 683 (1888). That in the present case the Plaintiff should not have been allowed to proceed on the plaint as framed but should have been called upon to specify in his statement of claim the nature of the deeds and transactions from which he deduced his title. That the order for costs on the full value of the suit could not properly be made at the stage of the preliminary enquiry when the matter in controversy related only to a half anna share in the property. MOTILAL PODDAR v. JUDHISTIR DAS TEOR ... 310

————, Plaint verified if evidence—Verification, object of. See Civil Procedure Code, Or. 9, r. 6 1192

————, Accidental omission in plaint of portion of claim—Court's power to reserve portion of cause of action—Amendment of plaint which would deprive Defendant of plea of limitation if should be allowed. See Civil Procedure Code, Or. 2, r. 2, sub-r. 3 475

————, Allegation of fraud—Fraud different from that alleged in plaint if may be relied on. See Fraud ... 638

————, Declaratory decree if may be granted under cover of a prayer for "further relief" in the plaint. See Hindu Law—Woman's Estate ...1323

————. **Defendant admitting Plaintiff's title, in written statement, though claim notified before suit—Suit if may be dismissed for want of cause of action.**] The fact that the Defendant does not in his written statement deny the Plaintiff's title to land of which Plaintiff has sued for recovery does not show that the Plaintiff had no cause of action. Where, therefore, it appeared that the Defendant did not at any time before the institution of the suit admit the Plaintiff's title to the lands in suit, although Plaintiff served him with notice of his claim, **Held**—That this Court was not justified in dismissing the suit on the ground of want of cause of action, merely because the Defendant in his written statement admitted Plaintiff's title. GANGADAS SIL v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL 636

————, Amendment of plaint which would deprive Defendant of plea of limitation, if should be allowed. See Civil Procedure Code, Or. 2, r. 2, sub-r. 3 475

————, Power of amendment of plaint by original as well as Appellate Court. See Civil Procedure Code, s. 153.

————, issue not raised in, if may be allowed to be taken in second appeal. See Remand 1245

———— Change of case in second appeal. See Co-sharer 1258

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——— Title by adverse possession not pleaded, if may be allowed in the Court of Appeal. See Trespass ... 773

PLEADING AND PROOF, variance between. See Contract 66

———, variance between. See Estates Partition Act, s. 99 319

———, variance between, when fatal to suit—Variance not affecting cardinal points in issue—Nature of the principle—Question one of circumstances rather than of law—Application of the principle in an abstract way leading to error of decision on the merits—Trial Judge's appreciation of witnesses examined in his presence, value of.] When a sum of money due by A to B was entered in B's account-book as having been paid on 5th November 1907 in cash, but B's case was that it was liquidated by a promissory note which however bore date the 7th November 1907; and whilst A alleged that the payment was in fact made on 5th November in cash and the note of 7th November was a forgery, B and his witnesses throughout the trial insisted that the date of the transaction was the 7th and the note was signed then, but the evidence and circumstances of the case showed that there was no payment in cash and that the promissory note was genuine, but had been executed not on the 7th but on the 5th—the entry in the account-book to the effect that the payment was in cash being satisfactorily explained by the practice of entering payments by promissory notes as payments "in cash": Held—That the variance of the case established from the case pleaded in the plaint (as to the date of the note), was not fatal to B's suit to enforce the promissory note, in which the cardinal points to be decided were whether the debt had been paid in cash and whether the note was a forgery. That the High Court in relying for the dismissal of the suit on, amongst other grounds, that of variance between pleading and proof had applied that principle in an abstract and unsatisfactory way which had misled them in estimating the merits of the case. That the question, in ultimate analysis, was one of circumstances and not of law. That the evidence adduced in support of the transaction having been effected on the 7th November was not necessarily perjured or fabricated when it appeared that the statements of witnesses and entries in account-books might be due to bonâ fide mistake. HAJI UMAR ABDUL RAHIMAN v. GUSTADJI MUNCHERJI COOPER (P. C.) ... 297

POSSESSION, proof of, if sufficient for the Plaintiff in an action in ejectment—Previous possession alone if will entitle Plaintiff to a decree for possession. See Trespass 773

———, long continued, if gives rise to a presumption of transferability of tenancy. See Ejectment 1113

——— and title, suit to establish, whether suit for mere declaration—Maintainability—Whether catching fish in a streamlet amounts to dispossession.] Where the Plaintiffs in a suit establish their title to a village and also that they have been in possession of it and of a streamlet which lies within it, but that the Plaintiffs' possession has been disturbed inasmuch as the Defendants' people have caught fish in it, Held—That under such circumstances the Plaintiffs' suit for a mere declaration is maintainable. Even if the Defendants are found to have asserted the right to catch fish in the streamlet to other persons no that act would not amount to disturbance of possession or claim possession nor would the appearance persons have at times caught fish in the streamlet shew that the Plaintiffs have been dispossessed. At most the catching of fish in the streamlet would be a disturbance of possession. SAHDEO LAL BHAGAT v. KESHO MOHAN THAKUR (Patna) 1274

———, joint, suit to recover, when lies—Ouster by co-sharer. See Co-sharer 1258

———, wrongful, of land, party taking, cannot invoke the doctrine of estoppel or acquiescence in his favour. See Acquiescence 657

PRE-EMPTION—Property, partition of, after institution of suit but before decree—Plaintiff if entitled to decree—Court, if should take notice of matters which come into existence after suit—Talab-i-muasibat, erroneous statement as to price in, if invalidates—Review on ground not before taken, when allowed—Suits Valuation Act (VII of 1887), s. 11—Valuation—Appeal—Jurisdiction.] Sanderson, C. J. and Mookerjee, J.—The right of the Plaintiff to get pre-emption must exist not only at the time of the sale, but also at the time of the institution of the suit, and finally up to and at the date of the decree of the trial Court. A judgment passed by the High Court on second appeal was reviewed on a ground not taken at any previous stage of the proceeding, when the ground raised a pure question of law which did not depend for its determination upon the investigation of new facts and when the alleged error was apparent on the face of the record. Connecticut Fire Insurance Co. v. Kavanagh, [1892] A. C. 473 at p. 480, referred to. Per Mookerjee, J.—The decree in a suit should ordinarily conform to the rights of the parties as they stood at the date of its institution. But there are cases when it is incumbent upon a Court of Justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten

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litigation or to do complete justice between the parties. Per Sharfuddin and Roe, JJ.—For the performance of the talabi-i-muasibat what is necessary is an expression by the pre-emptor in clear and explicit terms that he demands to make the purchase and it is not necessary that he should, at the time of the performance of the ceremony, make any mention of the price. Where in performing the talab, the claimant, owing to want of information, understates the price although the ceremonies are fully performed, the talab was validly performed. The plaintiff, suing for pre-emption, valued his suit at Rs. 4,500, the price at which, according to his information, the property had been sold to the Defendant. The suit was dismissed by the Subordinate Judge but decreed on appeal by the District Judge who, however, found that the real value of the property was over Rs. 6,000. On second appeal it was urged that having regard to the value of property as found by the District Judge, appeal lay to the High Court and not to the District Judge, but the point was not taken in the memorandum of appeal, Held, per Sharfuddin and Roe, JJ.—That this objection should be overruled, in view of sec. 11 of the Suits Valuation Act, and that the decision in Raj Lakshmi Dasee v. Katyayani Dasee, I. L. R. 38 Cal. 637 (1910) was distinguishable from the present case as in that case the suit was intentionally and grossly undervalued. NURI MIAN v. AMBICA SINGH 1099

——————, suit by Hindu—Mahomedan law of sale, whether applicable—Sale complete, when—Ceremonies necessary before pre-emption, compliance with—s. 37, Act XII of 1887.] Per Mullick, J.—There being special custom pleaded, a case where pre-emption is claimed by a Hindu must be tried on the principles of justice, equity and good conscience under sec. 37, Act XII of 1887. As a sale is not complete till legal ownership passes, no matter whether there has been payment and delivery, the pre-emptor's title in the case of a property worth more than Rs. 100 does not accrue till after registration. It would be against equity, justice and good conscience to apply in such a case the Mahomedan law of sale which is no longer in force and to attach to a mere contract for sale an incident which the Mahomedan lawyers intended to attach only to an actual sale. The performance of the two formalities talabi mawasibat and talabi ishtishad can be combined, but it is essential that the talabi ishtishad should refer expressly to the talabi mawasibat as having been duly made. Najmunnessa v. Ajaib Ali Khan, I. L. R. 22 All. 343 (1910), Janki v. Girjadat, I. L. R. 7 All. 482 (1885), Begum v. Muhammed Yakub, I. L. R. 16 All. 344 (1894), Jadu Lal Sahu v. Janki Koer, I. L. R. 35 Cal. 575 (1908), and Budhai Sardar v. Sonaullah Mirdha, 19 C. L. J. 604: s. c. 18 C. W. N. 890 (1914), referred to. Roe, J.—The test to apply in these cases is, was the sale, in the eyes of the contracting parties and the pre-emptor, complete. If it was, it was not necessary for the pre-emptor to wait till registration before performing the ceremony of mawasibat. KHEYALI PROSAD alias JAGDIP NARAIN v. MULLICK NAZARUL ALUM (Patna) 1048

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——————, decree for—Price for pre-emption directed to be deposited within one month—Decreeholder's application for extension of time granted—Deposit made within extended time—Civil Procedure Code (Act V of 1908), Or. XX, r. 14—s. 148, C. P. C.—Court's jurisdiction—s. 115.] On the last day fixed for the deposit of money by a decree of pre-emption, the decree-holder applied for extension of time to make the deposit and he deposited the amount within the extended time granted to him (ex parte) by the Court, Held—That the Court had jurisdiction to extend the time. The High Court declined to interfere under sec. 115 of the Civil Procedure Code. ABU MUHAMMAD MIAN v. BABU MUCKUT PERTAP NARAIN (Patna) 860

PRELIMINARY DECREE, appeal preferred against, after final decree passed, if lies. See Partition Suit 231

——————, appeal against —Final decree passed pending appeal against preliminary decree—No appeal against final decree—Whether appeal against preliminary decree can proceed. See Partition Suit 1174

PRESIDENCY TOWNS INSOLVENCY ACT—(III of 1909), creditor if includes his benamdar under. See Sch. II, ss. 25, 26, 27 995

——————, Infants, if may be adjudicated insolvents under—Indian Contract Act (IX of 1872), ss. 68 and 247.] Infants cannot be adjudicated insolvents under any circumstances. Secs. 68 and 247 of the Contract Act provides special remedies against the property of an infant but that does not make an infant a debtor. Re SITAL PRASAD 1065

——————, Jurisdiction of Appellate Court to entertain application for security for costs in appeal from order in insolvency. See Costs 140

——————, ss. (8) (b), 12 (1) (a), 13. See Sch. II, secs. 25, 26, 27 995

——————— s. 36 (1), application under, if may be made ex parte—Calcutta High Court Insolvency Rules 17, 18, 19 and 30.] Applications under sec. 36 (1) of the Presidency Towns Insolvency Act for examination of persons thereunder are intended to be made ex parte under the Rules framed by the Calcutta High Court under sec. 112 of the Act. To

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such applications r. 30 applies and not rr. 17, 18 and 19, and this view is supported by the English Bankruptcy Act (1914), 4 and 5, George V, Ch. 59 and the rules thereunder. In re KISSORY MOHAN ROY 1155

———————, s. 57—Transfer by insolvent prior to insolvency to wife—Benami transaction—Transfer by wife to another after husband's adjudication.] A husband transferred his share in his family dwelling-house to his wife without consideration on the 11th November 1911. On the 27th of February 1912 he was adjudicated insolvent and his wife on the 12th of October 1912 transferred the property which had been so conveyed to her to the Appellant. Held—That even assuming that the Appellant had purchased the property for valuable consideration and without notice of the adjudication of the insolvent, the transfer to the Appellant subsequent to adjudication was void under sec. 57 of the Presidency Towns Insolvency Act inasmuch as the transfer by the husband to the wife prior to his insolvency was found to be fictitious or benami and the consequence was that the property had vested in the Official Assignee prior to the transfer to the Appellant. Per Mookerjee, J.—No title by estoppel accrued to the Appellant as against the Official Assignee. The Official Assignee to what extent representative of insolvent considered. In re Slobodinsky [1903] 2 K. B. 517, 524, and In re Hart, [1912] 3 K. B. 6, distinguished. In re SM. LAKHI PRIYA DASSI v. SM. RAI KESSORI DASSI 554

———————, s. 86—" person aggrieved," who is. See Presidency Towns Insolvency Act, Sch. II, secs. 25, 26, 27 995

———————, s. 112. See s. 36 (1) 1155

———————, Sch. II, ss. 25, 26, 27—Creditor, if includes his benamdar—ss. 12 (1) (a), 13, ss. 8 (2)—(b), and 86—Official Assignee, if may examine petitioning creditor's claim and remove his name—Benamdar, onus of proof of advances on own behalf—" Person aggrieved."] It is open to the Official Assignee after the insolvency to examine the claim of the petitioning creditor and if he finds that in fact there is no debt due to the petitioning creditor, he must strike out the name of such creditor from the list. A benamdar is not entitled to claim as a creditor in the insolvency. The persons who really advanced the moneys should come forward and prove their claims before the Court. Mookerjee, J.—The term " creditor " in the Presidency Towns Insolvency Act does not include the benamdar of a creditor. Any person who makes an application to a Court for a decision or any person who is brought before the Court to submit to a decision is, if the decision goes against him, thereby a person aggrieved by that decision,

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within the meaning of that expression in sec. 86 of the Act. KETOKEY CHURAN BANERJEE v. SREEMUTTY SARAT KUMARI DABEE 995

PRIMOGENITURE, custom of. See Grant 876

PRINCIPAL AND AGENT—Fraud by agent, principal's liability for—Act done within scope of agent's authority but not for his benefit.] Under the law of England, a principal is liable for the fraud of his agent acting [illegible] of his authority, whether [illegible] committed for the benefit of the claimant or for the benefit of the appellant, the principle being based upon [illegible], equity and good conscience is applicable also in this country. Lloyd v. Grace, [1912] App. Cas. 716, and other cases considered. SHERJAN KHAN v. ALIMUDDI 268

———————, Business of money-lenders and financiers—Agent's authority to guarantee advances to constituents by others—Pledging security for principal—Construction of power—Necessary implications arising from nature of business—Nature and extent of authority, practice among money-lenders, as evidence of—Benefit from the transaction, if essential—Onus.] Where an agent of a firm carrying on a general money-lending business, who had express authority " to borrow money from any bank or banks, firm of firms, person or persons, either with or without pledge of securities for moneys advanced to various persons," guaranteed a loan made to a constituent of the firm by a third party, Held—In a suit by the latter against the firm, that the firm was bound by the act of the agent. That the authority of the agent to enter into the transaction was to be found in the document itself by necessary implication from the nature of the business, with the general management of which he was entrusted. Bryant v. La Banque on Peuple, [1893] A. C. 170, 177, followed. That the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents. Held further—That if authority is established, the mere fact that the principal did not receive any benefit does not rid him of his liability. THE BANK OF BENGAL v. RAMANATHAN CHETTY (P. C.) 329

———————, Broker liable as principal—Custom of Calcutta Gunny Market. See Broker 365

———————, Principal, suit by, against agent for accounts—Limitation—Limitation Act (IX of 1908), Art. 89.] The Plaintiff as principal sued the Defendant as agent for accounts. The agency was created in 1896 by a registered document which provided that accounts were to be rendered at the end of each year, the agent also hypothecating immovable property as security. In 1897 the Plaintiff transferred the pro-

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perty to his wife who in 1899 retransferred the property to her husband. The agency was terminated in 1910 and the suit was brought in 1911 for accounts from 1899, **Held**—That a new agency was created in 1899 irrespective of the agreement of 1896. That Art. 89 of the Limitation Act was applicable to the case and as in this case there was no demand and refusal during the continuance of the agency and as the suit was [redacted] three years of the agency terminated the [redacted] entitled to the accounts [redacted] ASHI KANTA BANERJEE [redacted] CHOWDHURY v. NAWAB ALI SIR [redacted] 356

PRIVY COUNCIL ORDER, application to enforce—Limitation. **See** Limitation Act, Sch. I, Art. 183 1051

PROBATE, double, duty if payable on. **See** Court-fees Act, s. 19C 472

———— COURT'S decision on matter within its jurisdiction if reversible by another Court. **See** Specific Relief Act, s. 42 738

————, decision of, on matters other than genuineness of Will, if conclusive. **See** Specific Relief Act, s. 42 ... 738

PROBATE AND ADMINISTRATION ACT (V of 1881), **s. 83—Probate case—Procedure.**] Sec. 83 of the Probate and Administration Act read with Or. 23, r. 3, C. P. C., merely means that in a probate case the Civil Procedure Code so far as possible determines the procedure of the Court. These sections nowhere say that it is competent to the Court to allow the parties to divide the testator's property without proving the Will. **Kunja Lal Chowdhury v. Kailash Chandra Chowdhury**, 14 C. W. N. 1068 (1910) and **Saroda Kanta Dass v. Gobindo Mohan Dass**, 12 C. L. J. 91 (1910), referred to. There can be no dismissal of a probate case in accordance with the terms of a petition of compromise between the propounder and objector. The main issue in such a case is whether or not the Will has been proved and the only effect of a compromise is to reduce a contentious proceeding into one which is not contentious, but this does not absolve the Court from the task of either granting probate or refusing it. If a compromise has been made and the objector withdraws from the contest, the Court will grant probate in common form, but the Court cannot dismiss the case altogether and embody the terms of the compromise as if the decree was one capable of execution by him. HARIHAR MISSER v. SYED MOHAMED (Patna) 986

————, **ss. 86, 90—Administrator's application to sell, granted against opposition—Appeal—Order if appealable as decree or irrespective of whether order decree or not—Interlocutory orders under the Act, if appealable.**] A Hindu widow who had obtained Letters of Administration to the estate of her de-

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ceased husband applied under sec. 90 of the Probate and Administration Act for permission to sell the dwelling-house for the purpose of satisfying debts. The application which was opposed by the reversioner having been granted, the latter appealed, **Held—Per** D. Chatterjee, J., that the order was a decree as defined in the Civil Procedure Code and was appealable as such. **Quære**—Whether sec. 86 of the Probate and Administration Act in making orders of the Probate Court "appealable under the rules contained in the Civil Procedure Code" means only that the procedure in such appeals would be as in appeals under the Civil Procedure Code. **Per** Beachcroft, J.—An appeal lay under the terms of sec. 86 of the Probate and Administration Act irrespective of whether the order was a decree or not. SARAT CHANDRA PAL v. BENODE KUMARI DASSI 28

PROVINCIAL INSOLVENCY ACT (III of 1907), **sec. 37—Mortgage to creditor, challenged as preference—Preference to be shown intentionally fraudulent—Pressure—Previous understanding.**] In order to determine whether an insolvent, at the date of a transaction sought to be annulled under sec. 37 of the Insolvency Act, was unable to pay from his own money his debts as they fell due, money locked up which may be available at a later period for the payment of debts cannot be considered. But from this it does not follow that all unliquidated assets of the debtor must for that purpose be excluded from consideration. **In re Washington Diamond Mining Co.**, [1893] 3 Ch. 95 at p. 101, referred to. A preference to a creditor to come within the prohibition of sec. 37 must be shown to have been fraudulent, with reference to the state of mind of the debtor. **Sharp v. Jackson**, [1899] A. C. 419 at p. 421, referred to. A preference given under pressure is no ground for annulment under sec. 37. Such pressure need not be threat of criminal proceedings. Threat of civil suits would equally take away from its spontaneous character. A previous oral agreement to mortgage sufficient property would take a mortgage given later on out of the operation of sec. 37. NRIPENDRA NATH SAHU v. ASHUTOSH GHOSH ... 420

PROVINCIAL SMALL CAUSE COURTS ACT (IX of 1887), **s. 23 (1)—Return of a plaint under—High Court's power of interference—Sec. 25, Provincial Small Cause Courts Act, sec. 115, Civil Procedure Code (Act V of 1908), and sec. 107, Government of India Act of 1915.**] Where a Provincial Small Cause Court returned a plaint for presentation to a proper Court on the ground that the "suit involved a question of title which should be tried in a regular suit" and the Plaintiff thereupon moved the High Court and obtained a rule, on a preliminary objection taken that the order under sec. 23 (1) is not covered by sec. 25 of the Provincial Small Cause Courts Act: **Held**—That there is a good deal of

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distinction between disposing of a case and deciding a case. A case is something less definite than a suit. The meaning of the word "decided" as held in **Subal Ram Dutt v. Jagadananda**, 13 C. W. N. 403 (1909), approved. **Umesh Chandra v. Rakhal Chandra**, 15 C. W. N. 666 (1911), referred to. Under sec. 115 of the Civil Procedure Code the High Court would only interfere if the question were one of jurisdiction. The Calcutta High Court's powers under the Charter Act have been exercised, with few exceptions, only in cases where jurisdiction has been exceeded or the Judge has ignorantly or perversely refused to exercise or made only a colourable pretence at exercising jurisdiction vested in him by law. This limited power should be exercised only when irreparable injury would be caused to one of the litigants if matters were not set right. **Chandi Ray v. Kripal Ray**, 15 C. W. N. 682 (1911), and **Amjad Ali v. Ali Hussain Johar**, 15 C. W. N. 353 (1910), referred to. Sec. 23 (1) of the Provincial Small Cause Courts Act is designed to meet cases in which a Small Cause Court Judge is satisfied that the question of title raised is so intricate that it should not be decided summarily, but in a Court in which the evidence is recorded in full and the decision is open to appeal. The matter is one of discretion, and where discretion is vested in a Court, it is not open to interference unless it has been exercised ignorantly or perversely. BABU GANGA PRASAD v. NANDURAM (Patna) ...1080

——————, s. 25—Suit for delivery of cattle, specific performance of the contract or compensation—Maintainability. See Specific Relief Act, s. 12 1020

——————, s. 25, revision by High Court under—Finding of fact, interference with. See Civil Procedure Code, Or. 46, r. 7 ...1110

——————, s. 25. See s. 23 (1) 1080

——————, Sch. II, Art. 15. See Specific Relief Act, s. 12 1020

PUBLIC DRAIN, filled up, if becomes public way. See Way 773

——— POLICY, agreement to compound criminal case compoundable with leave of Court only if opposed to. See Agreement 946

——— TRUST. See Trust.

——— WAY, public drain when filled up if may become. See Way 773

——— WORSHIP. See Trust.

PURDANASHIN LADY, dealings with—Independent legal advice. See Specific Performance 929

——————, **Person trusted by her as manager and managing her properties, but acting adversely to her interests, acts of, if bind her—Fiduciary relationship—Betrayal of trust—Fraud by fiduciary, when may be condoned—Nullity—Sham arbitration proceedings and award—Limitation, if applies to de-**

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fence—Time for recovery to run from termination of relationship—Family arrangement, award if may be upheld as.] H, a Hindu, who had separated from his brothers, acquired considerable property by money-lending and died in 1892 leaving a widow K and several daughters and a daughter's son P by a predeceased wife. K, who was not a woman of business, came under the influence of F, a separated brother of H, and F managed her properties and K believed that he was acting as her manager. He died in 1905. Shortly after H's death F in collusion with P got up a [illegible] claim proceeding, which resulted in an award by which the properties left by H were divided up amongst the various members of the family, K receiving only a one share. The true nature and effect of the proceedings were concealed from her and she was misled and betrayed by F and P, both of whom had interests adverse to her and were acting in their own interests. In a suit by another member of the family to enforce, in his right under the award, a mortgage effected by F from advances made out of properties left by H, K denied the Plaintiff's title altogether and claimed the entire mortgage money in her right as the widow of H. The High Court held that the arbitration was a sham, that it had not been shown that K had any independent advice or understood the effect of the so-called award on her interests and believing that she never knowingly consented to the division of her husband's estate dismissed the suit, **Held**, by the Judicial Committee (without dissenting from the conclusions of the High Court), that from the death of K's husband, F stood to her in a fiduciary relationship which continued till he died and she was entitled to receive from him a full disclosure of all the affairs which concerned her. That F having betrayed the confidence K reposed in him, the question in the case was not whether K knew what she was doing, had done or proposed to do, but how her intention to act was produced: whether all that care and providence was placed round her as against those who advised her, which from their situation and relation with respect to her, they were bound to exert on her behalf. That fraud, such as there was in this case, could not be condoned unless there was full knowledge of the facts and of the rights arising out of those facts and the parties were at arm's length. **Huguenin v. Baseley**, 14 Ves. Jun. 273 (1807), and **Moxon v. Payne**, 8 Ch. App. 881 (1873), referred to. That the Indian Limitation Act was no bar to her defence, and even if she were suing to recover property of which she was deprived by the award, time would not, under the circumstances of the case, begin to run against her until F died. That the award regarded as an award, or as a document embodying a family arrangement was a nullity. SRI KISHAN LAL v. MUSSAMAT KASHMIRO (P. C.) ... 957

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——————, **document executed by—Suit for cancellation on the ground of fraud.**] The Plaintiff a **purdanashin** lady executed a conveyance in favour of the Defendant, the consideration for which consisted of money due on a mortgage bond previously given by her to the purchaser and an additional sum paid at the time of sale. It appeared that on the mortgage bond she wrote with her own hand "this bond executed by me is correct" and then signed her name. Similarly on the conveyance [illegible] this deed of sale executed is true and correct executed and ratified by me," and [illegible] affixed her signature. She brought a suit for cancellation of the conveyance on the ground of fraud. In the plaint it was alleged that the Defendants who were agents of the Plaintiff got the mortgage bond and the deed of sale signed by her without the document being read out and explained to her, that she did not get any independent legal advice in connection with the documents and did not get any consideration for them. In her deposition the Plaintiff stated that she had put her signature on blank sheets, which had subsequently been filled up without her knowledge or consent by the Defendant and turned into the mortgage bond and the sale deed, **Held**—That as the documents undoubtedly bore the Plaintiff's signature the burden was upon her to establish that the recitals contained therein were untrue. BANSIRAM v. PANCHAMI DASI 638

PUTNI TALUQ, sale of, in execution of decree for arrears of rent—Purchaser if liable for arrears previous to confirmation of sale. **See** Sale 749

"PUTRA POUTRADI," meaning of. **See** Grant 876

"PUTRA-POUTRADI-KRAME," meaning of. **See** Bengal Tenancy Act, sec. 85 (2) 182

RAILWAY RECEIPT, if document of title or document showing title or instrument of title. **See** Contract Act, s. 102 1182

RAILWAYS ACT (IX of 1890), s. 3 (6). **See** s. 77 790

——————, **ss. 72 (2) (a)—Risk-note, now to be signed in order to bind consignor.**] The provision of sec. 72, cl. (2), requiring risk-notes to be signed by or on behalf of the person sending or delivering goods to a Railway Administration, should be exactly carried out. Where the person who delivered the goods signed not his own name but the name of the owner of the goods, there was not a sufficient compliance with the requirements of sec. 72, cl. (2). Holmwood, J.—The person who signs the risk-note must write his own name either by his own hand or by the hand of an agent who must be disclosed and have authority. MAHABARSHA BANKAPORE v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL 685

——————, **ss. 77, 3 (6), 140—Railway administered by Government—**

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RAILWAYS ACT—contd.

Suit by consignee for price of goods consigned and mislaid by railway—Notice to Traffic Manager and to Collector for Secretary of State, if sufficient—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 30, 31, 115.] In the case of a railway administered by Government, notice under sec. 77 of the Railways Act is [in view of the definition of the words "Railway Administration" in sec. 3 (6) of the Act] effective, if served on Government, and sec. 140 does not mean that the "Manager" is the only person on whom notice can be served, but that if notice is served on the Manager, it must be served on him in the manner provided in sec. 140. **The Secretary of State** v. **Dipchand Poddar**, I. L. R. 24 Cal. 306 (1897), **Great Indian Peninsula Railway** v. **Chandra Bai**, I. L. R. 28 All. 552 (1906), **Janaki Dass** v. **The Bengal Nagpur Railway Company**, 16 C. W. N. 356 (1912), **Periannan Chetti** v. **South Indian Railway Company**, I. L. R. 22 Mad. 137 (1899) and **Nadiar Chand Saha** v. **Wood**, I. L. R. 35 Cal. 194 (1907), considered. **Per** D. Chatterjee, J.—**Semble.**—In the absence of evidence showing that the "Agent" of a railway administered by Government is the Manager, or that the "Traffic Manager" is not the Manager and regard being had to the rule printed and published in the Fare and Time Table of the Railway that "references regarding delay in transit to or loss of goods, parcels, luggage or other articles or claims for compensation and refunds should be addressed to the Traffic Manager," notice to the Traffic Manager may be considered sufficient under sec. 140 of the Act. In a suit by consignors of goods which were not alleged to have been lost, but were found to have gone astray after they were delivered to the Railway, for recovery of their price with compensation, the Defendant did not plead or prove any loss and on the other hand alleged that the goods had not been delivered at all, nor was there evidence when the goods were to be delivered, **Held, per** Curiam, that neither Art. 30 nor Art. 31 applied, and (**Per** D. Chatterjee, J.), that the suit was governed by Art. 115 of the 1st Schedule to the Limitation Act. **Mohan Singh Chawan** v. **Conder**, I. L. R. 7 Bom. 478 (1883) and **Danmull** v. **British India Steam Navigation Company**, I. L. R. 12 Cal. 477 (1886), referred to. RADHA SHAM BASAK v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL ... 790

——————, **ss. 77, 140—Notice on Claims-Superintendent, if notice on Agent—Suit for compensation for loss of goods consigned—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 30.**] In the absence of evidence to prove that the Claims-Superintendent was authorised by the Agent to receive notices on his behalf, **held**, that a notice of claim served on the former was not served in compliance with the provisions of sec. 140 of the Railways Act. The law re-

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quires that the notice should be on the Agent and whether a particular officer is authorised by the Agent to receive such notice on his behalf is a question of fact that must be decided on evidence. **Woods v. Meher Ali**, 13 C. W. N. 24 (1908), distinguished. **Janaki Das v. The Bengal-Nagpur Railway Co.**, 16 C. W. N. 356 (1912), **The East Indian Railway Co. v. Madho Lal**, 17 C. W. N. 1134 (1913), and **Radha Kissen v. The East Indian Railway Co.**, 19 C. W. N. 62 (1913), referred to. Where the consignor sued a Railway Company for compensation for loss of goods alleging the same to have been due to the wilful negligence of or theft by its servants, **Held (semble)**—That the suit was governed by Art. 30 of the 1st Schedule to the Limitation Act. THE EAST INDIAN RY. CO. v. RAM AUTAR 696

——————, **s. 140. See** s. 77 696, 790

RECEIVER, **order refusing to remove, if appealable—Resignation of one of two joint Receivers if terminates order appointing Receiver.**] No appeal lies against an order refusing to remove a Receiver who has already been appointed. Where two persons were appointed joint Receivers to an estate, the order appointing them did not come to an end on the resignation of one of them so as to leave the estate without a Receiver and without the protection for which a Receiver is, in fact, appointed. EASTERN MORTGAGE AND AGENCY Co., LTD. v. PREMANANDA SAHA ... 789

——————, if may be appointed in proceedings to appoint Common Manager. **See** Civil Procedure Code, Or. 40, r. 1 1009

——————, **ex parte order appointing, if** necessarily bad—Remedy of aggrieved party. **See** Civil Procedure Code, Or. 40, r. 1 1009

RECORD OF RIGHTS, presumption arising from, if can be rebutted by evidence of what happened before the record was made. **See** Revenue Sales Act, s. 37 ... 185

REGISTRATION—Compromise which affirms previous executed registered lease, if requires registration. **See** Hindu Law—Woman's Estate ... 210

REGISTRATION ACT (XVI of 1908), s. 2 (6) if applies to the creation of easements. **See** Easement 1158

—————— **s. 35—Registration of deed of gift—Death of donor—Execution admitted by donee—Registration if proper.**] The donee under a deed of gift is an "assign" of the executant within the meaning of sec. 35 of the Registration Act and may, when the donor is dead, admit the execution of the deed before the Registering Officer. AKAHOY CHANDRA MAJHI v. MANNATH NATH CHATTERJEE ...1845

REGULATION **of 1799, V, s. 5—Order if can be made, when no regular suit has been brought by the claimants.**] When no regular suit has been brought by the persons who claim the property dealt

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REGULATION—contd.
with by the Court, an order under sec. 5 of Reg. V of 1799 is **ultra vires.** BALIA KOER v. BANDRAM SAHU 823

—————— (ASSAM) of 1886, I, sec. 28, provisos 2, 4. **See** Regulation (Bengal) of 1805, II, sec. 2 576

—————— (BENGAL) **of 1805, II, s. 2, sub-sec. 2—Land revenue, assessment with, of land claimed as lakheraj—Government's right to assess if may be barred by limitation—Assam Regulation I of 1886, s. 28, provisos 2 and 4.**] Where the right of Government to assess certain lands claimed as lakheraj with land revenue appeared to have accrued either in 1793 or 1840, the case being governed by sub-sec. 2 of sec. 2 of (Bengal) Regulation II of 1805 until it was repealed, so far as regards Assam, by sec. 28 of Assam Regulation I of 1886, **Held**—That at the end of 60 years, calculated from either of the above dates, Government's right to assess the land with land revenue was time-barred. **Per** D. Chatterjee, J.—The proposition that the right to assess revenue is a Sovereign right and cannot be lost can have no application when there is a period of limitation provided by statute such as is contained in Reg. II of 1805. **Per** Beachcroft, J.—Government can divest itself of the right to assess revenue and can make such regulations for the guidance of its officers as will have the same practical result as a renunciation of the right to assess revenue. Proviso 4 to sec. 28 of the Assam Regulation I of 1886 would seem intended to reproduce the rule of 60 years' limitation provided by sec. 2 of Regulation II of 1805. Its effect is to save the land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within the 60 years there was a cessation of the assessee's right to so hold it, and this is not affected by proviso 2 to the same section. **Per** D. Chatterjee, J.—The proviso excepts a particular class of lands from the operation of the enacting part of the section and no question of giving retrospective operation to the enactment arose in the case. **Queen v. St. Marry Whitechapel**, 12 Q. B. 120, 127 (1846), referred to. Cl. 2 of the proviso would authorise the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other excepting clauses of the proviso, and cl. 4 saved the lands in suit from assessment. NANDA KUMAR BHATTACHARJI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL 576

REMAND—**Remand order by Appellate Court without retaining case on file—Whole case if open before Court to which case remanded—Limitation of scope of appeal remanded by High Court.**] In strict law a remand made by an Appellate Court without retaining the appeal in its own file necessarily reopens the whole case and the Court of Appeal to which the

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REMAND—contd.
case is remanded is bound to hear the appeal upon the judgment of the Court of first instance and on nothing else. But the High Court in the exercise of its powers of supervision under the Charter rightly assumes in certain cases authority to limit the scope of certain appeals remanded to the lower Court without keeping them on its own file. But whenever this is done it is absolutely essential that the High Court should lay down clearly without any possibility of mistake that it did intend to limit the scope of the appeal to certain specified questions. KARTICK CHANDRA DAS v. SATYA NIDHI PAL 584

————, power of Appellate Court to. See Civil Procedure Code, sec. 107 ... 547

———— ORDER, scope of. See Contract 149

———— **Order of appeal Court directing Court of first instance to remit findings on issues not tried—Decision on other issues in the remand order if binds Judge or his successor at final hearing—Decision if preliminary decree or interlocutory order—Civil Procedure Code (Act V of 1890), Or. 41, rr. 23, 25.**] Where a suit for recovery of possession in which the Defendant besides denying Plaintiffs' title set up certain pleas in bar (limitation, etc.), was dismissed by the first Court on the merits, but the lower Appellate Court finding in favour of the Plaintiff on the merits, the case was remanded to the first Court for finding on the issues in bar which had not been tried by the first Court, **Held**—That upon receipt of the findings of the first Court on these issues, the lower Appellate Court was not bound to reconsider its findings on the merits and this whether the officer before whom the appeal finally came for hearing was the same or another officer. Richardson, J.—An opinion incidentally or provisionally expressed in a remanding judgment would not amount to a final adjudication so as to conclude the parties, but an adjudication by the remanding Judge would bind him or his successor at the final hearing. One test which may be suggested for the purpose of determining whether such an adjudication is or is not final and conclusive so far as it goes is whether it does or does not amount to a preliminary decree. **Semble.**—The remand order in this case amounted to a preliminary decree in so far as it disposed of the merits of the case. **Per** Mullick, J.—It seems to be well settled that though it is open to a Court to revise after remand interlocutory decisions which were made either by itself or by an officer of co-ordinate jurisdiction, yet as a matter of practice a Court will not and ought not to do so. When, however, the interlocutory decision amounts to a preliminary decree within the meaning of sec. 2 of the Civil Procedure Code, the Court is incompetent to revise that decree till it is duly set aside or amended

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according to law. That the decision on merits contained in the remand order did not amount to a preliminary decree. HIRA LAL PAL v. ETBAR MANDAL 43

————, **Second appeal—High Court, if may remit case for re-hearing on a new case not raised in the pleadings, when decree as made correct on the issues raised and decided—Procedure, if competent, to be adopted in exceptional cases—Surprise, discovery of new facts—Costs, party at whose instance new issue raised to pay costs—Suit to eject "Paik" from tenure held for service—Chowkidari Chakran—Police duties performed under supervision of Government—Control of Goearnment over private chakran, if exists.**] In 1801, the predecessor of the Plaintiff executed a **kabulyat** in favour of Government in respect of a newly-settled Pergunnah, under which the proprietor of the Pergunnah was bound "to maintain and keep the same Sardars and Paiks who had all along existed in the Pergunnah and to carry out whatever order might be passed by the Magistrate on the Paiks, and was precluded from dismissing the Sardars or Paiks and bound to depute the Paiks to watch and take care of the boundaries of the Pergunnah, and see that no theft or dacoity and no riot occurred anywhere." The Plaintiff's suit to eject a Paik was opposed by Government, which relying only on the **kabulyat** urged that the Paik in question was one whose tenure services included the performance of police duties, whilst the Plaintiff urged that he held on tenure services personal to himself and having no connection with the local police. The Subordinate Judge, the District Judge and the High Court all agreed in upholding this contention, but whilst the two former upon that finding decreed the suit, the High Court in second appeal permitted the Government to raise a fresh issue, viz., whether the lands comprised in the jaighir in question were Chowkidari Chakran lands, that is lands which at or before the settlement had been appropriated or assigned for the maintenance of the police force, and by reason of such appropriation excluded from the Zemindari assessment (**vide** Regs. I of 1793 and XIII of 1805), discharged the decree of the District Judge and remitted the action for rehearing—ordering at the same time that all the costs already incurred would abide the result of the rehearing. **Held**—That the Government ought not to have been allowed to raise a new issue not raised in the pleadings, although they appeared to have had full knowledge of it when they preferred their defence; and that therefore the order of the High Court should be discharged and the decree of the District Judge restored. That even if it was competent to the High Court to remit a case for hearing on an issue not raised by the Defendant in the pleadings or suggested in the lower Courts, this

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might be done only in exceptional cases for good cause shown and on payment of all costs thrown away. That in this case the Government had shown no ground whatever for the indulgence they claimed, as they did not suggest that they had been in any way taken by surprise or had discovered fresh facts of which they were unaware when the case was before the lower Courts. That the order that all costs already incurred should abide the result of the rehearing was bad inasmuch as the Plaintiff, if he had failed on a new case raised by the Defendants for the first time in second appeal, would have to pay the whole costs of the issues on which he had succeeded in the two Courts below. MAHARAJA SRI RAM CHANDRA BHANJ DEO v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (P. C.) ...1245

————, power of High Court as to. See Civil Procedure Code, Or. 9, r. 6. ...1192

————. See Civil Procedure Code, sec. 107.

RENT, suit for—Lease for a term—Suspension of portion of rent during the term—Stipulation for payment of rent at full rate after expiry of term—Agreement if invalid. See Landlord and Tenant ... 347

————. Kabuliyat stipulating excessive rate of rent—Assurance by landlord that kabuliyat rate would not be enforced—Effect. See Landlord and Tenant ...1067

———— Registered kabuliyat—Acceptance by landlord for a long time of reduced rent, if precludes suit at kabuliyat rate—Intention of parties—Conduct, evidence of, admissibility. See Evidence Act, s. 92, prov. 4 680

———— Sale of tenure in execution of decree for arrears of rent—Purchaser if liable for arrears previous to confirmation of sale. See Sale 749

———— suit valued below Rs. 100—Whether second appeal lies. See Bengal Tenancy Act, sec. 153 1352

———— suit in Foreign Court on cause of action tried and determined between the parties in a British Indian Court. See Foreign Court 1213

RES JUDICATA, rule of, not a mere technical rule.] The application of the rule of res judicata by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law. SHEOPARSAN SINGH v. RAMNANDAN PRASHAD NARAYAN SINGH (P. C.) 738

————. Ostensible owner, transfer by, when binds real owner. See Transfer of Property Act, s. 41 ... 265

————. See Landlord and Tenant 48

————. See Civil Procedure Code, sec. 11.

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RES JUDICATA—contd.
————. See Civil Procedure Code, Or. 23, r. 1 (b) 1000

REVENUE, assessment with, of land claimed as Lakheraj—Government's right to assess it may be barred by limitation. See Reg. (Bengal) II of 1805 576

REVENUE SALES ACT (XI of 1859), s. 37—Class of tenants entitled to protection under section—Raiyat at fixed rent and occupancy raiyat—Enhancement of rent—Record of Rights—Presumption if may be rebutted by what happened before record—Duty of Appellant to place necessary materials before Court.] Plaintiff claiming under a purchase at a sale for arrears of revenue sued to have the [illegible] of the Defendants annulled under sec. 37 of Act XI of 1859. It was found that the Defendants had cultivated the land themselves for 30 years before 1895 when they obtained pottah as raiyats at fixed rates. Held—That the protection of occupancy raiyats at fixed rates which is referred to in sec. 37 of Act XI of 1859 is not one of the ordinary exceptions in that sec. It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation of the soil and are cultivating it. The term "rights of occupancy at fixed rent" meant in the year 1859 the successors of khademi khud khast raiyat in the Regulations and to these persons have succeeded "raiyats holding at fixed rates" under the Bengal Tenancy Act. Raiyats holding at fixed rates therefore are primarily the persons referred to in the proviso to sec. 37 of Act XI of 1859. A person who takes the tenancy originally as a raiyat at fixed rates may not thereby acquire an occupancy right, but a person who has already obtained occupancy rights cannot by obtaining a grant of fixed rent lose that occupancy right. Bhut Nath Naskar v. Surendra Nath Dutt, 13 C. W. N. 1025 (1909), referred to. That the Plaintiff's prayer for assessment of fair and equitable rent should also be rejected as such a prayer was not within the scope of a suit under sec. 37 of Act XI of 1859. Quære—Whether a purchaser at a Revenue Sale can sue, according to the provisions of the Bengal Tenancy Act, to enhance the rents of occupancy raiyats not holding at fixed rents or fixed rates of rent. Sarat Chandra Roy Chowdhry v. Asiman Bibi, 8 C. W. N. 601 (1904), referred to. When a decree has been passed against a person who desires to appeal, it is for him to put forward all necessary materials for the purpose of getting the presumption which is against him on the lower Court's judgment set aside. The presumption arising from a finally published Record of Rights can be rebutted by evidence of what happened before the record was made. ABDUL GONI CHOUDHURY v. MAKBUL ALI ... 185

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REVENUE SALES ACT—contd.

——————, **s. 37 (4)—Purchaser at revenue sale if may eject lakherajdar from land which has been planted or built upon—Incumbrance how annulled.**] Sec. 37 of the Revenue Sale Law does not protect land held without payment of rent upon which dwelling-houses, manufactories or other permanent buildings have been erected or whereon gardens, plantations, etc., have been made. The assignee or transferee of the auction purchaser at a Revenue sale is entitled to exercise the rights of a purchaser. It is not essential on the part of the auction purchaser or his assignee who seeks to annul an incumbrance to give a formal written notice to avoid it. All that is necessary is to notify to the incumbrancer by some unequivocal act the intention to annul. SM. KRISHNA KALYANI DASI v. MR. R. BRAUNFIELD 1028

——————, sec. 82. **See** Under-raiyat 1240

REVIEW on ground not before taken when allowed. **See** Pre-emption 1099

——————— of High Court judgment, application for—Limitation runs from when. **See** Limitation Act, sec. 12 967

——————— **of High Court judgment—Application for review presented to Court presided over by Chief Justice under special circumstances—Deputy Registrar certifying application not in order—Application if must be presented within seven days of return of application with such certificate.**] The application for review was properly presented to the Court presided over by the Chief Justice, as there was no time after the application was put in order to present it to the Bench which had disposed of the appeal in the first instance, one of them having retired from the Court some days before and the other having gone away on furlough two days after that date. R. 4 of Chap. XI of the Appellate Side Rules was intended to apply to the case where the Deputy Registrar gives a certificate that the review application was in order and not to cases where the certificate is to the effect that the proceedings were not in order. GANGADHAR KARMAKAR v. SHEKHAR BASINI DASYA... ... 967

——————. **See** Civil Procedure Code, Or. 47, rr. 2, 4, 7, 8.

ROAD-CESS return, value of, to show **status as lakherajdar. See** Land Acquisition Act, sec. 30 816

SALE—Release if may operate as conveyance. **See** Local Self-Government Act, sec. 138 (d) 370

———, order for—Title of purchaser under order of Court. **See** Specific Performance 929

———, contract of, specific performance of—Contract varied—Effect of variation. **See** Specific Performance 929

———, contract of—Contract if complete before writing—Specific performance—

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Earnest money, payment of, if conclusive of completed contract. **See** Specific Performance 66

———, **contract of—Exception clause excusing delay due to late shipment—Failure of seller to deliver on due date—Tender on a subsequent date—Onus on party relying on exception—Shipment to be shown to be unavoidably delayed—"Shipment," meaning of—Measure of damages.**] Defendant contracted with Plaintiff to deliver to him in Calcutta 50 tons of Rangoon rice in June 1909, and another 50 tons in July 1909. A clause in the contract provided that no objection was to be raised by the Plaintiff in case of the delivery of the goods being delayed by reason of the non-arrival in time of the steamer carrying the goods on account of the shallowness of water at Diamond Harbour, damage to the steam-engine, accidents of the sea and other causes not under human control, as also owing to late shipment at Rangoon. The June consignment was not tendered by Defendant until the 9th of July and the July consignment until the 3rd August. The market rates on both these days were the same as those on 30th June and 31st July respectively. The Plaintiff refused the tenders on both days and sued for damages, being the difference between the contract price and the market price on the said two dates. Defendant relying on the clause relating to late shipment pleaded that under the contract there was no particular due date of delivery. **Held**—That the Defendant could not rely on that clause unless he was able to prove that the circumstances which led to delay in shipment were not attributable to his negligence. **Dunn** v. **Bucknall**, [1902] 2 K. B. 614 (621), followed. That the burden of establishing that his case was covered by the exception on which he relied was on the Defenadnt. **Sandeman & Sons** v. **Tyzack and Branfoot Steamship Co., Ld.**, [1913] A. C. 680 at p. 689, followed. The term "shipment" in the contract included not merely the loading of goods on board the ship but also the starting of the ship. That as soon as the contract had been broken, the obligation of the purchaser to take delivery of the goods vanished and he was not bound to accept the goods when they were delivered and that the right measure of damages was the difference between the contract price and the market price on the dates of delivery originally agreed upon by the parties. **Grenon** v. **Lachmi Narain**, I. L. R. 24 Cal. 8 (1896), relied on. KALI KANTA SHAHA v. ISMAIL ... 159

——— **(Certificate), purchaser at, suit for rent by, after registration under Land Registration Act—Decree obtained therein, sale in execution of—Purchase by decree-holder—Certificate sale subsequently cancelled—Rent-decree and sale, if thereby reversed.**] A, having purchased property at a sale under the Public Demands Recovery Act, on 7th

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September 1908, sold it to B who duly obtained a sale certificate from the Revenue authorities, was placed in possession and had his name registered under the Land Registration Act. B then sued the tenant on the property for rent and obtained an ex parte decree, in execution whereof the tenure was sold and purchased by the decree-holder himself on 20th November 1909. The sale under the Public Demands Recovery Act was cancelled on 29th March 1910 on the ground that no notice had been served under sec. 109 of the Act and that the proceedings were invalid and inoperative in consequence, Held—That the rent-decree and sale thereunder which were duly and regularly had at the instance of a stranger who had no concern with the irregularities in connection with the certificate sale were not affected by the reversal of the certificate sale. NAGENDRA NATH BOSE v. PARBATI CHARAN ... 819

——, Suit by purchaser under registered kobala against Defendant in possession—Plaintiff, if has to prove passing of consideration—Recital in deed admitting receipt of consideration, value of—Second appeal—Onus.] A Plaintiff has to prove his title when a Defendant in possession pleads he is only a benamdar but he shows a primâ facie title by producing and proving a conveyance which usually contains a recital of the receipt of consideration. The onus in such a case is on the Defendant to show non-payment of consideration. The fact that the Defendant is in possession is an important element to be taken into consideration in determining whether the transaction is benami. But there is no presumption in favour of benami even where the Defendant is in possession. Where the lower Appellate Court held that the Plaintiff's purchase was benami, being influenced by the erroneous view that the onus was on the Plaintiff, though it relied also on the fact that the Defendant was in possession, the finding was reversed in second appeal and the case was sent back for rehearing. A recital in a deed of sale admitting the receipt of consideration is evidence, though not conclusive, against the vendor. DURGA CHARAN CHANDER v. THE KHARDA COMPANY, LD. 254

—— of putni, in execution of decree for arrears of rent—Purchaser if liable for arrears previous to confirmation of sale.] The Plaintiffs purchased a putni taluq at a sale held in execution of a decree for arrears of rent due thereon. Some of the putnidars applied to set aside the sale and while the proceedings for setting aside the sale were pending the zemindar brought a suit against the recorded putnidars for arrears of rent subsequent to the period covered by the decree in execution of which the sale was held at which the Plaintiffs purchased the taluq. The Plaintiffs were made parties to this suit which was decreed and in execution of the decree the putni was put up for sale and the Plaintiffs whose purchase at the previous sale had been by that time finally confirmed deposited the decretal amount and saved the putni from sale, Held—That in the absence of anything to denote the contrary, a sale of a tenure held in execution of a decree for its own arrears of rent passes it free from liability for previous arrears and the Plaintiffs were not liable for the arrears of rent for the period to the date of confirmation of sale at which they purchased the putni. MATHURA MOHAN SAHA v. NABIN CHANDRA DUTT ... 749

—— (EXECUTION) when to be set aside when decree set aside—Decree holder purchaser—Purchase by stranger from latter before decree set aside—Equity.] The Court as a matter of policy has a tender regard for honest purchasers at sales held in execution of its decree, though the decree may be subsequently set aside, where those purchasers were not parties to the suit and the decree had not been passed without jurisdiction. But the same measure of protection is not extended to purchasers who are themselves the decree-holders; nor can purchasers from such decree-holders claim that the Court owes them any duty or to be within the policy which prompts the extension of protection to strangers, since they have bought from one whose title is liable to be defeated. Sheik Ismail Rowther v. Rajab Rowther, I. L. R. 30 Mad. 295 (1906), dissented from. SATISH CHANDRA GHOSE v. RAMESSARI DASSI 665

—— (EXECUTION), if holds good when ex parte decree set aside where property has been assigned by decree-holder purchaser to stranger—Decree subsequently passed if validates sale—Court's power to take notice of facts which have occurred since institution of proceedings.] The assignee from the decree-holder who has purchased property in execution of his own decree is in no better position than his assignor, and the sale is set aside when the decree is set aside even when the decree-holder has sold the property to a stranger. Satis Chandra v. Ramessari, 20 C. W. N. 665 (1914), followed. As soon as an ex parte decree is set aside, the sale, where the decree-holder is the purchaser, falls through and is not validated by a fresh decree subsequently made. Set Umedmal v. Srinath Roy, I. L. R. 27 Cal. 810: s. c. 4 C. W. N. 692 ((1900). Hazari Mull v. Janaki Prasad, 6 C. L. J. 92 (1907), and Ram Yead v. Bindeswari, 6 C. L. J. 102 (1907), distinguished, the decree in those cases though temporarily set aside having been ultimately maintained. It is well-settled that the Court may, in order to shorten litigation or to do complete justice between the parties, take notice of events which have happened since the institution of the proceedings and may afford relief to the parties on the basis of the altered conditions. ABDUL RAHAMAN v. SARAFAT ALI 667

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——— (EXECUTION) **if void or voidable when decree fraudulent—Suit to set aside decree barred by limitation—Sale if may be vacated.**] A sale in execution of a fraudulent decree is not a void but a voidable sale; till vacated by an appropriate proceeding, the rights created thereby are effective. Such a sale cannot be set aside without setting aside the decree; consequently where the right to have the decree set aside as fraudulent has become barred by limitation, no decree can be made setting aside the sale only as made in execution of a fraudulent decree. Ram Narain Shew Bhunjan, I. L. R. 27 Cal. [illegible], distinguished. RAJ KUMAR SA[illegible] v. RAJ KUMAR MALI ... 659

——— (EXECUTION) suit to set aside on ground of fraud—Maintainability. See Fraud 819

SECOND APPEAL—Reversal of lower Appellate Court's decision as being influenced by an erroneous view of onus. See Sale 254

——— Finding of fact. See Bengal Tenancy Act, sec. 109A ... 428

——— if lies in rent suit valued below Rs. 100—Setting up title by the Defendant in himself whether involves a question of title in land between parties having conflicting claims thereto. See Bengal Tenancy Act, sec. 153 1352

SECRETARY OF STATE, suit by, if lies to recover penalty imposed by Revenue authority under Statutory powers, where no provision for recovery by summary process. See Court Fees Act, s. 19E ...504

SHEBAIT. See Hindu Law—Religious Endowment.

"SHIPMENT," meaning of. See Sale ... 159

SIGNATURE—Bond signed by Defendant only and registered, suit upon. See Contract 408

SMALL CAUSE COURT, reference by District Judge of case tried by—Small Cause Court if subordinate to District Judge. See Civil Procedure Code, Or. 46, r. 7 1110

SOLICITOR. See Attorney.

SPECIFIC PERFORMANCE of contract. See Contract.

———, **suit for—Agreement to assign a decree, whether executory or executed—Civil Procedure Code (Act XIV of 1882), s. 232—Assignment must be in writing—Refusal to take assignment on decree being time-barred—Duty to keep decree alive whether intending assignee's.**] Defendant who had agreed to purchase from the Plaintiffs a mortgage-decree refused to pay the agreed price and to take an assignment of the decree when the decree became incapable of execution owing to the bar of limitation, **Held**—That the decree being dead, the Plaintiffs were asking for a decree for the specific performance of an agreement which they were unable to perform and the suit was not maintainable. That as the decree had not been transferred by assignment in writting to the Defendant, (as was required by sec. 232 of the Code of Civil Procedure of 1882), the Defendant could not by any application to the Court have kept alive the decree, and the High Court was wrong in holding that it was the Defendant's duty to keep it alive. JATINDRA NATH BASU v. SRIMATI PEYER DEYE DEBI (P. C.) ... 866

——— **of a contract of sale—S. 27 (6), Specific Relief Act (I of 1877)—Contract varied—Vendors asked to take out letters of administration and leave to sell—Effect of variation—Contingent contract—Order for sale—Title of purchasers under order of Court—Whether such purchasers are affected with notice of previous agreement—Dealings with purdanashin ladies—Independent legal advice—Costs—Discretion of the appeal Court in modifying order for costs made by the Court of first instance.**] Two widows Defendants Nos. 1 and 2 entered into an agreement on the 23rd January 1910 for sale of certain properties for legal necessity with the Plaintiffs at Rs. 8,000 per cottah. The agreement contained the following covenant on the part of the vendors—"We shall at our own expenses do everything which your attorney shall consider necessary for rectifying and clearing the title-deeds." The idea of applying for Letters of Administration was not present in the mind of any of the parties at the time of the agreement. Subsequently in order to obviate any objection of the reversioner on the score of legal necessity the Plaintiffs asked the widows to apply for Letters of Administration with leave to sell to the Plaintiffs. The widows obtained Letters of Administration and one of them actually obtained leave to sell to the Plaintiffs. Subsequently the widows applied and obtained leave for sale to the Defendants Nos. 3, 4 and 5 (described as the Nandi Defendants) who offered a higher price and the property was conveyed to them. The Nandi Defendants had notice of the agreement for sale to the Plaintiffs at the time when they took the conveyance. In a suit by the Plaintiffs for specific performance of the agreement of sale against all the Defendants and in the alternative for damages against Defendants Nos. 1 and 2 for breach of contract, **Held**—That the contract as varied by mutual consent became a contingent one, and as the contingency had not happened (i.e., leave of the Court had not been obtained in their favour) the Plaintiffs were not entitled to claim performance of the contract. **Narain Pattro** v. **Aukhoy Narain Manna**, I. L. R. 12 Cal. 152 (1885) and **Sarbesh Chunder** v. **Khetrapal**, 14 C. W. N. 451: s. c. 11 C. L. J. 346 (1910), followed. **Held also**, that the Plaintiffs were not entitled to claim damage as their action was based on the original contract and not on the contract as modified and as there was no breach of the modified contract. SREEMATI KALIDASI DASSEE v. SREEMATI NOBO KUMARI DASSEE 929

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SPECIFIC RELIEF ACT (I of 1877), s. 12—**Suit for delivery of cattle, specific performance of the contract or compensation—Alternative reliefs—Non-maintainability of the suit—Art. 15, second schedule, Provincial Small Cause Courts Act (IX of 1887)—Substantial justice—Sec. 25, Provincial Small Cause Courts Act.**] The mortgagors entered into a contract with their mortgagees whereby, in consideration of the latter making an endorsement on the back of the mortgage-bond crediting Rs. 215 to the mortgagor's account, the mortgagors agreed to deliver to the mortgagees certain heads of cattle. The mortgagees performed their part of the contract and then sued the mortgagors in the Small Cause Court for delivery of the cattle promised, and in the alternative for damages. The Court having dismissed the suit as being a suit for specific performance of a contract and thus beyond its competence as a Small Cause Court, **Held**—That under sec. 12 of the Specific Relief Act no suit for specific performance would lie as, unless there was something remarkable about the cattle, it was obvious that adequate compensation for the breach of the contract could be given in money. Substantial justice was done by the High Court in the exercise of the powers under sec. 25, Provincial Small Cause Courts Act, by directing that the plaint be amended by striking out the clause demanding specific performance and the suit dealt with solely as a suit for damages occasioned by a breach of the contract. BHARAT MAHTO v. NISARALI SHEIKH (Patna) ... .1020

——————————, s. 27 (6). See Specific Performance 929

——————————, s. 39—**Conveyance executed by accused in consideration of complainant withdrawing prosecution for non-compoundable offence—Suit to set aside such sale-deed, if lies—Parties in pari delicto, if entitled to declaratory relief—Court's discretion under sec. 39.**] The rule of law in England with regard to illegal contracts is that a Court of Law will not aid persons in enforcing the performance of an illegal contract or assist them to recover back property which they have given away under such an illegal contract when the persons and parties to the contract are themselves **pari delicto** in procuring this illegality. The Courts of equity in England have always refused to afford equitable relief in enforcing a contract void in law or restoring property which is based on an illegal contract where the illegality is apparent on the face of the document itself. The principle on which Courts of law and equity have refused to restore property given away under an illegal agreement, is equally applicable when the relief prayed for is by way of a declaration, after the party seeking such relief has secured to himself the benefit of the agreement. Sec. 39 of the Specific Relief Act in allowing relief to

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be granted in a proper and fit case, even when a contract out of which the right springs is void, leaves it entirely in the discretion of the Court to exercise the jurisdiction so conferred upon it. Where L, B's agent, having purchased property, B alleged that it was purchased by L as B's trustee whilst L claimed to have purchased it in his own right, and the dispute culminated in civil actions brought by the parties against each other and in B instituting criminal proceedings against L under secs. 408, 477 of the Indian Penal Code but at the instance of arbitrators appointed by mutual consent, the disputes were settled and B withdrew the criminal and other proceedings against L and in consideration thereof L inter alia executed a sale-deed of the property purchased by him: **Held**, in a suit by L to have the conveyance declared void and the sale set aside and cancelled, that the whole of the contract was illegal, as it was not possible to sever the legal from the illegal part. That there being no evidence that there was any undue influence, fraud or duress or that the Plaintiff took a more innocent part in the illegal compromise than the Defendant, the Court would not grant relief under sec. 39 of the Specific Relief Act. BINDESHARI PRASAD v. LEKHRAJ SAHU (Patna) 760

——————————, s. 42—**Probate, application for—Caveat—Probate granted upon finding that Will genuine and caveator had no locus standi to oppose—Suit by caveator for declaration that he has sufficient interest to apply for revocation of probate, if lies—Probate Court's decision on matter within its jurisdiction if reversible by another Court—Strict fulfilment of statutory conditions, when declaratory decree prayed for, necessary—Res judicata—Decisions of Probate Court on matters other than genuineness of Will if conclusive—Rule of res judicata, not a technical rule.**] On B's death leaving two widows, but no male issue, R applied for probate of what he alleged was B's *Will*. The widows did not oppose the application but the present Plaintiffs amongst others lodged caveats. The matter was thereupon heard as a *suit with* R as Plaintiff and the caveators *(including the present Plaintiffs)* as *Defendants*, and the *Court held that the Plaintiffs* had no right to oppose the application and that the Will propounded was genuine. The *Plaintiffs* then brought this suit against R and others for a declaration that they were the nearest reversioners according to Hindu Law of B and as such entitled to apply to the Probate Court to get the probate to R revoked, **Held**—That the declaration could not be made under sec. 42 of the Specific Relief Act as, having regard to the decision that the Will was genuine, the Plaintiffs were not entitled to "a legal character or to a right as to property." That the Will having been

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affirmed in a Court exercising appropriate jurisdiction, the propriety of that decision could not in the circumstances of the case be impugned by a Court exercising any other jurisdiction. The Court's power to make a declaration without more is derived from sec. 42 of the Specific Relief Act, and regard must be had to its precise terms. SUKHOPARSAN SINGH v. RAMNANDAN PRASHAD NARAYAN SINGH (P. C.) 738

———, s. 42—Suit for declaration of title to office and recovery of land if entertainable—Court if can grant declaratory decree though suit not framed as one under section. See Digwar 446

———, s. 56 (B). See Foreign Court 1213

STAMP ACT (II of 1899), Sch. I, Art. 5, cl. (c)—Agreement to hire with option of purchase, stamp duty on.] An instrument was executed between the Linotype and Machinery, Ltd., and the Windsor Press whereby a machine was hired by the latter for a period on condition that the hirer would pay a fixed amount on execution of the deed and another fixed amount by equal monthly instalment with interest and that on payment of the full sum with interest the machine would become the property of the hirer but that until such payment was made the machinery would continue to be on hire, Held (on a reference by the Board of Revenue under sec. 57 of the Stamp Act).—That the document in question was an agreement within the meaning of Art. 5, cl. (c) of Sch. I to the Indian Stamp Act and was therefore liable to a stamp duty of eight annas. IN THE MATTER OF LINOTYPE & MACHINERY, LD., OF LONDON AND CALCUTTA AND THE WINDSOR PRESS OF CALCUTTA ...1252

STATUTE—Interpretation—Inference as to legislative recognition of judicial construction when section re-enacted in same language. See Estates Partition Act, s. 99 319

——— not declaratory but amending—No restrospective operation.] Statutes which are properly of a declaratory character have a retrospective effect. But the nature of the statute must be determined from its provisions, and the mere fact that the expression "it is declared" has been used, is by no means conclusive as to the true character of the legislation. JOTIRAM KHAN v. JONAKI NATH GHOSE 258

———, Interpretation.] A special text or statute forming an exception to a general text or statute should be construed strictly and applied only to the cases falling clearly within it. KUMAR GUNGADHUR BOGLA v. KUMAR HIRA LAL BOGLA 489

———, Interpretation.] Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation may be disregarded by it for cogent and persuasive reasons. Baleswar v. Bhagirathi, I. L. R. 35 Cal. 701 (713): s. c. 12 C. W. N. 657; 7 C. L. J. 563 (1908), referred to. No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience; it is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed. A statutory rule may upon interpretation be very well held to be in part mandatory and in part directory. MATHU RAMOHAN SAHA v. RAM KUMAR SAHA ... 370

———, Interpretation—Ousting of jurisdiction of Courts must be express—Limitation of ordinary incidents of litigation. See Adverse Possession ...1311

———, Interpretation—Indian Contract Act, scope of—Draughtsmanship. See Contract Act, s. 102 1182

———, Interpretation—Preamble.] Though the preamble of an Act does not control any plain enactment which follows it, it may be a most useful guide when a question of doubt arises upon the construction of a particular provision and considerations relating to the scope of the Act are involved. SITAL CHANDRA CHOWDHURY v. MRS. A. J. DELANNEY 1158

———, Interpretation. See Court-fees Act, Sch. I, Art. 12 1125

———, Interpretation—Heading of Chapter if may be looked to for construing sections. See Bengal Tenancy Act, Sch. III, cl. 1 (a) 1097

SUCCESSION ACT (X of 1865)—Aboriginal tribes in Chota Nagpur—Inheritance—Law applicable—Special notification under sec. 332 issued at the appellate stage, whether has retrospective effect.] Notification, dated 2nd May 1913, issued by the Government of India under sec. 332 of the Indian Succession Act at the appellate stage of a case did not apply where there had already been a decision of a competent Court regarding the rights of parties. In the case of codified law the ordinary practice of the legislature is to make special provision when it thinks fit to do so for the saving of custom, usage and ordinary rights. There is no authority that, after customary law has been stereotyped in the form of a statute which contains no provision saving custom, it is open to a Court to give effect to custom, much less to a custom inconsistent with the statute. As the Indian Succession Act contains no clause saving custom, the Courts are not competent to accept custom as a reason for deviating from the provisions of the Act. TUNI ORAIN v. LEDA ORAON (Patna) 1063

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——————, s. 57—Will, revocation of, tearing.] When a testator sent for his Will, wrote the word "cancelled" thereon and signed in and according to his Attorney's direction tore it partially: **Held**—That this showed the intention of the testator to revoke the Will and the partial tearing constituted a sufficient revocation of the Will within the meaning of sec. 57 of the Indian Succession Act. **Elms** v. **Elms**, 1 Sw. & Tr. 155 (1858), distinguished. **Bibb** v. **Thomas**, 2 W. Bl. 1043 (1749), referred to. JOHUR LAL DEY v. DHIRENDRA NATH DEY 304

——————, s. 111—Gift over—Validity. See Will 169

——————, s. 187—Will not probated if can be used in evidence and for what purpose. See Hindu Law—Religious Endowment 122

——————, s. 332, notification by Government of India under, at the appellate stage of a case, effect of. See Succession Act 1082

SUCCESSION CERTIFICATE ACT (VII of 1889), s. 14—Succession Certificate—Court-fee. See Court-fees Act, Sch. I, Art. 12 1125

SUITS, consolidation of. See Consolidation 475

——, decision of, in the absence of Defendant—Decree—Legality. See Decree ... 943

SUITS VALUATION ACT (VII of 1887), s. 11—Valuation—Appeal—Jurisdiction. See Pre-emption 1099

SUMMONS returned unserved—Trial of suit without fresh summons being served—Legality. See Decree 943

SURETY, discharge of, by act of creditor detrimental to surety. See Contract Act, s. 139 562

TENURE, part of, created before Permanent Settlement but separated by assignment and held at proportional rent by assignee—Confirmatory sanad if creates new tenure. See Bengal Tenancy Act, ss. 6, 7 1002

THAK MAP, value of, as evidence—Thak maps of 1852, if to be presumed as unreliable.] Thak maps have always been considered by Courts as good evidence, and although the value of a Thak map depends upon its accuracy there is no presumption that Thak maps must be inaccurate. Opinion of Captain Hirst in his "Notes on the old Revenue Surveys" and **Jagadindra Nath Roy** v. **Secretary of State for India**, L. R. 30 I. A. 44: s. c. I. L. R. 30 Cal. 291; 7 C. W. N. 193 (1902), referred to. SM. KRISHNA KALYANI DASI v. MR. R. BRAUNFIELD 1028

THICCA taken by a cultivating raiyat—Conversion into tenure-holder—Merger. See Bengal Tenancy Act, s. 22 ... 800

TRANSFER OF PROPERTY ACT (IV of 1882), s. 2 (c)—Lease from year to year in existence from before 1882—Transfer by way of sub-lease. See s. 108 (j) ... 322

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——————, ss. 3, 6 (c), provisions of, if apply to the creation of easements. See Easement ...1158

——————, s. 4. See Contract Act, s. 102 1182

——————, s. 4—Rule of damdupat if applicable to mortgage decree. See Interest ... 110

——————, s. 41—Ostensible owner, transfer by, when binds real owner—Res judicata.] In a suit by A to recover from B property the title to which was disputed between A and B, M in whose favour B had on 14th March 1893 executed a usufructuary mortgage—in lieu whereof on 21st January 1895 another mortgage had been executed in his favour by B—was made a Defendant apparently on the ground of his being a transferee under the mortgage of 14th March 1893. The suit was decreed. In a suit by M to enforce his mortgage of 21st January 1895, which the representative in title of A contested, the High Court held that the decision in the previous suit was **res judicata**; and also that sec. 41 of the Transfer of Property Act did not apply to give M a title, although B had got his name entered in the Revenue papers as owner, because the application for the entry having been opposed by A, B could not be said to have been entered as ostensible owner with A's consent, and also because if M had made enquiries before he advanced money to B, he could have discovered the fact of B's opposition and facts showing B's title. The Judicial Committee on appeal found the judgment of the High Court to be so satisfactory and sufficient that they felt themselves justified in advising the dismissal of the appeal without following the practice of making an elaborate report. NAGESHAR PRASAD PANDE v. RAJA PATESHRI PARTAB NARAIN SINGH (P. C.) 265

——————, s. 41—Husband's property sold by wife—Bonâ fide purchaser for value, "without notice"—His rights—"Without notice"—Significance of the expression—Husband's right to redemption.] Where, during the husband's absence on pilgrimage, the wife sold a piece of land, which had before the husband's departure been mortgaged by her, the purchaser who paid off the mortgage having by proper enquiries satisfied himself that the wife was owner, **Held**—That the husband could not recover the land, nor was he entitled to be allowed to redeem the mortgage. NIRAS PURBE v. MOST. TETRI PASIN 103

——————, s. 44. See Mortgage 675

——————, s. 53—Transfer to defraud or delay creditor, when voidable under the section—Preferring one creditor to another, debtor himself not benefiting, if within the statute.] In a case in

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which no consideration of the law of bankruptcy applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. MUSAHAR SAHU v. LALA HAKIM LAL (P. C.) 393

——————, s. 54, ...visions of, if apply to the creation ...sements. See Easement ...1158

——————, s. 54 —...lease if may operate as conveyance. See Local Self-Government Act, sec. 139 (d) 370

——————, s. 54 —Transfer of immoveable property of less than Rs. 100 in value to mortgagee with possession on failure to pay off mortgage—Oral transfer—Delivery of possession, necessity of—Formal delivery.] Where immoveable property of less than Rs. 100 in value was first mortgaged to A with possession, and then on mortgagor's failure to pay up the mortgage amount, the latter on 5th March 1906 orally sold the property to A, and at the same time formally delivered possession by pointing out boundaries, by endorsing on the back of the mortgage bond the fact of the sale and by handing it over to A; and the mortgagor later on, on 6th June 1906, sold the property to B by a registered deed, Held—That everything that could be done to deliver possession to give effect to the sale of 5th March 1906 was done, and the requirements of sec. 54 of the Transfer of Property Act having thus been satisfied, title passed to A and B's suit to recover the property from A must fail. Sibendrapada Banerjee v. Secretary of State for India in Council, I. L. R. 34 Cal. 207 (1907), distinguished. SONAI CHUTIA v. SONARAM CHUTIA 195

——————, s. 59—Mortgage-bond—Attestation—Person subscribing as scribe if attesting witness.] Per Chamier, C. J.—To be an attesting witness within the meaning of sec. 59 of the Transfer of Property Act, the witness must not only have seen the execution of the document but should have also subscribed as a witness. Shamu Patter v. Abdul Kadir, L. R. 39 I. A. 218: s. c. I. L. R. 35 Mad. 607: 16 C. W. N. 1000 (1912), Raj Narain Ghose v. Abdur Rahim, 5 C. W. N. 454 (1901), Dinamoyi Debi v. Bon Behari Kapur, 7 C. W. N. 160 (1902) and Badri Prasad v. Abdul Karim, I. L. R. 35 All. 254 (1913), referred to. Where a person who subscribed a mortgage bond as scribe was proved to have been present when the document was executed and the lower Appellate Court upon this and other evidence found that he had seen the document executed and held that he was an attesting witness within the meaning of sec. 59 of the Transfer of Property Act: Held, per Chamier, C. J.—That although on the finding he must be held to have seen the mortgage-deed executed, the scribe was not an attesting witness as he did not subscribe as a witness. Per Jwala Prasad, J.—That in the absence of evidence showing that he had witnessed the execution it could not be presumed that he had. A scribe of a deed who has witnessed the execution may sign the deed because he has done so, and yet describe himself as a scribe. RAM BAHADUR SINGH v. AJODHYA SINGH (Patna) 699

——————, ss. 59, 67—Mortgage—Attestation. See Mortgage 989

——————, s. 100 —Mortgage not validly executed if creates a charge. See Mortgage ... ...

——————, ss. 106, 107—Land held not for agricultural or manufacturing purpose on oral settlement at an annual rent—Presumption that tenancy annual—"Contract to the contrary," not valid, because not registered—Notice, length of.] Where, there being no written lease, the tenants were found to have been holding the land on an annual rent of Rs. 15 and not for an agricultural or manufacturing purpose: Held—That from the fact that the rent was an annual rent, the presumption ought to be drawn that the tenancy was an annual tenancy. That, in the absence of anything to rebut the presumption, sec. 106 of the Transfer of Property Act, if it stood alone, would be inapplicable, there being "a contract to the contrary" within the meaning of that section. This contract, however, not being in writing and registered was invalid under sec. 107. That the tenancy was therefore terminable under sec. 106 on fifteen days' notice expiring with the end of a month of the tenancy. Durga Nikarini v. Goberdhan Bose, 19 C. W. N. 525: s. c. 20 C. L. J. 448 at p. 454 (1914), referred to. SHEIKH AKLOO v. SHEIKH EMANON 1005

——————, ss. 108 (j), 2 (c)—Lease from year to year in existence from before 1882—Transferability—Custom—Onus—Sublease, transfer by way of—Landlord if may recover khas possession.] A lease of homestead land from year to year which was in existence before the passing of the Transfer of Property Act is not governed by that Act and sec. 108, cl. (j) of that Act does not make it transferable absolutely or by way of sub-lease. Such leases are not transferable except by custom, the burden of proving which is on the party who sets it up. Whether a tenant from year to year had power before the Transfer of Property Act to transfer the holding by way of sub-lease or not, where it appeared that the tenant had abandoned the lands without arranging for payment of rent, and

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no rent had been paid by him since the ijara, and that the transaction was in substance though not in form an assignment, Held—That the landlord was entitled to recover khas possession of the land. ANANDA MOHAN SAHA v. GOBINDA CHANDRA RAY CHOUDHURY 322

——————, s. 117.
See Bengal Tenancy Act, Sch. III, Art. 2 485

——————, s. 123,
provisions of, if apply to the creation of easement. See Easement 1158

——————, s. 137.
See Contract Act, s. 102 1182

TRESPASS, action for—Who may sue, tenant or owner—Title by adverse possession not pleaded, if may be allowed in the Court of Appeal—Civil Procedure Code (Act V of 1908), Or. 41, r. 24—Adverse possession against Municipality or the Crown.] Per Sanderson, C. J., and Mookerjee, J.—The tenant is the proper Plaintiff to sue for trespass committed in respect of the land, and the reversioner can only sue for trespass if the alleged trespass is injurious committed in respect of the land, and to the reversion. Per Sanderson, C. J.—Even though the trespass is accompanied by a claim of right, it is not necessarily injurious to the reversionary estate. Baxter v. Taylor, 4 Barn. & Ad. 72 (1832), referred to. Per Woodroffe, J.—It is not sufficient for the Plaintiff in an action in ejectment to prove possession. He must show title. Per Mookerjee, J.—Mere previous possession will not entitle a Plaintiff to a decree for recovery of possession, except in a suit under sec. 9 of the Specific Relief Act. Purmeshwar v. Brojolal, I. L. R. 17 Cal. 256 (1889), Nishachand v. Kanchiram, I. L. R. 26 Cal. 579: s. c. 3 C. W. N. 568 (1899), Shama Charan v. Abdool, 3 C. W. N. 158 (1898), and Manik Borai v. Banicharan, 13 C. L. J. 649 (1910), referred to. The Plaintiff may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of Appeal, provided such a case arises on the facts stated in the plaint, and the Defendant is not taken by surprise. Sundari Dossee v. Madhu Chunder, I. L. R. 14 Cal. 592 (1887), Vasudeva v. Maguni, L. R. 28 I. A. 81, 88: s. c. 5 C. W. N. 545 (1901), Majkai v. Thunbuswamy, [1914] Mad. W. N. 784, Somasundarum v. Vadivelu, I. L. R. 31 Mad. 531 (1898), Shirokumari v. Govind Shaw, I. L. R. 2 Cal. 418 (1877), Joytara v. Mahomed Mobaruck, I. L. R. 8 Cal. 975 (1882), and Bijoya v. Bydonath, 24 W. R. 444 (1875), referred to. To establish a title by adverse possession, the Plaintiff must prove enjoyment possessing the same characteristics as are necessary for presumption of a lost grant and consequently that the possession was adequate in continuity, in publicity and in extent, to extinguish the title of the true owner. Subramania v. Secretary of State, 21 Mad. L. J. 132

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(1910), and Radhamani v. Collector of Khulna, I. L. R. 27 Cal. 943: s. c. 4 C. W. N. 593, 690 (1900), referred to. Per Woodroffe, J.—Where in a suit for declaration of title and possession, the Plaintiff did not in the alternative plead title by adverse possession, the Plaintiff cannot ask the Court to frame such an issue on appeal except by amendment, and Or. 41, r. 24, which authorises the Court to remodel the issues does not apply to such a case. RAM CHANDRA SIL v. RAMANMANI DASI 773

TRIAL JUDGE'S appreciation of witnesses examined in his presence, value of. See Pleading and Proof 297

TRUST, betrayal of—Fiduciary relationship. See Purdanashin Lady ... 957

——, public—Court's functions in settling a scheme for carrying on the trust—Control of public trust if may be exclusively claimed by a particular group of worshippers. See Civil Procedure Code (XIV of 1882), sec. 539 1118

TRUSTEE—Trust-deed—Voluntary settlement to pay off debts—Trustee, mortgage by—Validity—Trustee acting improperly and unreasonably in execution of trust—Compromise based on such alienation, if valid—Compromise by guardian ad litem of minor without Court's sanction—Civil Procedure Code (Act XIV of 1882), ss. 462.] Where R, a zemindar who was heavily involved in debt, executed a deed of voluntary settlement, settling all his zemindary and certain other property—subject to the payment of specified debts which he then owed and to certain allowances to members of the family including himself directed to be made and to the several trusts, provisos and declarations therein contained—on his minor son RR, and appointed V as trustee thereof, and the allowances were made payable after the specified debts and the interest on and principal of such other debts and sums of money as should be incurred or become payable by the trustee for the purpose of paying off all or any of the said debts and sums of money; and the trustee finding that the income in his hand was not sufficient to meet the charges on the trust-estate and in order to save the estate arranged with certain financiers for raising a large sum on the security of the estate at a moderate rate of interest to pay off the debts, but the latter having required that R should become a party to the deed and that the allowances specified in the deed should be expressly postponed to their security, the trustee agreed to give a second mortgage of four lacs of rupees to R on the security of a suitable portion of the estate, in order, as he alleged, to obtain the assent of R and other persons entitled to the payment of allowances; and, in a suit by RR, in which the validity of this agreement to mortgage was challenged as beyond the power of the trustee, the latter urged that in the circumstances it was reasonable and prudent on his part to agree to give the

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mortgage, Held—That the trustee had not exercised his power (if he had it), properly and reasonably in the interest of the estate. That it was not established that the consent of the allowance-holders was required to enable the trustee to postpone their rights to the security of the financiers or that the latter would have pressed their requisition if the legal position had been explained to them and that regard for the position of R and his family and unwillingpass on the part of the trustee to incur their ill-will did not justify the placing of a [illegible]den of four lacs on the trust-estate. [illegible]mpromise was entered into by the t[illegible]e with a creditor of R in a suit to [illegible]lare the settlement invalid brought by [illegible]n creditor against the trustee and RR, then a minor, by which the trustee executed mortgages not with a view to imposing a new charge on the trust-estate but on the basis of utilising the charge already promised to R, Held—That the compromise being based on the invalid agreement with R was also invalid, and the mortgages effected in pursuance of the compromise were equally invalid. That the compromise was also invalid as not complying with the requirements of sec. 462 of the Civil Procedure Code of 1882, the trustee who had been appointed guardian ad litem of RR having entered into the compromise without the sanction of the Court. **Manohar Lal** v. **Jadu Nath Singh**, L. R. 33 I. A. 128: s. c. 10 C. W. N. 898 (1906), and **Ganesha Row** v. **Tuljaram Row**, L. R. 40 I. A. 132: s. c. 17 C. W. N. 765 (1913), referred to. M. R. M. A. SUBRAMANIAN CHETTIAR v. RAJAH RAJESWARA DORAI (P. C.) 201

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UNDER-RAIYAT Status of under-raiyat where raiyat evicted from occupancy-holding for non-payment of rent in Chota Nagpur—Interest of under-raiyat, void or voidable—Distiction between proceedings with respect to a tenure-holder and a raiyat—Right of under-raiyat to contest the validity of the decree against his lessor.] Where a holding of an occupancy raiyat is sold, the interest of an under-raiyat is not void but voidable. But when the occupancy holding has been destroyed by eviction of the raiyat for non-payment of rent, sec. 82 of Act X of 1859 provides that the decree-holder shall be put in physical possession of the land. There is a clear distiction between proceedings in regard to a tenure-holder and proceedings in regard to a raiyat. Where the proceeding has been with regard to a tenure-holder or under-tenant the decree is to take the form of an order to all raiyats to pay rent to the decree-holder, and the decree-holder cannot be put into actual physical possession of the land. An under-raiyat cannot contest the validity of the decree against his lessor as a defence to a suit in which it is sought to declare him a trespasser. BISHUN NARAIN DASS PODDAR v. CHANDRA KANTA NAIK (Patna) 1240

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WILL—CONSTRUCTION—Absolute gift—Rules of construction approved by Courts—Effect of subsequent clauses in Will restricting absolute gift created in previous clauses—Will of a Hindu, matters which Court may consider in construing—Malik—Nirbyudha malik, meaning of.] A Hindu testator left a Will the material portions of which were as follows. The second and third clauses of the Will appointed the testator's widow as executrix and authorised

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her to meet the expenses and pay the debts by sale, if necessary, of a portion of the estate. The fourth clause provided that the widow shall obtain as nirbyudha malik whatever moveable and immoveable properties shall be left by the testator and she shall be the absolute owner with the rights of gift, sale and all other kinds of transfer. In the next three clauses the testator authorised the widow to adopt a son and prescribed the devolution of the estate in the event of such adoption and in the last clause he provided that if at the time of the death of his widow there be no adopted son or if no son or wife of the adopted son be alive, then the testator's heir according to the Hindu shastras who shall be alive at the time shall get the properties which shall remain after disposal by the widow by way of gift or sale of the same. Held—That under the fourth clause of the Will the widow took an absolute interest in the estate devised and the gift over contained in the last clauses of what might remain undisposed of by her was void and inoperative in law. That the provisions of the Will relating to adoption and the devolution of the estate in the event of adoption could not qualify the effect of the fourth clause even though they contained provisions repugnant thereto. That where an absolute interest is given the Court will not cut it down by subsequent words in the Will unless they clearly have an effect to restrict it. That where a devisee takes an absolute interest a gift over on his failure to dispose of the property or whatever part of the property he does not dispose of is void. That the rule of construction applicable to cases of this description is that not only ought the Court to look to the words of a Will alone to determine the operation and effect of the devise but the Court ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate when such estate is once collected from the words of the Will itself. Scarborough v. Savile, 3 A. and E. 897, 962 (1836). The instrument must receive a construction according to the plain meaning of the words and sentences therein contained, that is, the words are to be first read in their grammatical and ordinary sense unless the context shows otherwise. That in construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, namely, that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family and also that a Hindu knows that as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate but where the terms are perfectly clear the Court cannot assume contrary to the plain meaning thereof that the testator intended to create estates of a particular description and then bend and twist the

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language in favour of the assumption so made. That the use of the term malik may not by itself necessarily create an absolute interest but the expression nirbyudha malik is the strongest and most unequivocal phrase employed in the vernacular to indicate absolute ownership. SURES CHANDRA PALIT v. LALIT MOHAN DUTT CHOUDHURI 463

——, CONSTRUCTION—Authority to adopt, verbally given, before death—Proof—Relevancy of Will, which contained no directions for adoption, made two months before death, in estimating probabilities—Probable change of intentions. See Hindu Law—Adoption ... 650

——, CONSTRUCTION—Widow appointed executrix with power to adopt five sons in succession—Gift over on her dying without son to nephews—Son adopted if divests widow—Life-estate to widow inferred from tenor—Gift over valid and not touched by sec. 111, Succession Act (X of 1865).] Where a Hindu testator belonging to the Dayabhaga School appointed his wife sole executrix and authorised her to adopt a son, and five such sons in succession in case of death, and the Will finally provided that if the wife died without adopting a son or if such adopted son predeceased her without leaving any male issue, the estate, after the death of his wife, would pass to such of his sister's sons as might be living at death, Held—That the estate was in the widow during her life, and it could pass only to the son who survived her or in case of his death in her lifetime, to his male issue if he left any. A son adopted by the widow predeceased her without issue. Held—That the gift over to the nephews took effect on the death of the widow. That the gift to the nephews was not affected by sec. 111 of the Succession Act, the event upon which, as distinctly mentioned in the Will, the distribution was to take place being the death of the widow. Sec. 111, Succession Act commented on. It should be applied only to cases strictly coming within its scope. Under the Dayabhaga, the testator has not only the power of authorising his widow to adopt a son to him, and in case of the death of such adopted son to make other adoptions in order to ensure the performance of those religious rites on which depends his salvation in after-life, but he can attach to such authority a direction that her estate should not be interfered with or divested during her life, just as he can postpone the succession of his natural-born son by interposing a life-estate. BHUPENDRA KRISHNA GHOSE v. AMARENDRA NATH DEY (P. C.)... 169

——— PROBATE granted upon finding that Will genuine and caveator had no locus standi to oppose—Suit by caveator for declaration that he has sufficient interest to apply for revocation of probate if lies —Probate Court's decision on matters within its jurisdiction if reversible by

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another Court—Decisions of Probate Court on matters other than genuineness of Will if conclusive. See specific Relief Act, s. 42 738
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——— PROBATE proceeding—Caveat, what is a—Persons upon whom citations issued, preferring objections—Objections if must be stamped as caveat. See Court-fees Act, Sch. II, Art. 12 ... 787
——— PROOF of genuineness—Clear and trustworthy evidence of attesting witness if to be rejected because appearance of document suspicious—Court if in such a case may speculate as to what would have been a proper Will for the testator.] Proof of the genuineness of a Will depended mainly upon the testimony of a doctor who attested on the last page of the Will, the signature of the deceased and who deposed that at the time the Will was executed, the deceased was perfectly capable of understanding a business transaction. The Will on examination showed that the writing on the last page was inconveniently crowded above the signature of the testator, and, on the last page but one, the writing at the foot was so placed as to lend colour to the suggestion that the page had been filled up after the signature had been attached. Upon this the Trial Judge built the theory that the Will had been written in blank pages over signatures of the testator previously obtained, Held—That the doctor's evidence, if believed, (and which the Judicial Committee did believe) completely destroyed this theory, and that the High Court was right in pronouncing in favour of the genuineness of the Will. That it would be most unsafe and most undesirable, in circumstances such as these, to try to spell out from the peculiar form in which a document written in the vernacular appears, a hypothetical answer to the clear, distinct and trustworthy evidence of the doctor who witnessed the Will. Where a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of Will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or with justice. SUNA ANA ARUNACHELLAM CHETTY v. S. R. RAMASWAMI CHETTY (P. C.) 673
——— PROOF of execution and due attestation—Attesting witnesses, turned hostile—Court may find execution proved from other evidence—Proof that testator saw attesting witnesses sign, and latter saw testator sign, if necessary, where Will regular on its face—Presumption of due execution.] The mere fact that attesting witnesses to a Will have repudiated their signature does not invalidate the Will, if it can be proved by evidence of a reliable character that they have given false testimony. When the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with; in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the Will. It is not necessary under the law that affirmative evidence should be forthcoming that the testator did, as a matter of fact see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. It is enough if the circumstances show that their relative position was such that they might have seen the execution and the attestation respectively. Every presumption will be made in favour of due execution and attestation in the case of a Will regular on the face of it and apparently duly executed. BRAHMADAT TEWARI v. CHAUDAN BIBI 192
———, PROOF—Execution in unusual circumstances—Will not inofficious—Witnesses such as were reasonably to be expected to be available in the circumstances, not to be disbelieved merely because their position socially inferior—Beneficiary under Will recited as being testator's adopted son—Caveator, if may question adoption—Judge if may refuse to frame an issue as to adoption, whilst admitting evidence thereon—Relevancy on the question of genuineness of Will—Note of evidence to be given by witness, refusal to produce, if should prejudice party—Privilege.] K, a Hindu gentleman of means and resident of a place called Sursand, went accompanied by his two wives and some of his servants and dependants to attend the bathing fair at Sonepur on 10th November 1905. Cholera having broken out at the fair, it was broken up by Government order, but K, who had been suffering from dysentery and had been made nervous about the state of his health by the outbreak of Cholera, (it was alleged) exe-

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...uted the disputed Will on 15th November 1905 and died at 3 A.M. of 16th November 1905. The Will was proved by such of the attesting witnesses as were available and other witnesses. The genuineness of the Will was challenged **inter alia** on the ground that the witnesses to the execution were not of a superior position. The Will however appeared to be one which a Hindu gentleman in K's position might reasonably and naturally have made and the attesting witnesses were such as one would reasonably expect to be available on the occasion, **Held**—That there being nothing in the case to suggest that the Will had been forged or that the witnesses who gave evidence as to the preparation, and as to the due execution, of the Will had committed perjury, the contention that the Will should not be accepted as genuine because the witnesses to its execution were not of a superior position was not sound and was contrary to the view of the law as expressed in **Chotey Narain Singh** v. **Ratan Koer**, L. R. 22 I. A. 12 at p. 24 (1894) and **Jagrani Koer** v. **Koer Durga Parshad**, L. R. 41 I. A. 80: s. c. 18 C. W. N. 521 (1913). That something more than mere suspicion is necessary in such a case to make convincing an argument based on the social position of the witnesses. One of the beneficiaries under the Will was C, a boy who, the Will recited, had been adopted according to Hindu rites, by K as his son. The caveators questioned the **factum** of the adoption: **Held**—That the trial Judge was right, upon an application for probate, in declining to frame an issue as to the alleged adoption, though the matter had to be considered as bearing on the question of the genuineness of the Will and the caveators were not precluded from questioning the adoption and were rightly allowed to cross-examine the propounder's witnesses on that subject and to call evidence to prove that C was not adopted. For the purposes of the propounder's brief, a note had been obtained from a witness (subsequently examined at the trial) of the evidence that he could give: **Held**—That the note was privileged from production and the caveators were not entitled to see it, and the Judges should not have allowed their minds to be influenced in considering the evidence by the fact that the note was not produced in Court for the information of the caveators. DULHIN GENDA KUNWAR v. HARNANDAN SINGH (P. C.) 617

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——, **REVOCATION—Will of Hindu—Two Wills by same testator making different dispositions of property, and former giving his widow power to adopt—Absence of words of revocation in latter—Both Wills invalid by reason of property being coparcenery property at testator's death—Widow if may exercise power of adoption—Doctrine of de-**

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pendent relative revocation.] A Hindu, then the sole surviving co-parcener of a divided share of ancestral property, executed on 8th September 1889 a document which contained an appointment of his wife and his daughter to be executrixes and consisted of two parts: (1) a disposal of the property in a certain way and (2) an authority to his widow, in case the executant should die before completing the adoption as his son of one V. P., to complete the adoption and in case V. P. should die during the widow's lifetime to take certain other persons in adoption. On 9th February 1890 he completed the adoption of V. P. himself and on 21st March 1890 executed another Will which contained no words of revocation of the previous Will and was wholly silent as to the adoption, and whilst it stated that the property was ancestral, it proceeded to provide that in case V. P. should happen to die at any time, his issue should enjoy the property, and that on the failure of such issue, it should be divided amongst his daughter's sons. The testator died on 4th April 1890, and V. P. on 4th June 1891. The widow adopted P. on 13th August 1906, **Held**—(1) That the disposition of 8th September 1889 was a Will. (2) That as another member V. P. had entered the coparcenery, the testator was, after his adoption, not competent to dispose of the property and the Wills to that extent became ineffectual. That the portion of the first Will which gave a power to adopt remained unaffected and was not revoked by the subsequent Will. An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property. **Alexander** v. **Kirpatrick**, L. R. 2 H. L. Sc. 397 (1874), relied on. **Tupper** v. **Tupper**, 1 K. and J. 665; 69 Eng. Rep. 627 (1855), **Quinn v. Butler**, L. R. 6 Eq. 225 (1868), and **Baker v. Story**, 31 L. T. N. S. 631; 23 W. R. 147 (1874), referred to. V. VENCATANARAIYANA PILLAY v. SUBBAMMAL (P. C.) 234

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